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CALIFORNIA REPORTER

IN VOLUME

5 PACIFIC REPORTER

SECOND SERIES

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.*

S. F. 14251.

Supreme Court of California.
Oct. 30, 1931.

Rehearing Granted Nov. 28, 1931.

1. Master and servant ⚿346.

Constitutional provision for workmen's compensation contemplates compensation for "injury" or "disability" sustained by workmen to their person, not to their personal property (Const. art. 20, § 21, as amended in 1918).

[Ed. Note.—For other definitions of "Disability" and "Injury," see Words and Phrases.]

2. Master and servant ⚿347.

Statute conferring on Industrial Commission jurisdiction to award compensation for injuries to artificial members, *held* unconstitutional as beyond power conferred on Legislature to create complete system of workmen's compensation (Const. art. 20, § 21; St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

3. Statutes ⚿64(7).

Invalidity of section of statute conferring on Industrial Commission jurisdiction to award compensation for injuries to artificial members, *held* not to affect validity of remaining sections, since clearly severable (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

WASTE, C. J., and LANGDON and SEAWELL, JJ., dissenting.

In Bank.

Proceedings under the Workmen's Compensation Act by John Driscoll, claimant, opposed by the Pacific Indemnity Company. From an award by the Industrial Commission, the indemnity company petitions for certiorari.

Award annulled.

Bronson, Bronson & Slaven and Harold R. McKinnon, all of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

PRESTON, J.

This proceeding challenges the constitutionality of the last phrase (as italicized) added by the amendment of 1919 to the first sentence of section 3, subdivision 4, of the Workmen's Compensation Act of this state (Stats. 1917, chap. 586, p. 833; Stats. 1919, chap. 471, p. 910, § 1), reading as follows: "The term 'injury,' as used in this act, shall include any injury or disease arising out of the employment *including injuries to artificial members.* * * *" In other words, the sole question here presented is whether the commission had jurisdiction to make an award for injury to an artificial limb of an employee. As the phrase under attack is clearly severable from all other portions of the statute, a successful assault against it does no violence to any of the remaining language employed in said act.

The facts are undisputed: Respondent Driscoll was employed by petitioner as a teamster. In the course of his duties, his team shied; he lost his balance, catching his artificial leg between the footboard and seat and breaking it beyond repair. He was otherwise unhurt, but was unable to continue work without said leg, and had no funds to buy a new one. The Industrial Accident Commission, after hearing the cause, made its findings and order awarding said employee accrued temporary total disability from May 9, 1930, to October 1, 1930, in the sum of $383.44 and the further sum of $19.45 a week to continue indefinitely until termination of disability or further order of the commission; further awarding said employee "medical

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 11 P.2d 1.

treatment to cure and relieve from the effects of said injury."

No medical treatment, of course, can cure and relieve a wooden leg broken beyond repair; the effect of the order, therefore, was to either compel petitioner to buy said respondent a new leg or else continue to make weekly disability payments to him for an indefinite period. Petitioner, therefore, instituted this proceeding to have said order reviewed, and, if possible, annulled; as above stated, it must stand or fall upon our determination of the issue of constitutionality of said provision.

The sole source of authority in the Legislature to confer judicial power upon the Industrial Accident Commission is derived from section 21 of article 20 of the Constitution, as amended in 1918 (Yosemite Lumber Co. v. Industrial Accident Commission, 187 Cal. 774, 204 P. 226, 20 A. L. R. 994; Commercial Casualty Ins. Co. v. Industrial Accident Commission, 211 Cal. 210, 295 P. 11), the pertinent portions of which read as follows: "The legislature is hereby expressly vested with plenary power * * * to create and enforce a complete system of workmen's compensation * * * and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their *workmen for injury or disability* * * * incurred or sustained *by said workmen.* * * * A complete system of workmen's compensation includes adequate provisions for the comfort * * * and general welfare of any and all *workmen* * * * to the extent of relieving from the consequences of any injury * * * incurred or sustained *by workmen* * * * also * * * full provision for such medical * * * and other remedial treatment as is requisite to cure and relieve from the effects of such injury. * * *" (Italics ours.)

[1] It is plain from the above provision that the limitation of power under the act and its sole purpose is to compensate *workmen* for injury or disability incurred or sustained by *them*; not for injury sustained by their personal property. The words "injury or disability" are both used in the sense of injury to or disability of the person or natural body; that is the living body of the workman (see City and County of San Francisco v. Industrial Accident Commission, 183 Cal. 273, 191 P. 26), due to sustaining or incurring industrial accident or disease. This is clearly indicated by the history of the legislation and authorities bearing upon the subject, an extended review of which is not essential here. An intent that power be granted to compensate workmen for injuries to their personal property is nowhere to be found.

That a man's artificial leg is his personal property and not a part of his natural living body cannot be disputed. If, under the above provisions of the Constitution, power were conceded to compensate workmen under the act for injuries to or loss of such property, the jurisdiction of the commission would be thereby enlarged to an unwarranted extent. If an employee could recover for injury to an artificial limb, what would prevent the extension of this right to include other property injuries causing an equal inconvenience; for instance, injuries to eyeglasses, false teeth, crutches, belts, and trusses, or even perhaps clothing, tools, or an automobile, any of which might prevent resumption of employment, pending replacement? To so widen the scope of the act would be a direct violation of said power conferred by the Constitution.

It is true that section 9(a) of the Compensation Act (as amended by St. 1929, p. 420, § 1), imposes a liability upon the employer to provide such medical and surgical treatment "including artificial members, as may reasonably be required to cure and relieve from the effects of the injury. * * *" But this is a different matter. It is one thing to furnish an artificial member in order to cure and relieve from the effects of an injury to a man's natural body, and another thing to furnish an artificial member to replace an injured artificial member damaged beyond repair; no personal or bodily injury to the employee being involved. The former liability is proper (County of Los Angeles v. Industrial Accident Commission, 202 Cal. 439, 261 P. 295); the latter, for the reasons above set forth, cannot be imposed under the present constitutional provisions.

Respondent calls attention to the fact that the Legislature is invested with plenary power to create and enforce a *complete* system of workmen's compensation, and pleads that to deny relief in this case is to render our system of workmen's compensation incomplete. The fact is, however, that the word "complete," as used in the provision in question, is fully defined as including only a complete system for compensating *workmen* for injury sustained by *them* (not by their property).

We believe that the above holding is in harmony with the prevailing rule on this subject. We know of no jurisdiction wherein provision is made to compensate workmen for injuries to artificial members. In the state of Colorado (London Guaranty, etc., v. Industrial Commission, 80 Colo. 162, 249 P. 642), the issue was directly presented by an award to a claimant for accidental injury to his wooden leg. By the following brief but positive statements, the court made quick disposition of the case: "Compensation can be awarded for personal injuries only * * * which means injury to the person [citing numerous cases]. A wooden leg is a man's property, not part of his person, and no compensation can be awarded for its injury."

[2, 3] It follows that, in attempting to confer upon the commission authority to entertain this proceeding, said phrase of section 3, subdivision 4, to wit: "Including injuries to artificial members," is void as beyond the power of the Legislature to enact it, although its unconstitutionality does not affect the validity of any of the remaining portions of the act; therefore, in so taking jurisdiction over an injury to an artificial member, the commission exceeded its judicial power as limited by the Constitution, and its award in favor of said respondent must be, and it is hereby, annulled.

We concur: SHENK, J.; RICHARDS, J.; CURTIS, J.

LANGDON, J.

I dissent. The view taken by the majority opinion is to my mind supported by neither authority nor principle. That there is no authority for such a holding is, I think, quite clear. The brief memorandum opinion of the Colorado court in London Guaranty & Accident Co. v. Industrial Accident Commission, 80 Colo. 162, 249 P. 642, disposes of the case without any discussion of the issues, and interprets a statute which refers only to "personal injuries" and not to "disability." The court in City and County of San Francisco v. Industrial Accident Commission, 183 Cal. 273, 191 P. 26, briefly remarked that "injury" referred to "bodily injury," but proceeded to adopt the broadest possible construction of that term so as to bring industrial diseases within its meaning, and thus to uphold the legislative definition. The case was decided under the constitutional provision as it read prior to the amendment of November 5, 1918, which added to the word "injury" the words "or disability," and consequently the opinion is only pertinent as an indication of how liberal the rule of construction should be. These are the only authorities relied upon to sustain the conclusion reached by the majority opinion, and it may readily be seen that they are not even persuasive, and certainly are not controlling.

In construing special constitutional provisions of this nature, we are in danger of overlooking the cardinal rule which limits the power of the courts to declare statutes unconstitutional. The presumption is in favor of constitutionality, and the contravention of the Constitution must be clear and unquestionable before it can be so declared. For the purpose of determining constitutionality, we cannot construe the constitutional provision as if it were a statute, and adopt that meaning which we deem most *reasonable*. It is our duty to accept the legislative enactment if it can be brought within a *possible* meaning of the provision of the Constitution. Many decisions have made this clear, and of them one of the most important is San Francisco v. Industrial Accident Commission, supra, where the court said (page 279 of 183 Cal., 191 P. 26, 28): "* * * Where a constitutional provision may well have either of two meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh, if not completely controlling. When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another and co-ordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary. But plainly this cannot be said of a statute which merely adopts one of two reasonable and possible constructions of the Constitution." Further on the court says (page 281 of 183 Cal., 191 P. 26, 29): "In the present case, the Legislature has construed the Constitution, and has placed upon the word 'injury' the broader meaning possible to it. * * * The Constitution cannot be given the more limited meaning contended for by the city without declaring this provision in the statute void. This we cannot do, unless there is a plain and unmistakable conflict between the statute and the Constitution. But there is no such plain and unmistakable conflict, since the statute does no more than adopt what is at least a possible and not unreasonable construction. * * *"

Furthermore, the Constitution uses the broadest of language with the object of overcoming technical objections and preventing judicial interference with its beneficial objects. It provides: "The legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create and enforce *a complete system of workmen's compensation*, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for *injury or disability*, and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. *A complete system of workmen's compensation includes adequate provisions for* *the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment,* * * * full provision for such medical, surgical, hospital *and other remedial treatment* as is requisite to *cure and relieve from the effects of such injury* * * * all of which matters are expressly declared to be the social public policy of this state, binding upon all departments of the state government." (Italics ours.)

Bearing these matters in mind, it should not be difficult for us to find a justification in the Constitution for this eminently reasonable statute. Does it not make for the "comfort, health and safety and general welfare" of workmen, and does it not help to "relieve from the effects" of the injury which they have suffered? A man is injured and his leg is amputated; he has lost the use of the stump and is given an artificial limb. This, we say, is justifiable, for it tends to relieve him from the consequences of the injury. Here is a man who is placed by an industrial accident in the identical position; that is, he has lost the use of the remainder of the limb and requires an artificial leg to relieve him from the consequences of the accident. But this man, it is said, is not entitled to that relief because the amputated leg, forsooth, was wood and not flesh. I cannot ascribe to the people of California any such absurd object in the enactment of article 20, § 21, of the Constitution; nor is there anything in the section which can be made to sanction this result. In plain words, it permits compensation for "injury or disability" to workmen. We may, if we choose, cling to the letter and not the spirit in construing the term "injury," and so may conclude that a man whose wooden leg is destroyed and who is unable to walk is nevertheless uninjured, the Legislature to the contrary notwithstanding. But to say that this man is not "disabled" is directly to contradict the physical facts. The analogy to clothes and tools is wholly unconvincing. They have nothing to do with the functioning of the body. An artificial limb, however, is an essential part of the body, without which it cannot function properly. To call it "personal property" is to ignore the real point, namely, that its destruction results in disability to the workman.

Not only is the Constitution devoid of language inconsistent with this statute, but the holding of the majority opinion is in direct conflict with the expressed intention to provide for a "complete system of workmen's compensation." No amount of theorizing can avoid the regrettable conclusion that by this decision we have deprived the commission of power to render necessary compensation to workmen disabled in the course of their employment, and have prevented the Legislature from creating a complete system of such compensation.

We concur: WASTE, C. J.; SEAWELL, J.

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214 Cal. 251

HANNON et al. v. MADDEN et al.

S. F. 13508.

Supreme Court of California.

Nov. 2, 1931.

1. Municipal corporations ⚷488, 489(7).

Where no protests are made to council, nonjurisdictional matters such as failure of work to comply with contract cannot be urged in court action as grounds for invalidating improvement assessment (St. 1911, p. 743, § 21, as amended by St. 1923, p. 114, § 1).

2. Municipal corporations ⚷493(6).

On appeal to council, its decision may be attacked in legal proceedings only on pleading and proof that board of trustees in accepting improvement acted fraudulently or that its action was so arbitrary as to raise inference of abuse of discretion as matter of law (St. 1911, p. 743, § 21, as amended by St. 1923, p. 114, § 1).

3. Municipal corporations ⚷493(6).

It is function of governing board to determine whether improvements are according to contract, not that of court, in absence of fraud (St. 1911, p. 743, § 21, as amended by St. 1923, p. 114, § 1).

4. Municipal corporations ⚷493(1).

Governing board is vested with wide discretion with respect to change of plans for street improvements, deviation from plans and specifications, and substantial performance of contract (St. 1911, p. 743, § 21, as amended by St. 1923, p. 114, § 1).

5. Municipal corporations ⚷513(7).

Evidence *held* not to show fraud in board of trustees in overruling protest against acceptance of street improvements.

Record failed to show just what evidence protestants introduced before board. Board's action was based on personal inspections and satisfactory reasons for deviation from plans and specifications.

6. Municipal corporations 🔑**513(7).**

Fact that rock was not screened to size specified is not conclusive proof that finished street did not substantially comply with contract.

7. Municipal corporations 🔑**493(2).**

Board of trustees was not bound to accept testimony offered by protestants against street improvement, if their own knowledge and investigation convinced them that work complied with contract.

8. Municipal corporations 🔑**513(7).**

That board of trustees paid engineer 8¼ per cent. of street improvement cost, and that latter used part of compensation to employ own attorney, did not tend to prove fraud.

9. Municipal corporations 🔑**493(6).**

Employment of engineer for street improvement is not a jurisdictional matter, and decision of board of trustees is conclusive, in absence of fraud (St. 1911, p. 743, § 21, as amended by St. 1923, p. 114, § 1).

10. Municipal corporations 🔑**513(1).**

That board of trustees ordered assessment for street improvement reduced $184.75, but failed to distribute reduction among assessments on 650 parcels of property, is within de minimis rule.

11. Municipal corporations 🔑**493(5).**

Board of trustees' refusal to order new assessment and allow further period of protest after ordering changes in street assessments *held* proper (St. 1911, p. 743, § 21, as amended by St. 1923, p. 114, § 1).

12. Municipal corporations 🔑**444.**

Advancement of preliminary expenses from city treasury when they should have been paid by contractor is not jurisdictional, and cannot affect assessment for street improvements (St. 1911, p. 766, § 79; p. 743, § 21, as amended by St. 1923, p. 114, § 1; p. 737, § 17, as amended by St. 1923, p. 108, § 8; p. 744, § 23, as amended by St. 1923, p. 115, § 2).

13. Municipal corporations 🔑**460.**

Omission of proper item of expense, such as inspection fees, does not invalidate street assessments (St. 1911, p. 743, § 21, as amended by St. 1923, p. 114, § 1).

14. Municipal corporations 🔑**493(2).**

Participation of trustee who was street superintendent in vote to confirm assessment for street improvements did not prejudice protestants, where majority, not including trustee, voted for confirmation.

15. Municipal corporations 🔑**493(2).**

Executive session by board of trustees before voting to confirm assessment for street improvement was lawful.

16. Fraud 🔑**41.**

Fraud must be pleaded in specific language descriptive of the acts relied on to constitute fraud.

In such case it is not sufficient to allege fraud in general terms or in terms which amount to mere conclusion.

17. Municipal corporations 🔑**513(7).**

Since "fraud" imputes venality or corruption, it must be clearly established against board of trustees vested with wide discretionary powers concerning public improvements.

[Ed. Note.—For other definitions of "Fraud," see Words and Phrases.]

18. Evidence 🔑**83(1), 89.**

There is a presumption of validity in favor of official acts, and mere mistake is insufficient to overcome it.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by John A. Hannon, and others, against J. H. Madden, J. B. Lowe, W. H. Mahaffy, Wm. H. Hannon, and W. E. Ammerman, as trustees, comprising the Board of Trustees of the Town of Sausalito, the Town of Sausalito, Wm. Z. Tiffany, as Clerk of said Town and Board, and J. A. Dowling. Judgment for plaintiff, and defendant appeals.

Reversed.

H. C. Symonds, of San Francisco, and Kirkbride, Wilson & Brooks and Ernest A. Wilson, all of San Mateo, for appellants.

L. C. Pistolesi and Franklin B. Worley, both of San Francisco, for respondents.

PER CURIAM.

Plaintiffs, forty-five residents and taxpayers of the town of Sausalito, who own real property situate within street assessment district C, as established by the board of trustees of said town, brought this action to establish the invalidity of an assessment in the sum of $181,304.54 levied against approximately 650 parcels of real property comprising said district C, to pay the cost of street improvements done under the Street Improvement Act of 1911 (St. 1911, p. 730) and amendments thereto. From a judgment for plaintiffs and an order denying their motion for a new trial, defendants, consisting of the five members of the board of trustees, the town clerk, and the contractor who did the work of street improvement, prosecute this appeal.

As grounds for invalidating the assessment, the plaintiffs alleged in a second amended complaint that the board of trustees in overruling the protests of plaintiffs and confirming the assessment by a four to one vote disregarded the rights of plaintiffs, and acted fraudulently, unlawfully, and arbitrarily, knowing that the work of street improvement was not performed according to the plans and specifications in material particulars, which will be discussed hereafter. The court made a finding in the language of this allegation, except that it omitted the word "fraudulently." The findings no place expressly find that defendants acted fraudulently. The terms used are wrongfully, unlawfully, illegally, arbitrarily, and knowingly coupled together in various forms. The one member of the board of trustees who did not vote with the other members to confirm the assessment is the brother of one of the plaintiffs. The plaintiffs also alleged that the assessment and proceedings leading up to it were irregular and defective in other respects. The court below made findings favorable to plaintiffs on most of said additional allegations. The sufficiency of the evidence to support said findings, and the further question as to whether the irregularities invalidate the assessment, will be considered in subsequent discussion.

The Street Improvement Act of 1911, in common with other public improvement acts, provides for an appeal to the governing board of the city, the decision of which body is declared to be final and conclusive as to all errors, informalities, and irregularities which the council might have avoided or remedied during the progress of the proceedings or which it can remedy at the time of hearing of the protests. A curative provision is also found in the 1911 act, as in other acts, the effect of which is to validate the proceedings and cure all irregularities and informalities except those violative of requirements which are jurisdictional, in the sense that a failure to follow them constitutes a taking of property without due process of law. Southlands Co. v. San Diego, 211 Cal. 646, 297 P. 521; Noyes v. Chambers, 202 Cal. 542, 261 P. 1006; Chase v. Trout, 146 Cal. 350, 80 P. 81. The pertinent provisions of the 1911 act, as amended at the time the proceedings herein were taken, are as follows: "All the decisions and determinations of said city council, upon notice and hearing as aforesaid, shall be final and conclusive upon all persons entitled to appeal under the provisions of this section, as to all errors, informalities, and irregularities which said city council might have avoided, or have remedied, during the progress of the proceedings, or which it can at that time remedy. No assessment, warrant, or diagram, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided." Stats. 1923, p. 114, amending section 21.

[1, 2] It has been held repeatedly in this and other jurisdictions, in interpreting such statutes, that, where no protests are made to the council, such nonjurisdictional matters as the failure of the work to comply with the contract cannot be urged in a court action as grounds for invalidating the assessment. Southlands Co. v. San Diego, supra; Blake v. City of Eureka, 201 Cal. 643, 258 P. 945; McLaughlin v. Knobloch, 161 Cal. 676, 120 P. 27; Warren v. Riddell, 106 Cal. 352, 39 P. 781; Fanning v. Leviston, 93 Cal. 186, 28 P. 943. Where an appeal has been taken to the council, its decision may be attacked in a legal proceeding only upon pleading and proof that the board acted fraudulently or that its action is so palpably unreasonable and arbitrary as to raise an inference of plain abuse of discretion as a matter of law. Cutting v. Vaughn, 182 Cal. 151, 187 P. 19; Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 P. 217, L. R. A. 1918E, 197; Lambert v. Bates, 137 Cal. 676, 70 P. 777; Hutchinson v. Coughlin, 42 Cal. App. 664, 184 P. 435. The allegation in the instant case is that the board of trustees fraudulently, unlawfully, and arbitrarily overruled the protests of plaintiffs, knowing that the work was not performed according to the plans and specifications. It is also alleged that the superintendent of streets accepted the work, knowing that it did not conform to the contract. In their protests filed with the board of trustees, the particulars wherein the work did not meet the requirements of the contract are not stated, but the complaint specifies several alleged deficiencies. Where a city council or board of trustees acts dishonestly and fraudulently to the detriment of the district, there is no doubt that its action may be the subject of judicial inquiry. Plaintiffs must fail in the instant case, for the reason that the case as presented falls short of establishing fraud on the part of the town's officials who were charged with the duty of making the public improvements.

[3] Upon the trial plaintiffs called a number of witnesses whose testimony was to the effect that the local red rock used as pavement upon portions of two streets and as shoulders of the paved portion of other streets did not comply with the specifications. Said specifications provided: "All rock to be used in this work shall be sound local chert and broken to such size that all will pass through a ring 2½ inches in diameter and at least 70 per cent. will be retained on a ring one-half inch in diameter." Witnesses on behalf of plaintiffs testified that a large portion of the rock was too large by several inches to go through a two and one-half-inch screen,

and that it also contained a large quantity of material so fine as to be classified as dirt or dust rather than rock. If the question whether the work had been fully performed according to the contract had been presented to the trial court in an original proceeding in which it had jurisdiction, the court's decision would have been final upon a question of conflicting evidence, even though another court would have taken a contrary view, but the duty of deciding that question has been confided by the Legislature to the city council or such other governing board as may be charged with the duty of initiating and performing all street improvement work. This court and the courts of all other states of the Union, as a matter of public policy and necessity, have zealously guarded the power and jurisdiction of municipal public bodies in the performance of the duty with which they are specially charged, and have limited the jurisdiction of courts to declare their action invalid to extreme cases.

As an illustration of the rule, it is necessary to cite or discuss but a few of the many decisions and text-writers which are in agreement upon the subject. Page and Jones on Taxation by Assessment, p. 1580, says: "The act of the common council or other corresponding body in confirming an assessment is said to be an exercise of quasi-judicial power. Where this effect is given to an order or decree of confirmation, such order or decree is final and conclusive as between the parties and cannot be attacked collaterally by any of the parties thereto, unless the proceedings or the order of confirmation are absolutely void. If the record shows that the court or other tribunal by which an assessment is confirmed has jurisdiction, a judgment, decree or order of confirmation made by such court or other tribunal is final and conclusive between the parties and is not subject to collateral attack."

In Heft v. Payne, 97 Cal. 108, 31 P. 844, it was held that the property owner has nothing to say in determining whether the work shall or shall not be done by the contractor, nor, in the absence of fraud, whether the work has been done according to the contract.

In Lambert v. Bates, 137 Cal. 676, 678, 70 P. 777, this court said: "The legislature has thus not only provided a tribunal for the purpose of determining whether the contractor has completed his contract according to its terms, but it has also declared that the decisions and determinations of that tribunal upon this question shall be 'final and conclusive' as to all errors which it might have remedied. Whether the work in the present case was done, in conformity with the contract, to the official grade, was a fact to be determined in the first instance by the superintendent of streets. The street improvement act declares that all street work shall be done under his direction and to his satisfaction, and it is alleged herein, and found by the court, that the work was accepted and approved by him, and that he thereupon made the assessment upon which the action is brought. If in fact he accepted the work and made the assessment before the contract was fulfilled, such determination or act was an error of that officer which the council could have remedied. It was within the functions of that body, upon the defendant's appeal, to determine whether in fact the work provided for in the contract had been fully performed or not; and, under the above provision of section 11, its action in overruling said appeal, and dismissing the same, is final and conclusive upon him. The council acted judicially in its determination upon the appeal (Belser v. Hoffschneider, 104 Cal. 455, 38 P. 312); and, as in the case of the judgment of any tribunal for which there is no review provided by statute, its action must be held conclusive whenever the fact determined by it is brought into question before any other tribunal (Lewis v. Barclay, 35 Cal. 213; Fairchild v. Wall, 93 Cal. 401, 29 P. 60; Van Fleet, Former Adj. § 7; Demarest v. Darg, 32 N. Y. 281; Culross v. Gibbons, 130 N. Y. 447 [29 N. E. 839])."

Speaking to the question as to the case presented to the council as distinguished from the case made in the Superior Court, the decision above cited holds that the Legislature did not intend that the appeal to the council should be prosecuted in a perfunctory manner or should be a mere formality. It devolves upon protestants to show that sufficient evidence was adduced to support the appeal, and, if the council should overrule the appeal because of its misapplication of the law to the facts, it is incumbent upon the party seeking the review to clearly present to that tribunal the questions of law which he claims to have been misconstrued or erroneously applied, and show that they have been presented upon the appeal to the council. It cannot be presumed that the council made an erroneous decision upon the evidence which he did present. Continuing, the court said: "If he failed or omitted to present to that body the evidence which he afterwards presented to the superior court upon the trial herein, he is in the same position as any litigant who has rested his case upon insufficient evidence. If the statute does not authorize a new trial or a re-examination of such evidence, he must abide the decision of that tribunal." See, also, Cutting v. Vaughn, 182 Cal. 151, 187 P. 19.

In the instant case it is by no means made clear what evidence was presented in the council hearing directed to the issue of fraud as distinguished from the case presented in the Superior Court. The appeal to the council continued through three evenings, while the trial in the Superior Court consumed six days. It is therefore evident that the proceeding in the court trial was at least much fuller than the council proceeding could possibly have been.

[4] Numerous authorities are in agreement to the effect that, if the improvement substantially complies with the contract, no grounds exist for invalidating the assessment. In considering the question of substantial compliance in the particular situation, as in the instant case, the locus of the improvement, which is upon a hillside where the contour of the earth's surface is broken and irregular, forms an important factor. Also the magnitude and character of the improvement is to be considered. It is the rule of construction that, where a street or public improvement contract has been departed from to avoid an unforeseen incongruity, such as changing the grade fixed by the contract so as to make the improvement conform to the grades of intersecting streets and highways anciently established, or to avoid an engineering error or miscalculation which would lead to an absurdity, or where changes would benefit the property owners and would cause no material detriment to the improvement, the city council is fully warranted, and acts within the plenary power with which it is clothed by the Legislature in passing upon the contractor's work, though there may be found departures, as above indicated, from the plans and specifications. Plenary power was conferred upon municipal governing boards, doubtless for the purpose of giving them wide latitude in matters of discretion, for the definite reason that in determining the question of compliance with street improvement contracts wide discretion is necessary from the very nature of the work to be performed. Official efficiency requires that their hands be not too tightly tied.

The rule applicable to a city council in its consideration of departures from the provisions of a street improvement contract is general, and applies to reclamation districts and other public bodies as well. In Reclamation District No. 3 v. Goldman, 65 Cal. 635, 4 P. 676, 681, it is stated in the following language: "Nor do we think that a deviation from the approved plans in making the reclamation, where no injury results from such deviation, but rather a benefit, is outside of the discretion vested by the statute in the trustees. Some discretion must be left to the trustees in regard to the work, and a trifling deviation from the plans, or a deviation which would result in benefit, should not be regarded as a violation of the requirements of the statute. A work of reclamation, with a deviation justifiable under the circumstances, may well be regarded as a substantial compliance with the original approved plan."

[5, 6] In the instant case no property owner at the board hearing claimed damage, direct or special, by reason of said changes. The court, conceding the second amended complaint to be sufficient, was limited to a determination whether the board acted fraudulently and arbitrarily in deciding against the protestants. The record indicates that the plaintiffs, as protestants, introduced at the board of trustees' hearing some evidence, the extent of which does not appear, similar in import to that introduced upon the trial. The record also shows that the members of the council, in overruling the protests, relied upon personal inspections made by them which showed the streets and rock shoulders to be in sound condition, with some larger rocks and dust present only to an immaterial extent not affecting the quality of the work, and that said board members also acted upon the statements of the contractor and his superintendent that, if larger rock were originally placed upon the streets, it would be crushed by the action of the twelve-ton roller which the specifications required to be used and which was in fact used. Some of the larger rock was crushed by hand. In view of this evidence, we cannot brand the action of the board as fraudulent. The fact that the rock was not screened before being dumped upon the streets after being brought from a nearby quarry, and that protests concerning the size of the rock were made to members of the board during the course of the work, is not conclusive proof that the streets as finished did not substantially meet the requirements of the contract. The issue about which protestants' case centers involved but a very small cost compared with the cost of the entire expenditure, being something like 4 per cent. of the gross cost.

[7] The claim is also made that the work was not performed according to the grades established by the plans and specifications. Protestants' chief witness, Edward A. Parry, a surveyor, estimated the grades from the blueprints, and gave as a result of his estimate a large number of instances in which the work as completed varied from the grades called for in the blueprints, and claimed in some cases the variation amounted to several feet. A table prepared by him to show the variations was introduced in evidence. Mr. Parry gave similar testimony at the hearing of the protests before the board of trustees. Defendants introduced evidence, which was not shaken, to the effect that the work was graded according to the stakes set by the engineer and approved by the city, and that reasonable changes were made at the request of property owners and others to adjust the grade of the streets at points where they joined streets outside the district which were already completed. Charles E. Sloan, a civil engineer, whose qualifications were admitted, pointed out some forty errors in reading 128 stations in the calculations of Mr. Parry, including some in which the greatest variances were claimed to exist, and presented a table which showed that the variations were neither as numerous nor as large as Mr. Parry's

estimate would indicate. Before overruling plaintiffs' protests, members of the board conferred with the engineer and contractor as to the grades. The board was not bound to accept the testimony of protestants' witness introduced upon the hearing, if their own knowledge, investigation, and consideration of the evidence convinced them that the work as completed was in substantial compliance with the contract, as certified by the engineer. It was the exclusive function of the board to determine all conflicts which may have arisen during the hearing.

[8, 9] Unsavory inferences of collusion are predicated upon the fact that the engineer, whose compensation was fixed at 8¼ per cent. upon the cost of the improvement, paid to his specially employed counsel, whose residence was in San Mateo county, and who was present at practically every one of the many meetings of the board of trustees, 1 per cent. or one-quarter of one per cent., whichever fact may be, of said compensation allowed said engineer. The engineer's fee, it appears, had been fixed by resolution of the board prior to the doing of the work, and it was first established by the board at a time when the personnel of the board was not composed of the same members as here sought to be bound by the judgment. As a matter of fact, trustee Hannon, who is now associated with protestants, voted for the resolution. It has not been shown that the fee was unreasonable or disproportionate to fees allowed for similar services. In fact, the contrary appears. The board knew that the engineer, in order to protect himself in an important matter fraught with legal complications, intended to employ expert assistance, and we have been cited to no section of the laws under which the town of Sausalito is organized that would prohibit the engineer from using a part of his compensation for the employment of an attorney, nor do we see that the transaction could in any remote degree tend to establish fraud on the part of the board or the engineer. The fact that the town had a regularly appointed attorney would not change the situation, and, unless there is some provision of law forbidding it, the town can also employ special counsel to take charge of important litigation in which it is interested. There is nothing in the circumstance as it is related which tends to cast suspicion upon the good faith of the board or the engineer. We know of no reason why an engineer, in fixing his compensation, may not include in his estimate such an item. The amount of the attorney's fees was approximately $500. This matter, it will be noted from an examination of the statute, does not present a jurisdictional question.

The engineer employed by the board had been employed in other street improvement districts in Sausalito at the same rate of compensation he was to receive for his services in district C. It appears that, in addition to performing engineering work prescribed by the act, he prepared the assessment under the direction of the superintendent of streets, and that the cost of preparing the assessment, which the statute expressly allows as a proper incidental expense is included in the engineer's fee.

[10] Plaintiffs argue that the assessment appears to be void on its face. The board ordered the total amount of the assessment reduced $184.75 upon ascertaining that expenses for printing and advertising not chargeable to district C had been included in the incidental expenses, but did not order a proportionate reduction in the amount of the separate assessments against each parcel of property in the district. The board gave extended consideration to many vexatious problems arising out of the project, and ordered a large number of changes in the separate assessments, both by way of reduction and increase, before confirming it. The final assessment, as amended to conform to the order of the board, was not rendered invalid because the board did not first make the inconsequential reduction in the separate assessments which would result from spreading $184.75 over 650 parcels of property. Conceding the respondents to be technically correct in their claim, the de minimis rule might properly be applied in the light of the multitude of perplexing factors which the board was called upon to compose.

[11] Plaintiffs feel aggrieved at the failure of the board to order the preparation of a new assessment and to allow a further period of protest after ordering changes made in the assessment by the resolution of December 4, 1925. As amended in 1923, the act provides that, after completion of the work, the assessment shall be filed with the city clerk, who shall give notice of a time for hearing protests, but that it shall not be recorded in the office of the superintendent of streets until after the determinations of the council upon appeal have been complied with. In the copy of the assessment in the record herein, October 22, 1925, had originally been written in as the date of record, but a line had been drawn through said date and December 4, 1925, inserted in lieu thereof; Superintendent of Streets Madden initialing the change. It is obvious that October 22, 1925, the date of filing with the clerk, was inadvertently written in as the date of recording, instead of the true date, December 4, 1925. Plaintiffs were not entitled to an additional period of protest after the latter date. The act expressly provides for amendment of the assessment as filed without the necessity of an entire new assessment or additional time to protest the assessment as amended. As this court said in Johnson v. City of Los Angeles, 210 Cal. 240, 291 P. 395, 396: "* * * When the roll [assessment roll] is lodged with the clerk for presentation to the council and notice is duly

given to the property owners to be affected thereby of the specified date of hearing thereon, the whole assessment roll is in a state of flux and each property owner is charged with knowledge of the number of pieces of property to be assessed, the amount to be raised, the interdependence of the properties upon each other, and the fact that power to modify necessarily carries with it power to increase as well as decrease any assessment made by the board of public works. The property owner who fails to appear must be held to have acquiesced in any action the city council might take upon consideration of said roll, either by increasing or decreasing the assessment as to him. In fact, we see no reason why, even in the absence of protest or objection, the council may not, after due notice, modify or raise any assessment and then confirm the same." See, also, Gadd v. Workman, 200 Cal. 384, 253 P. 700. It follows that, even though the council orders changes made in the assessments of property where the owners made no objection to the assessment as originally filed, and for whom an additional period of protest is not provided in the act, no ground of objection to the assessment is thereby furnished. The assessment in the instant case, as amended, conforms to the order of the board of trustees. There is no room for the claim that the protestants were denied full opportunity to present their objections.

[12] The record herein indicates that incidental expenses for printing and advertising were paid from the city treasury, which was later reimbursed for these advances in full, and that one or more warrants drawn upon the city treasury were issued to the engineer for a portion of his fee. There is evidence of an understanding that these warrants were not to be cashed until the contractor had advanced amounts for incidental expenses sufficient to pay them. Section 17 (as amended by St. 1923, p. 108, § 8) requires the contractor, before receiving his contract, to advance to the superintendent of streets, for payment by him, the amount of all incidental expenses incurred to date, and section 23 (as amended by St. 1923, p. 115, § 2) provides that the warrant to collect the assessment shall not be delivered to the contractor until after he shall have paid to the superintendent of streets the amount of incidental expenses not previously paid. The evidence as to whether verified claims for certain of the incidental expenses were presented, as required by the act (section 79), is also in a state of uncertainty. It was established that reimbursement in full had been made for the printing and advertising expenses, and it seems probable that reimbursement had also been made for amounts paid the engineer, if any portion of his fee was in fact paid from the treasury. The protests filed with the board do not urge these grounds of objection. These irregularities as to incidental expenses are not jurisdictional, and do not invalidate the assessment.

[13] The act provides for the appointment by the superintendent of streets of an inspector, whose duty it shall be to see that the contract is fulfilled in every respect, and whose compensation at the time the proceedings herein were had was not to exceed $7 per day. An inspector was appointed in the instant case by resolution of the board of trustees rather than by appointment of the superintendent of streets. He was paid $435, at the rate of $5 a day, from the city treasury, which has not since been reimbursed. The assessment does not include this item. The only allowance for inspection is to the engineer for inspections made by him. The assessment is not rendered invalid because a proper item of incidental expense has been omitted therefrom. The validity of the assessment does not, however, affect the fact that payment from the city treasury may be an improper expenditure of public funds, for which a remedy exists, as in the case of unauthorized expenditures in general.

[14, 15] The participation of trustee Madden, who was also superintendent of streets, in the vote to confirm the assessment, over the objection of protestants that in so doing he was passing upon his own assessment prepared by him as superintendent of streets, did not prejudice plaintiffs, since a majority, not including Madden, voted in favor of the resolution. Complaint is made against the action of the board in holding an executive session for a period of time on the night of December 1 after the public hearing had been in session for some time. This action does not indicate a fraudulent design on the part of the board. Certainly the board acted within its rights in considering the matter in executive session before voting in open meeting upon the protests, and it would matter not at all whether the executive session was held in advance of, at the close of, or intervening the opening and closing of, said open meeting. No proof was offered tending to show that any conspiracy or plot against the protestants was attempted, or that any evil design influenced the members of the board who attended. One of the members of the board, a brother of one of the protestants, and who was hostile to his fellow trustees, was no doubt in attendance upon said executive session, and, as he was a willing witness at the trial for protestants, he would doubtless have freely communicated to protestants whatever transpired of a prejudicial nature to them during said session.

[16-18] Appellants have presented a number of assignments of error, among which are objections to the pleading and the ruling of the court in refusing to permit them to call

witnesses after the evidence had closed, at which juncture protestants were allowed to file a second amended complaint containing allegations which appellants claim they had no occasion to meet in the trial, as they were not pleaded, and therefore not issues in the trial, and that they were denied the opportunity to rebut said allegations after the case was closed. They asked that the case be opened for that purpose, but the court ruled that said matters were sufficiently put in issue during the trial. Complaint is also made that the pleading under which the case was actually tried was wholly deficient in its allegations of fraud. It is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions. The second amended complaint in some respects may be sufficiently descriptive to meet the objection, while it is deficient in other allegations. Fraud, being a term which imputes venality and corruption to the person charged, should be clearly proved and satisfactorily established, especially where the persons charged are public officers vested with wide discretionary powers. If official acts may be explained on any reasonable theory of duty honestly, even though mistakenly performed, it must be resolved in favor of the presumption, which may not be lightly ignored. This is made doubly true where no substantial evidence, as in the instant case, points to a corrupt motive or dishonest purpose on the part of the accused. A wide divergence of views, especially in matters where local taxation for public improvements is involved, frequently exists. Suspicions easily aroused and baseless charges of dishonesty hurled in the acrimony of controversy have a tendency to defeat, rather than promote, efficiency in the administration of public affairs. It may be that considerations akin to those here suggested furnish a partial explanation for the wide discretion and power of finality in the determination of issues with which recent legislative acts have vested municipal bodies in matters of street improvements.

The case no doubt presented a number of difficult questions to the learned trial judge, as it has to us, and the record shows that unnecessary vehemence characterized the conduct of the case, which did not aid the trial court in its labors.

Upon an examination of the record, we are of the view that many of the acts of the board complained against are not jurisdictional and were concluded by the board's acceptance of the work. We are also of the further view that the evidence as it now stands is not sufficiently definite and certain to sustain a judgment of either actual or constructive fraud against the board of trustees and the other municipal officers who are joined as codefendants in the action, or against any of them.

It may be added in conclusion that there is much evidence in the record to the effect that the improvement as a whole was done in a good and workmanlike manner.

Judgment and order reversed.

214 Cal. 190

FIRST NAT. BANK OF SAN PEDRO v. STANSBURY et al.

L. A. 12827.

Supreme Court of California.

Oct. 30, 1931.

Appeal and error 🔑1217.

Party obtaining reversal which carried with it costs could not be denied right to recover costs pending final determination of principal action.

SHENK, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by the First National Bank of San Pedro against Charles Stansbury, with a cross-complaint by defendant, wherein John Balch was named as cross-defendant. From an order staying execution on a judgment for costs of appeal pending final determination of issues on subsequent appeal, plaintiff and cross-defendant appeal.

Reversed, with instructions.

Superseding opinion in 294 P. 43.

See, also, 5 P.(2d) 13.

Goodspeed, Pendell & Neff and Goodspeed, Pendell & McGuire, all of Los Angeles, for appellant.

Miller & Ellis, Kenton A. Miller, and Herbert N. Ellis, all of Los Angeles, for respondent.

PRESTON, J.

In an action entitled as above, a reversal of the judgment for respondent was had in the appellate court. 62 Cal. App. 336, 217 P. 91. This reversal carried with it costs of appeal, and thereafter, on the 3d day of August, 1923, pursuant to the remittitur in that case, judgment for appellant was entered in the sum of $1,242.55, which judgment became final and remained unsatisfied, except for a credit of $77.10 entered thereon on March 2, 1925.

A second trial of the principal cause was had, which resulted on August 10, 1927, in a judgment in favor of respondent, Stansbury, carrying only the affirmative item of $31.75 as costs. On October 4, 1927, these same appellants took an appeal from said judgment, and said appeal is still pending and undetermined.

On October 13, 1927, appellants caused an alias writ of execution to be issued on the unsatisfied portion of said first judgment, but directed the sheriff to credit the fund secured by him with the item of $31.75. Later, and on October 25, 1927, an order was made directing these appellants to show cause why they should not be enjoined from collecting said judgment of August 3, 1923, until said appeal taken by them from the judgment of August 10, 1927, should be determined. On November 1, 1927, pursuant to the order to show cause, the court made its order purporting to enjoin appellants from collecting said judgment upon respondent giving a bond in the sum of $2,000 to pay the parties enjoined such damages as they might sustain by reason of the making of said order, but not requiring a bond to satisfy the judgment.

The appeal before us is taken from said order of November 1, 1927, and is a distinct proceeding from the appeal from the judgment in the main case. Notwithstanding the order purports to be in the nature of an injunction, it is in reality an attempt to stay the proceedings upon the former judgment for costs, pending the determination of the appeal from the later one on the merits. It will at once be seen that, if the latter judgment is reversed on appeal, the respondent will owe all the judgment, with the added costs of another appeal; if the judgment is affirmed, the respondent will have at most only an offset for his costs on appeal and in the court below. The judgment for costs of appeal in the first case has long since become final, and the judgment for costs in the second trial has not yet become final.

We perceive no grounds upon which to deny appellants the right to realize upon their judgment. Oftentimes the trial court refuses to proceed with a second trial until the costs of the appeal from a former judgment have been paid. Weile v. Sturtevant, 176 Cal. 767, 169 P. 685, 15 C. J., p. 308, § 759. There is no interdependence between the judgment for costs of the former appeal and any judgment which may subsequently be entered in the main case.

The order is reversed, with instructions to dismiss the proceeding.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.

SHENK, J.

I dissent. I am unable to agree with the reasoning or conclusion of the main opinion wherein the power of the trial court to control the issuance of process in the action before it is denied. It is well settled that courts have power temporarily to stay execution on judgments rendered by them whenever it is necessary to accomplish the ends of justice. United States v. McLemore, 45 U. S. (4 How.) 286, 11 L. Ed. 977; 23 Cor. Jur. pp. 521, 522. The judgment, execution on which was stayed by the trial court herein, is a judgment of that court when entered after the going down of the remittitur. See Granger v. Sheriff, 140 Cal. 195, 73 P. 816; Fischer v. Lukens, 41 Cal. App. 358, 182 P. 967. Furthermore, it is a judgment for costs in the very action pending and undetermined (by reason of the reversal) at the time the stay of execution was ordered. The respondent on the second appeal (who is also respondent herein), which appeal is now pending and undetermined, has compensating claims against the appellant herein, who is also the appellant in the main appeal. If the judgment on that appeal is affirmed, the respondent will be entitled to a judgment for costs which may and should be offset against the judgment for costs which the appellant herein is seeking to enforce. If the judgment on the main appeal is reversed, the respondent herein may again urge his claim for an additional credit of over $6,000 against the appellant, which claim the respondent has expressed a willingness to forego, in order to end this protracted litigation. In any event, the trial court will be called upon to adjust compensating claims and offsets between the parties before the litigation is terminated. Under these circumstances, I see no abuse of discretion in the order of the trial court in staying the hand of one party to an action before it and thus prevent him from harrassing the other party with the process of the court prior to a final determination of the action in which the cross-demands are being asserted.

118 Cal.App. 80

FIRST NAT. BANK OF SAN PEDRO v. STANSBURY et al.

Civ. 7991.

District Court of Appeal, First District, Division 2, California.

Nov. 2, 1931.

Rehearing Denied Dec. 2, 1931. Hearing Denied by Supreme Court Dec. 31, 1931.

1. Stipulations 🔑19.

Where during first trial on notes it was stipulated judgment should be entered for plaintiff in another pending action, and referee should be appointed to state account in present action, trial court properly ordered reference again during second trial after reversal of judgment rendered on first trial.

2. Jury 🔑28(12).

Where sole issue was covered by stipulation for reference, plaintiff by such stipulation waived jury trial.

3. Appeal and error 🔑1195(1).

Judgment on former appeal *held* not "law of case" as to cause of action as stated in pleadings as amended before second trial.

[Ed. Note.—For other definitions of "Law of the Case," see Words and Phrases.]

4. Appeal and error 🔑1201(1).

On retrial after remittitur, defendant had same right to apply for permission to amend pleadings as though case had never been tried (Code Civ. Proc. § 473).

5. Pleading 🔑238(2).

Defendant's application to amend pleadings to conform to proof having been made in plaintiff's presence, subsequent order allowing amendment *held* not ex parte.

6. Appeal and error 🔑758(2).

Points regarding referee's failure to give plaintiff opportunity to be heard could not be considered, where plaintiff's brief did not quote or cite record showing alleged irregularities.

7. Appeal and error 🔑614.

Transcript of reporter's notes taken before referee included in bill of exceptions certified to by trial judge could not be considered (Code Civ. Proc. §§ 649, 650).

> The transcript of the reporter's notes could not be considered, since transcript was not certified by reporter nor by referee, and record did not show that it was used before trial court.

8. Exceptions, bill of 🔑32(1).

When statute designates officer to settle bill of exceptions, such act may not be performed by different official (Code Civ. Proc. § 649).

9. Appeal and error 🔑713(1).

Wholly improper matter inserted in transcript will not be considered by court of review.

10. Reference 🔑91.

Where referee was appointed to state account, referee's findings on other matters *held* surplusage (Code Civ. Proc. § 644).

11. Appeal and error 🔑931(10).

In absence of contrary showing, appellate court must assume discounts allowed defendant by referee stating account were proper.

12. Reference 🔑100(6).

Question presented on conflicting affidavits as to whether referee's report should have been rejected because it was prepared by defendant's counsel *held* within trial court's discretion.

13. Appeal and error 🔑967(2).

Court's exercise of discretion regarding question presented on conflicting affidavits respecting rejection of referee's report must be sustained, unless abused.

14. Appeal and error 🔑687.

Alleged errors in referee's reception of evidence could not be considered, where transcript of reporter's notes taken before referee was not properly before appellate court.

15. Limitation of actions 🔑182(2).

Contention that defendant's rights were barred by limitations *held* unavailing, where plaintiff did not plead facts or statute (Code Civ. Proc. § 458).

16. Equity 🔑87(2).

In absence of special circumstances, one is not guilty of laches in any shorter period of time than period of statute of limitations.

17. Limitation of actions 🔑40(1).

One sued on contract which he claims was obtained through fraud or mistake may set up such defense at any time.

18. Reference 🔑66.

Where reference was special for purpose of stating account, whether evidence of fraud was introduced before referee *held* immaterial.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by the First National Bank of San Pedro against Charles Stansbury, with a cross-complaint by defendant, wherein John Balch and plaintiff were named as cross-defendants. From an adverse judgment, the plaintiff and the cross-defendant John Balch appeal.

Affirmed.

See, also, 5 P.(2d) 11.

Richard C. Goodspeed and Goodspeed, Pendell & McGuire, all of Los Angeles, for appellants.

Miller & Ellis and William A. Alderson, all of Los Angeles, for respondent.

STURTEVANT, J.

As assignee the plaintiff sued to recover on two promissory notes. The defendant answered and filed a cross-complaint, and in that manner brought into the action John Balch, the assignor. The cross-complaint was answered, and the trial was had before the court sitting without a jury. The court made findings in favor of the plaintiff, and caused a judgment to be entered for a sum amounting to about one-half of the face of the notes. The plaintiff appealed from the judgment, and it was reversed and the cause was remanded for the sole purpose of stating the account, between Mr. Balch and Mr. Stansbury, who had been partners, making a new finding on that issue, and ordering judgment. First National Bank v. Stansbury, 62 Cal. App. 336, 217 P. 91. That decision was filed May 29, 1923. After the remittitur went down, the action was again called for trial. The defendant filed amendments to its cross-complaint and answer. The plaintiff asserts that the defendant did not give notice that he would apply for permission to amend and that the amended pleadings were improperly filed. There is no merit in the contention, because the same contention was raised in the trial court, and the trial court sustained the objection and ordered the pleadings stricken out. Afterwards, on due notice, the defendant was given permission to amend, and the same pleadings were again filed.

[1, 2] During the proceedings on the first trial, an agreement was entered into that a referee could be appointed to state the account between Mr. Balch and this defendant. Prior to that agreement being entered into, two different actions had been commenced by the plaintiff against the defendant on different promissory notes. By the terms of the agreement, it was agreed between the parties that the plaintiff should be allowed to take judgment in one of said actions, and that the action we are considering should be referred to the referee to state the account. The agreement was in the form of a stipulation, and was entered in the records. The defendant complied with the stipulation, and, after the judgment was entered in the other action, he paid that judgment. When this action came on for trial the second time, the defendant made a motion that it be again referred to a referee to state the account. In opposition to that motion, the plaintiff contended that the stipulation had become functus officio. The trial court overruled the objection and ordered the reference. At no time did the plaintiff make any motion to be relieved from the alleged stipulation, and it did not take any steps to place the defendant in statu quo. On its face the stipulation was a contract supported by a good and sufficient consideration, and it does not appear that the trial court erred in again referring the action for the purpose of having the account stated according to the terms of the stipulation. 36 Cyc. 1394. The plaintiff complains because it was not given a jury trial. As will presently appear more fully, but one issue was tried, and that was the issue as to what errors or mistakes had entered into an alleged stated account and to take an account thereof. This was the sole issue on trial, and it was entirely covered by the stipulation which we have just been considering. It is perfectly clear that the plaintiff had by that stipulation waived a jury trial.

[3-5] When the cause was before the District Court of Appeal, it held that, as the pleadings then stood, there was no charge of fraud. When the cause went back for a second trial, the defendant prepared amended pleadings. In his amended cross-complaint, the defendant set forth three causes of action. To one of them the court sustained a demurrer. In another cause of action he pleaded fraud. As will later appear, he did not follow it up by offering proof, and no judgment was given him on the basis of that cause of action. The third cause of action pleaded errors and mistakes that had been made in the alleged stated account, and, as we understand the plaintiff, it does not claim that any error was committed in allowing an amendment to that cause of action. The plaintiff strenuously contended in the trial court, and at this time contends, that the judgment on the first trial has become the law of the case. However, we do not understand it to extend that contention to the third cause of action as stated in the amended pleadings. If we misunderstand the plaintiff, and if its contention is broader than as we have stated it, the contention must be ruled against the plaintiff. That is so because on a retrial of the action the defendant had the same right to apply for permission to amend as though the case had never been tried. Ellis v. Witmer, 148 Cal. 528, 531, 532, 83 P. 800. In making this point below, the plaintiff demurred to the amended pleadings, and it also made a motion to strike out. The demurrer was properly overruled, and the motion was properly denied. Code Civ. Proc. § 473; Ellis v. Witmer, supra. The trial court made an order allowing the defendant to amend his pleadings to

conform to the proof. That application to amend was made in plaintiff's presence on December 23, 1926, but it was not allowed until February 9, 1927. On those facts the plaintiff predicates the statement that the order was made ex parte. Clearly that was not the fact.

[6-9] The plaintiff asserts that a new and amended report was made by the referee after his first report had been vacated, and it asserts that the new report was made without first giving plaintiff an opportunity to be heard before the referee on either the old matters or any new matters. This point brings forth a consideration of certain defects in the record which are applicable to points Nos. 8, 11, 12, 13, 15, 17, and 19—all of which involve the proceedings before the referee. No one of those points may be considered for two distinct but separate reasons. The plaintiff's brief contains much argument, but does not quote nor cite any part of the record showing the alleged irregularities. The transcript on appeal contains 1,783 pages. The plaintiff's brief contains 347 pages. Other briefs are also very long. In the case of Dauphiny v. Buhne, 153 Cal. 757, 766, 96 P. 880, 884, 126 Am. St. Rep. 136, the court said: "Neither in the briefs of counsel for appellant is it indicated where, nor in what part of the bill, the questions objected to, and the rulings of the court upon them, may be discovered, He contents himself with setting forth in a page or so in his brief a lot of questions which he claims the court erred in overruling his objections to. We are not even enlightened on the subject as to whether the questions were answered or not. It is the duty of counsel to point out specifically where alleged errors, upon which they rely, may be found in the transcript, and if counsel do not see fit to do so, it will be assumed that they have not deemed them of sufficient merit or importance to undertake the task. In any event, under such circumstances, this court will not assume the burden of doing it."

In its brief the plaintiff refers to certain passages in the transcript. Those passages purport to be parts of the transcript of the reporter's notes of the proceedings before the referee. The references are not helpful. The referee was not asked to, and he did not, settle a bill of exceptions. Code Civ. Proc. §§ 649, 650. However, the plaintiff prepared a bill of exceptions and inserted therein the transcript of the reporter's notes, and, having done so, he then had the trial judge certify to that bill of exceptions. The transcript of the reporter's notes is not certified by the reporter nor by the referee, and the record does not show that it was used before the trial court, and therefore it may not be used on appeal. 2 Cal. Jur. 486; Borges v. Dunham, 169 Cal. 83, 145 P. 1011. The statute expressly requires that exceptions taken before a referee shall be settled before him and that the bill be certified by him. Code Civ. Proc. § 649; Goodrich v. Mayor, 5 Cal. 430. When the statute expressly designates an officer to settle the bill of exceptions or certify a record on appeal, such act may not be performed by a different official. Knoch v. Haizlip, 163 Cal. 20, 22, 124 P. 997; Lake v. Harris, 198 Cal. 85, 89, 243 P. 417; Estate of Carpenter, 127 Cal. 582, 584, 585, 60 P. 162. Wholly improper material inserted in the transcript will not be considered by a court of review. Sutton v. Symons, 97 Cal. 475, 476, 32 P. 588; White v. White, 112 Cal. 577, 580, 44 P. 1026. The plaintiff asserts that the referee's report is not the result of an account de novo nor is it the result of surcharging and falsifying. On its face it appears to be an account of the errors and omissions which the defendant claims occurred. As we have just shown, no bill of exceptions certified by the referee is in the record, and therefore the record contains nothing in any manner impeaching the report. In this connection the plaintiff contends that the referee heard evidence as to certain transactions which occurred at a time beyond the limit defined in one of the findings approved by the judgment of the District Court of Appeal in the first action. As already shown, these matters are not supported by any record that this court is entitled to examine.

[10] The plaintiff cites authority to the effect that, if the findings are contradictory, they will not support the judgment. Thereupon it proceeds to argue that certain findings made on the second trial are in conflict with the findings made on the first trial. After a full consideration of all of the facts, we think that the point is entirely without merit. As stated above, the stipulation of the parties was that a referee could be appointed to state the account and report any errors or mistakes. The order of reference took the same scope. Nevertheless the report of the referee and his amended report on its face appears to show that it is a set of findings on the whole issue. Be that as it may, no judgment was entered on the referee's findings and those findings were not treated by the trial court as finding on the whole issue. Code Civ. Proc. § 644. On the other hand, both parties in the trial court and the court itself treated the report as a special verdict. The court adopted it, and made its own findings, and then ordered judgment. As will be seen by an examination of the opinion by the District Court of Appeal on the first hearing, many findings of the trial court were approved, and the cause was sent back to be tried on the sole issue of the account. It is perfectly clear that the account appeared in the referee's report. All else was mere surplusage, and was so treated by the trial court. So viewing the report of the referee and the findings made on the second trial, we find no conflict whatever between the findings, whether we consider the

findings made on the first trial separately and compare them with the findings made on the second trial, or otherwise. However, the finding criticized by the District Court of Appeal on the first trial, and which was sent back to be retried, was retried and a proper finding made thereon.

[11] In making out his report, the referee allowed to the defendant certain items designated "discount." Pointing to that word, the plaintiff asserts that such items were interest, and that the referee should not have allowed the items in favor of the defendant. On the face of the report, it does not necessarily follow that the discount allowed was interest. Not every item of discount is interest. The allowances may have been proper discounts to which the defendant was entitled, and, in the absence of a showing to the contrary, we must assume that they were. When the referee's report came in, the plaintiff filed exceptions to it. No single exception challenged the allowance of any of the items of discount.

The plaintiff claims that as against the settled account there could be no relief without reliable records to support the allowance of the relief. The record discloses that many witnesses were examined and that a vast amount of documentary evidence was introduced. Nothing in the record shows us that the proof was not clear and satisfactory. In its next point the plaintiff contends that it cannot be determined how the settlement of December 16, 1916, or how the settlement of August 28, 1915, were arrived at. As we have shown above, there is certainly no record before us that shows a want of proof.

[12, 13] Another point made is that the referee's report should have been rejected because it was prepared by counsel for defendant. Suffice to say that the point was presented to the lower court and was submitted on affidavits. The most that can be said is that perhaps there was a conflict in the statements contained in those affidavits. However, that conflict was addressed to the trial court, and its ruling must be sustained, unless there was an abuse of discretion. We find no abuse of discretion in the instant case.

[14-17] It is claimed that evidence was received to the prejudice of the plaintiff. Some evidence was received before the trial court. The plaintiff does not claim that the errors occurred in taking that evidence. It does claim, however, that the referee made errors in receiving evidence. As shown above, we may not consider those matters. Again it is claimed that the rights of the defendant are barred by the statute of limitations. An examination of the plaintiff's pleading shows that it did not plead a single statute of limitation. It neither pleaded the facts nor did it plead the statute in the manner provided by the Code. Code Civ. Proc. § 458. As to laches, it is settled law that, in the absence of special circumstances, one is not guilty of laches in any shorter period of time than the period of the statute of limitations. It is also settled law that the defendant may set up fraud or mistake as a defense at any time when he is sued on the contract which, as he claims, was obtained through fraud or mistake. Field v. Austin, 131 Cal. 379, 382, 63 P. 692.

[18] It is said there was no fraud. That is apparently true, but the defendant's judgment has other evidence to support it. As we have stated above, the defendant filed an amended cross-complaint in which he alleged fraud. He did not introduce any proof on that subject in the trial court. As the reference was not a general one, but was a special reference for the purpose of stating the account, it is immaterial whether evidence of fraud was introduced before the referee.

In what has been said above we have tried to limit ourselves to such portions of the record as we are legally entitled to consider, and have not rested at all on the transcript of the reporter's notes of proceedings before the referee. However, we have examined every passage therein that has been called to our attention. We find nothing purporting to be prejudicial error, except the attack on "discounts" hereinabove referred to. The facts about such items were as follows: The two partners at times took contracts to do public work and were paid in warrants. After the warrants had been received, some of them were sold. The difference between the face value of the warrant and the selling price is what the referee called "discount." In finding No. IX made by the trial court on the first trial and approved by the District Court of Appeal is contained a passage as follows: "Otherwise, it was agreed that no salaries or other compensation should be drawn by either party and all profits thereunder were to be divided equally." In allowing a discount to Mr. Stansbury, the plaintiff claims violence was done to said finding. We think not. In selling the warrants, he was but transacting the partnership business. He was not given any "salary or other compensation."

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

BLEY v. BOARD OF DENTAL EXAMINERS OF STATE OF CALIFORNIA et al.*

Civ. 4350.

District Court of Appeal, Third District, California.

Nov. 4, 1931.

Rehearing Granted Dec. 3, 1931.

1. **Prohibition 🔑10(1).**

"Prohibition" lies only when subordinate court or tribunal entertains proceeding of which it has no jurisdiction, or where it assumes to exercise unauthorized power in cause or proceeding of which it has jurisdiction.

[Ed. Note.—For other definitions of "Prohibition (Writ of)," see Words and Phrases.]

2. **Physicians and surgeons 🔑11(3).**

Accusation charging that dentist permitted unlicensed dentist to use dental instruments *held* insufficient to charge unprofessional conduct under Dental Act so as to give dental board jurisdiction (St. 1915, p. 706, § 13, as amended by St. 1929, p. 1946, § 7).

Accusation was insufficient, since it was not in language of statute, in that nowhere in statute is word "permitted" found.

3. **Physicians and surgeons 🔑11(3).**

Allegation that dentist thereby aided and abetted unlawful practice, added after facts were set out in detail what dentist did, in accusation charging unprofessional conduct, *held* to add nothing to facts pleaded.

4. **Physicians and surgeons 🔑11(3).**

Omitting allegation that dentist owned or controlled equipment used by unlicensed person, in accusation charging unprofessional conduct, *held* fatal defect; nothing being alleged to imply equivalent of ownership or control.

5. **Physicians and surgeons 🔑11(3).**

Notwithstanding rule allowing great liberality in pleading before dental and medical boards, accusation in such proceeding must state facts showing violation of particular act under which charge is made.

6. **Physicians and surgeons 🔑11(3).**

Accusation must be sufficient in its statements of fact to show actual unprofessional conduct by person charged, or it will not give board jurisdiction to revoke practitioner's license.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action for writ of prohibition by Frederic A. Bley against the Board of Dental Examiners of the State of California. From a judgment for plaintiff, defendants appeal.

Affirmed.

Jesse W. Carter, of Redding, for appellants.

Levinsky & Jones, of Stockton, for respondent.

PRESTON, P. J.

This is an appeal from a judgment directing the issuance of a permanent writ of prohibition against the defendants. The facts are briefly these:

On May 10, 1928, an accusation was filed with the Board of Dental Examiners of the State of California against the plaintiff Frederic A. Bley by one L. M. Armstrong, an investigator for said board; a citation was issued and served upon plaintiff directing him to appear before said board at Bakersfield, Cal., on June 15, 1928, and answer said accusation. Thereafter, but prior to said hearing, plaintiff and respondent herein filed in the superior court of the county of San Joaquin a petition for a writ of prohibition directed to appellants herein. On the filing of said petition, an alternative writ of prohibition was issued on June 14, 1928; on June 25, 1928, appellants appeared and demurred to said petition on the ground that the same does not state facts sufficient to constitute a cause of action; they likewise and at the same time filed an answer to said petition. Thereafter, and on November 22, an order of said superior court was made granting plaintiff a preliminary writ of prohibition against the appellants herein; appellants thereupon appealed from said order to this court, but their appeal was dismissed. 101 Cal. App. 666, 282 P. 19.

Upon the trial the dental board stipulated to the truth of the facts alleged in the petition and judgment was entered November 10, 1930, making the writ of prohibition permanent. Findings of fact and conclusions of law were waived. From this order the appellants have appealed.

[1] The law is well established that prohibition lies only when a subordinate court or tribunal is entertaining a proceeding of which it has no jurisdiction, or where it is assuming to exercise an unauthorized power in a cause or proceeding of which it has jurisdiction. Bray v. Superior Court, 92 Cal. App. 428, 268 P. 374, 1081; section 1102, Code Civ. Proc.; 21 Cal. Jur. 583; Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 242 P. 725; Cooke v. Superior Court, 73 Cal. App. 744, 239 P. 381.

Therefore, the only question to be here determined is whether the accusation upon which the citation was based was sufficient and gave the said board jurisdiction of the alleged charge of unprofessional conduct against said respondent; or, in other words, does the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 7 P.2d 1053.

accusation state facts sufficient to constitute an offense against the Dental Act?

Said accusation reads as follows:

"Pursuant to the provisions of the Dental Laws of the State of California, I do hereby charge F. A. Bley, who is and was at all of the times herein mentioned, a regularly licensed and practicing dentist in the state of California, with unprofessional conduct as the same is defined in the said Dental Laws of the State of California, specifying as the basis of such charge the following facts:

"That on or about the 15th day of October, 1925, he the said F. A. Bley permitted one R. F. Morrison to have the use of a certain dental office located in the city of Porterville, state of California, and to have the use of certain dental instruments and paraphernalia therein contained, for the purpose of practicing dentistry therein as the same is defined by the said act aforesaid; that during all of said time the said R. F. Morrison was not licensed to practice dentistry in the state of California; that during a portion of the time hereinbefore mentioned said Morrison did in fact engage in the practice of dentistry in said office and in the use of said equipment.

"That by said acts on the part of the said F. A. Bley hereinabove set out said F. A. Bley aided and abetted the said R. F. Morrison, an unlicensed person, to practice dentistry unlawfully. That all of said facts above set out are contrary to the provisions of said Dental Law."

[2] Section 13 of the Dental Act (as amended by St. 1929, p. 1946, § 7) provides:

"*Revocation of license.* Any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes: * * *

"(3) For unprofessional conduct or for gross ignorance or inefficiency in his profession. Unprofessional conduct is hereby defined to be: * * * aiding or abetting any unlicensed person to practice dentistry unlawfully. * * *"

The accusation reduced to its simplest terms merely alleges that F. A. Bley permitted Morrison to use certain dental equipment, and by said act aided and abetted Morrison to practice dentistry unlawfully.

We think the accusation is fatally defective in the following particulars:

First, there is no allegation in the accusation that respondent owned or had any control of this dental office or equipment;

Second, there is no allegation in the accusation that respondent owned or had leased the building or premises wherein this dental office and equipment was located;

Third, there is no allegation in the accusation that Bley knew or had any information whatever that Morrison was an unlicensed dentist;

Fourth, there is no allegation in the accusation that respondent knew that Morrison was using said dental equipment for the practice of dentistry.

Appellants insist that an accusation for unprofessional conduct charged in the language of the Dental Act is sufficient. The following authorities so hold: Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625; Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P. 324; Suckow v. Alderson, 182 Cal. 247, 187 P. 965; and Winning v. Board of Dental Examiners (Cal. App.) 300 P. 866, 868. But that is of no avail to appellants in the case at bar, because here the *accusation* is not in the language of the statute. Nowhere in the statute is to be found the word "permitted." If the word "permitted" had been omitted and the accusation had charged that Bley had aided and abetted Morrison to practice dentistry unlawfully, then, under the authorities above cited, a violation of the Dental Act would have been stated. But the words "aid and abet" in this accusation are expressly limited.

[3] There is set out in detail what it is charged respondent did, and that he thereby aided and abetted Morrison to practice dentistry unlawfully. Therefore, the allegation that Bley "thereby aided and abetted" adds nothing to the facts theretofore pleaded.

Appellants strongly rely upon the case of Winning v. Board of Dental Examiners, supra. That case is clearly distinguishable from the case at bar, in that the accusation in that case stated "that he [Dr. Winning] controlled such office and equipment, and that he therefore had knowledge of what Jensen was doing." There is no such allegation in the accusation in the case at bar.

[4] The fatal defect in this accusation, it seems to us, is the omission of an allegation that Dr. Bley *owned or controlled the office or equipment used by Morrison*, etc. It may be conceded that the words "aided and abetted" used in the accusation imply knowledge (Osborne v. Baughman, 85 Cal. App. 224, 259 P. 70), and it may also be conceded that the words "permit or permitted" mean to allow after notice or knowledge; but there is nothing alleged in the accusation that can be construed to be the equivalent of ownership or control, or right of control by respondent of the dental equipment, and with that omitted, we think no offense against the Dental Act was stated.

[5] We are not unmindful of the rule allowing great liberality in pleadings before dental and medical boards, but giving this rule full scope, still an accusation in such a proceeding must state facts showing a violation of the particular act under which the charge is made.

In the case at bar, it would certainly be necessary to prove that Bley owned or had some right of control over the dental equipment, before he would be guilty of unprofessional conduct, and if it must be proved to make out a case it must also be alleged.

[6] Appellants also lay great stress upon the fact that respondent did not object to the sufficiency of the accusation before the Dental Board. There is no merit in this contention. The complaint or accusation must be sufficient in its statements of fact to show actual unprofessional conduct by the person charged, or it will not give the board power or jurisdiction to revoke respondent's license. Dyment v. Board of Medical Ex., etc., 57 Cal. App. 265, 207 P. 409.

We think the judgment must be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

118 Cal.App. 364

DVORSKY v. BALKUM.

Civ. 8051.

District Court of Appeal, First District, Division 2, California.

Nov. 17, 1931.

1. Pleading 🔑345(1).

In action to quiet title by executor of husband's estate against executor of wife's estate, court erroneously gave plaintiff judgment on pleadings; defendant alleging that husband commingled community property with his separate estate.

> The defendant denied plaintiff's allegation that defendant's claim was without right; that he further alleged that the parcel in suit was one of other property acquired by the husband after marriage; that the husband made large profits in his real estate business greatly exceeding income which his separate estate would have earned at interest, and that the wife had a community interest in the excess of the income; and that plaintiff should be required to account and that the husband had commingled his earnings with his separate property. After the plaintiff had set forth the terms of a prenuptial agreement to the effect that the husband and wife should retain absolute ownership of their properties without any claim from the other thereto, the defendant denied its genuineness and due execution.

2. Husband and wife 🔑249.

That some of community property is commingled with husband's separate property does not transfer it beyond law's reach.

3. Pleading 🔑345(1).

Motion for judgment on pleadings presents question of entire absence, not mere form, of allegations sustaining claim.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Paul E. Dvorsky, as executor of the last will and testament of James W. Dvorsky, deceased, against J. W. Balkum, as executor of the last will and testament of Hallie Byrd Dvorsky, deceased, in which defendant filed an answer and cross-complaint. After plaintiff had filed his answer to the cross-complaint and defendant had filed affidavit in denial of the contract set up in the cross-complaint, the court granted plaintiff's motion for judgment on the pleadings, and from that judgment the defendant appeals.

Reversed.

Nimmo, Leighton & Heath, E. B. Howell, and Mark A. Hall, all of Los Angeles, for appellant.

Charles S. McKelvey, of Los Angeles, for respondent.

STURTEVANT, J.

From a judgment in favor of the plaintiff quieting his title to a lot in Los Angeles the defendant has appealed. The plaintiff filed a complaint describing the lot and inserted the ordinary allegations of a cause of action to quiet title. The defendant filed an answer in which he alleged his title and interest and in which he denied the plaintiff's allegation "that the defendant's claim is without right," etc. He also alleged: "That the said James W. Dvorsky and Hallie Byrd Dvorsky intermarried on the 18th day of June, 1924; that at said time the said James W. Dvorsky had certain separate property and was engaged in buying and selling real estate, mortgages, trust deeds and other similar securities in Los Angeles county; that the property described in the complaint is only one parcel of the property so acquired by said James W. Dvorsky during said marriage state; that he continued to carry on said business until the time of his death and made very large profits therein, which were much in excess of the income which the said separate property put at interest would have brought; that the said Hallie Byrd Dvorsky had a community interest in said excess of income, and that the amount of such community interest and the particular property in which the same was invested, and whether any part thereof was invested in the property described in the complaint, are matters concerning which the defendant has no certain knowledge or information, and that it is necessary for their ascertainment that plaintiff be required to give an accounting concerning each and all of such investments." At the same time the defendant filed a cross-complaint in which he alleged that after the marriage of Mr. and Mrs. Dvorsky the husband made a large amount of earnings and that he commingled them with his separate property; that the husband died October 2, 1928, and the wife died December 11, 1928; that he does not know the amount of the community property; and, thereupon, he asks for an accounting. The plaintiff filed an answer to the cross-complaint in which he denied the material allegation therein contained and in which he pleaded a prenuptial contract as follows:

"This article of agreement made and entered into by and between James W. Dvorsky of Los Angeles City and County, State of California, the party of the first part, and Mrs. H. B. Balkum, also of Los Angeles City and County, State of California, the party of the second part, both of legal age and sound mind, witnesseth: Whereas the above parties contemplate matrimonial union and each have children by former marriages and each have more or less property, monies and credits of their own, it is hereby mutually agreed that each shall retain absolute ownership of such properties, monies and credits of whatsoever kind as their separate property, and that at no time shall either have or claim any interest in and to any property, monies or credits of the other except real estate that may be hereafter acquired as community property and designated as such in grant deed at time of purchase of same, and at death of either of us the property, monies and credits of such deceased shall pass to the children of such deceased party. This contract mutually agreed to by and between the parties hereto shall be binding on both parties statutes to the contrary notwithstanding.

"Signed this 17th day of June, 1924.

"James W. Dvorsky
"Mrs. H. B. Balkum"

Thereafter the defendant filed an affidavit in which he denied the genuineness and due execution of the above contract. Shortly thereafter the plaintiff made a motion for judgment on the pleadings. The motion was granted and from that judgment this appeal was taken.

[1] Under the foregoing pleadings the court could have been asked to hear the evidence and ascertain the fact as to whether any community property was acquired by Mr. and Mrs. Dvorsky during their marriage; if so, whether any of it was used to pay off any liens theretofore existing on the lot in suit or in making improvements thereon, and, if so, how much. Similar questions would arise of and regarding the prenuptial contract. After having determined those facts, and not until then, the trial court would have been in a position to know whether in truth and in fact the defendant did have any claim, in law or in equity, and, if so, the nature and the amount thereof.

[2, 3] The fact that some of the community property was commingled with the separate property of Mr. Dvorsky did not operate to transfer it beyond the reach of the law. Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885, and cases there cited. Indeed, we do not understand the plaintiff to contend to the contrary. But he earnestly contends that the defendant did not plead a commingling. With that contention we cannot agree. He may not have done so in the clearest terms, but there was surely an attempt to do so. A motion for judgment on the pleadings presents a question of entire absence of allegations but not the mere form of such allegations. Cuneo v. Lawson, 203 Cal. 190, 193, 263 P. 530. In other words, it may be, in legal effect, a general demurrer but not a special demurrer to any of the pleadings.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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118 Cal.App. 371

HOLLYWOOD CLEANING & PRESSING CO. v. HOLLYWOOD LAUNDRY SERVICE, Inc.

Civ. 7396.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1931.

Appeal and error ⚿1127.

Motion to affirm judgment will be denied, where to determine such motion would necessitate investigation and consideration of merits of the appeal (Code Civ. Proc. § 953c; Rules of District Courts of Appeal, Rule 8).

Motion by defendant to affirm judgment of the Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by the Hollywood Cleaning & Pressing Company against the Hollywood Laundry Service, Inc. From a judgment for plaintiff, defendant appeals. On motion of plaintiff to affirm judgment.

Denied.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Walter H. Hewicker, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

CONREY, P. J.

Respondent moves to affirm the judgment upon the ground that appellant's brief does not comply with the provisions of section 953c of the Code of Civil Procedure, and does not comply with the requirements of rule VIII governing such appeals, and upon the further ground that the appeal is not meritorious, was not taken in good faith, and has not been prosecuted with reasonable diligence.

We are satisfied that the appeal is meritorious in the sense that it presents questions which merit consideration, and that the appeal has been taken in good faith and has been prosecuted with reasonable diligence.

The principal basis of the motion is that in filing its brief appellant has not printed in the brief, or in any supplement appended thereto, a sufficient portion of the record to properly present to the court the merits of the appeal in relation to the points upon which appellant relies. The gist of the argument, on the part of the moving party, is that the points on appeal are substantially confined to questions relating to the sufficiency of the evidence to sustain the findings; that, although there are many hundreds of pages of evidence relating to those questions, appellant in his brief has quoted from less than ten pages. It is quite conceivable, however, that much less than ten pages of admissions in the testimony of an opposing party might be sufficient to nullify a thousand pages of testimony given by other witnesses. In response to the motion, counsel for appellant assures the court that appellant has, in its opening brief and in its supplement, quoted and referred to all of the testimony material to the points raised on appellant's appeal, including those points wherein he relies upon insufficiency of the evidence to sustain the findings. He further asserts that the testimony of all of the witnesses, referred to in the affidavit of plaintiff, is on points not relied upon by appellant on this appeal.

We have made sufficient examination of the briefs to ascertain that the determination of this motion to affirm the judgment would necessitate an investigation and consideration of the merits of the appeal. It is not a case where the lack of merit in the appeal is so plainly apparent from a mere inspection of the record that the court should not be required to go further. Before granting the motion, we would have to consider and decide debatable questions going to the merits of the action. Jenks v. Lurie, 195 Cal. 582, 234 P. 370. We observe that the main points now presented by respondent on this motion are contained in the opening pages of its brief. When the case has been submitted upon the merits, and when, under such submission, the court enters into a consideration of the record, it is possible that we might find such deficiencies in the presentation of the appeal as would have justified the granting of this motion. On the other hand, the contrary result might occur.

The motion to affirm judgment is denied, without prejudice to renewal thereof in connection with the presentation of the appeal on its merits.

We concur: HOUSER, J.; YORK, J.

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118 Cal.App. 379

SATERSTROM et al. v. GLICK BROS. SASH, DOOR & MILL CO. et al.

Civ. 4444.

District Court of Appeal, Third District, California.

Nov. 17, 1931.

1. Mortgages ⟹48(1).

Deed of trust failing to name county in which property was situated *held* void because of defective and insufficient description.

> Deed of trust purporting to convey property described it as all that property in the county of ——, state of California, described as: "Lot thirty nine (39) of Tract number Forty-five hundred eleven (4511) as per map recorded in Book 49, pages 4, 5, 6, and 7 of Maps, in the office of the County Recorder of said County."

2. Deeds ⟹38(1).

Deed must contain such description as will enable property to be readily located by reference thereto.

3. Deeds ⟹40, 41.

Parties to deed may describe property by reference therein to another deed or map, which, however, when taken together, must be certain in respect to description.

4. Mortgages ⟹48(1).

Execution, recordation, and sale under deed of trust in certain county *held* not to supply fatal omission in description failing to name county.

5. Evidence ⟹25(1).

Court will not take judicial notice that Los Angeles county is only county within state having certain numbered tract subdivided or map book numbered in certain manner.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Mortgages ⟹48(1).

Sale and all proceedings under deed of trust void for lack of sufficient description of property were likewise void.

7. Mortgages ⟹354.

Notice of sale under deed of trust *held* fatally defective for failure to contain description of property intended to be sold (Civ. Code, § 2924).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by K. Otto Saterstrom and another against the Glick Brothers Sash, Door & Mill Company, H. R. Coburn, doing business under the name and style of H. R. Coburn Lumber Company, and others. Judgment for plaintiffs, and defendant last named appeals. Reversed.

Goodspeed, Pendell & Neff, of Los Angeles, for appellant.

Paul Friedman, of Los Angeles, for respondents.

PRESTON, P. J.

Action to quiet title to real property. Plaintiffs prevailed in the superior court and defendant H. R. Coburn alone appeals.

Appellant contends that the evidence is insufficient to support the finding of the trial court "that the above named plaintiffs, K. Otto Saterstrom and Anna O. Saterstrom, are the owners of the fee simple title to the property described in paragraph 3 of plaintiffs' complaint," etc.

Plaintiffs relied wholly upon a record title. Their record title is based upon a sale of the property under a deed of trust. The deed of trust is dated September 1, 1927, executed by Claud Williams and Mary Williams to the Security Title Company, a corporation, and purporting to convey property described as follows:

"All that property in the County of ———, State of California, described as:

"Lot thirty nine (39) of Tract number Forty-five hundred eleven (4511) as per map recorded in Book 49, pages 4, 5, 6 and 7 of Maps, in the office of the County Recorder of said County."

[1] Appellant contends that the deed of trust is void because of the defective and insufficient description of the property therein set forth. We think this contention must be sustained.

[2] The rule is well established, as stated by this court in Scott v. Woodworth, 34 Cal. App. 400, 167 P. 543, 546: "To be valid on its face, a deed must contain such a description of the real property thereby intended to be conveyed as will enable the property to be readily located by reference to the description." It was further declared therein that if the writing itself does "not furnish the means whereby the description may be made sufficiently definite and certain readily to locate the property, then the instrument must be held void, since the imperfections of the description cannot be supplied through evidence extrinsic to the writing itself without running up against the positive mandate of the rule that a conveyance of real property must be in writing." See, also, Redemeyer v. Cunningham, 61 Cal. App. 424, 215 P. 83.

[3] The rule is also well established that the parties to a deed may describe the property therein conveyed by a reference therein to another deed or map which contains a description, yet the deed and instrument referred to, when taken together, must be as certain in respect to the description, as a description contained in the deed itself. Donnelly v. Tregaskis, 154 Cal. 261, 97 P. 421; Caldwell v. Center, 30 Cal. 539, 89 Am. Dec. 131; Redemeyer v. Cunningham, supra; Scott v. Woodworth, supra. See, also, Oatman v. Niemeyer (Cal. Sup.) 273 P. 567. Tested by these rules, the conclusion is irresistible that the description above set forth is fatally defective and wholly insufficient to identify the real property intended to be conveyed by said deed of trust. This being true, the purported deed of trust was wholly inoperative and void.

By examining the deed of trust, it will be readily perceived that, in describing the property, the name of the city and county in which the property is located has been left blank. The deed of trust gives no information as to where the property is located, except that it is in the state of California. Neither is there any deed or map mentioned or referred to therein, from which it can be ascertained in which city and county the property is situated. It is true the description refers to "map recorded in Book 49, pages 4, 5, & 6 of Maps, in the office of the County Recorder of said County." But it does not say what county. There are fifty-eight counties in California, each one of which undoubtedly has maps of tracks and subdivisions, etc., similar to the one referred to in the description in question.

[4] Respondents contend that as the deed of trust was executed, recorded, and the sale thereunder had in Los Angeles county, such facts constitute sufficient parol evidence that the property is also located in said city and county. These facts would not supply the fatal omission in the description or aid a surveyor in locating the property.

There is absolutely no proof of any character in the record of adverse possession by respondents or any of their predecessors in interest, and no proof that plaintiffs or the

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

parties who made the deed of trust were in possession of the property now claimed by respondents, at the time the deed of trust was made. Respondents admit that they never were in possession of the property they now claim.

Counsel for respondents also make this statement: "It is a matter of common knowledge that property in Los Angeles is subdivided and platted into tracts which are numbered, maps thereof being recorded in the county recorder's office. It is also a matter of common knowledge that there has been great real estate activity and a greater number of subdivisions platted and numbered in Los Angeles county than in any other county of the state of California, and it is probably a fair assumption that at the date of the execution of this deed of trust there was in no other county of the state the map of a subdivision recorded as high as 4511, and which was recorded in book 49, pages 4, 5, 6 and 7 of maps, in the office of the county recorder of such county."

[5] This argument might be said to be ingenious and somewhat characteristic of an ardent booster of our southern metropolis. While we realize and appreciate that Los Angeles has made great growth in the last decade and that many tracts of land in and adjacent to that city have been subdivided and maps thereof filed in the recorder's office of Los Angeles county, we hardly feel warranted at this time in taking judicial notice of the fact that Los Angeles county is the only county in California "that has a tract No. 4511 subdivided or a map book numbered 49 with pages 4, 5, 6 and 7."

If we adopted counsel's argument we would no doubt have visited upon us the eternal wrath and condemnation of real estate operators and land owners of other thriving southern and northern California cities and counties.

There is no merit in the contention of respondents that appellant failed to make a proper and sufficient objection to the introduction of the deed of trust in evidence and, therefore, is precluded from raising the insufficiency of the description on appeal. The objection made by appellant was sufficient if, indeed, any objection to the introduction of the deed of trust was necessary. It is not a question of the proper admission of evidence. It is a total failure of proof to sustain the finding of the trial court that respondents were the owners of the fee simple title to the property described in their complaint. The deed of trust, although admitted in evidence, proved nothing because of a lack of a definite and proper description of the property intended to be affected.

[6] The deed of trust being void for lack of a sufficient description of the property conveyed, the sale and all proceedings under the deed of trust would likewise be wholly ineffective and void.

[7] The notice given under section 2924 of the Civil Code is fatally defective because it contains no description of the property intended to be sold, *but only refers to the record of said deed of trust for the description of the property.*

There was no attempt to reform the deed of trust to set forth a correct and definite description of the property, etc.

We find no legal ground upon which the judgment can be sustained.

The judgment is therefore reversed.

We concur: PLUMMER, J.; THOMPSON, J.

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118 Cal.App. 254

SACKETT et ux. v. LOS ANGELES CITY SCHOOL DIST. OF LOS ANGELES COUNTY.

Civ. 520.

District Court of Appeal, Fourth District, California.

Nov. 9, 1931.

Rehearing Denied Dec. 3, 1931. Hearing Denied by Supreme Court Jan. 7, 1932.

1. Covenants ⚷69(2).

Restriction that lots be used for one-family residence only is merely right enforceable in equity between contracting parties or successors with notice in nature of "negative easement" or "equitable servitude."

[Ed. Note.—For other definitions of "Equitable Easement" and "Negative Easement," see Words and Phrases.]

2. Covenants ⚷49.

Covenants creating equitable servitudes, although enforceable, are strictly construed.

3. Contracts ⚷188.

State and its political subdivisions, not parties to private contracts, are not bound thereby.

4. Covenants ⚷84.

Building restriction in private contract to which state was not party, nor expressly or impliedly consented to be bound, *held* not enforceable against school district.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action for injunction by Charles G. Sackett and another against Los Angeles City School District of Los Angeles County. From an adverse judgment, defendant appeals.

Reversed.

Hearing denied by Supreme Court; CURTIS and LANGDON, JJ., dissenting.

Everett W. Mattoon, County Counsel, and Claude H. McFadden, Deputy County Counsel, both of Los Angeles, for appellant.

Fredericks, Hanna & Morton, Harold C. Morton, and Byron F. Story, all of Los Angeles, for respondents.

JENNINGS, J.

This is an appeal from a judgment permanently enjoining defendant from using certain real property for any purpose other than one-family residence or single bungalow purposes, and specifically from using said real property for playground purposes in connection with an adjacent public school, or otherwise, or for any public school purposes whatsoever. The real property involved herein consists of lots 79, 80, and 81 of tract No. 5690 in the city of Los Angeles.

Respondents, husband and wife, acquired lot 81 of said tract No. 5690 on January 9, 1925, and were the owners of said property at the time the present action was instituted. Appellant acquired lots 79 and 80 in said tract during the year 1926. When the tract was laid out, all of the deeds, conveying lots therein contained, among others, the restriction "that lots 55 to 102 both inclusive, of said tract, shall be used for one family residence or single bungalow purposes only." All of the lots in the tract were laid out under a general residential plan, and deeds to purchasers thereof contained similar restrictions, each inuring to the benefit of the other lots in the tract. Certain other lots, sixteen in number adjacent to the property herein involved, were acquired by appellant during the month of November, 1922. School buildings were erected on eleven of such earlier acquired lots prior to the purchase by respondents of said lot No. 81, and the remaining five lots were utilized for school playground purposes. In March, 1927, two years after respondents had acquired lot No. 81, a second public school building was erected on the five lots which prior to that time had served as a playground, and, during the fall of 1927, appellant commenced to utilize lots Nos. 79 and 80 for playground purposes for the younger children of the school.

As to the sixteen lots acquired by appellant in the year 1922, waivers of the above-mentioned restriction were secured from the various owners of lots in the tract. No such waivers were secured as to lots 79 and 80. The present action was instituted on November 10, 1927, approximately two months subsequent to the time when respondents first observed that lots Nos. 79 and 80 were being used as a school playground. Respondents' objection to the use of the property for the purpose indicated was prompt, and precludes the possibility of giving any consideration to the doctrine of acquiescence.

[1] The principal point of contention between the parties to this action relates to the effect of the restriction contained in the deeds to the various lots. It is not open to dispute that it was the purpose of the subdividers of the tract and of lot purchasers under the restrictions to establish and preserve the tract for residential uses. Respondents contend that a building restriction of the character here under consideration is private property, an interest in real estate in the nature of an easement, and a property right of value which cannot be taken for public use without due process of law and compensation therefor, and that the validity of such restriction is not affected by the character of the parties in interest. Respectable authority is not lacking to sustain this contention. In Peters v. Buckner, 288 Mo. 618, 232 S. W. 1024, 17 A. L. R. 543, the Supreme Court of Missouri held that the owner of land in a tract where all the real property concerned was covered by a building restriction which prohibited the erection on said land of any building other than a residence was entitled to a writ of mandate compelling a school district to award him compensation prior to the erection by such district of a school building on land across the street from plaintiff's land. In Allen v. Detroit, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890, the Supreme Court of Michigan held that property owners in a locality covered by building restrictions limiting the district to use for residence purposes only were entitled to an injunction restraining the city of Detroit from erecting a fire engine house on a site in such district. To the same effect are the decisions in Flynn v. New York, etc., R. Co., 218 N. Y. 140, 112 N. E. 913, Ann. Cas. 1918B, 588, and Ladd v. City of Boston, 151 Mass. 585, 24 N. E. 858, 21 Am. St. Rep. 481. The courts of California have, however, declined to recognize a building restriction of the character here under consideration as a positive easement or right in the land, but have defined it to be merely a right enforceable in equity as between the parties to the contract, or their successors with notice. and have said that it is in the nature of a negative easement or equitable servitude. Werner v. Graham, 181 Cal. 174, 183 P. 945; Martin v. Holm, 197 Cal. 733, 242 P. 718; Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080, 1082.

[2] While the enforceable character of covenants creating such servitudes is well established, the provisions of an instrument which creates, or which it is claimed creates, such a servitude, will be strictly construed; any doubt being resolved in favor of the free use of the land. Werner v. Graham, supra. In Friesen v. City of Glendale, supra, it was said that "this rule would seem to be especially applicable where the title to the land is acquired by a municipality for public street purposes." It was pointed out by the learned justice who wrote the opinion

that, if the instrument were construed strictly in favor of the servitude, it would result that there would be imposed upon the city an obligation to use the land which it had acquired for residential purposes only, a use to which the city obviously had no power to devote land which it had acquired for street purposes. The reasoning of the court is cogent, and is peculiarly adapted to the situation herein presented. Strict construction of the instrument in favor of the servitude would impose upon appellant the obligation to use the land acquired for residential purposes only, a use to which appellant obviously had no power to devote land which it has acquired for school purposes. A construction against the covenant will permit appellant to acquire the land freed from the restriction.

[3, 4] Furthermore, the state and its various political subdivisions may not be bound by the terms of a private contract to which it was not a party. United States v. Certain Lands (C. C.) 112 F. 622; Doan v. Cleveland Short Line Ry. Co., 92 Ohio St. 461, 112 N. E. 505; Friesen v. City of Glendale, supra. Public policy has been denominated a vague and uncertain guide at best (Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391), but instances arise that call for its application. The present action is one that does. It presents the situation of an agency of the state created for the sole purpose of providing adequate educational facilities for the youth of a certain limited area against whom there is sought to be invoked the aid of equity to enforce a restriction created by the provisions of a private contract to which the state was in nowise a party and by which it neither expressly nor by necessary implication consented to be bound. The state may not be thus hampered in carrying out a purpose in which it is so vitally interested.

Judgment reversed.

We concur: BARNARD, P. J.; MARKS, J.

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118 Cal.App. 297

BLODGET v. PRESTON et al.

Civ. 196.

District Court of Appeal, Fourth District, California.

Nov. 13, 1931.

Rehearing Denied Dec. 7, 1931. Hearing Denied by Supreme Court Jan. 11, 1932.

1. Appeal and error 🔑842(7), 989.

While question whether instruction directing verdict was erroneous is one of law, its solution requires examination of evidence.

2. Automobiles 🔑245(6).

Negligence of motorist striking pedestrian pushing lawn mower along street about five feet from curb with back toward motorist *held* for jury (St. 1923, p. 545, § 94, as amended by St. 1929, p. 530, § 36).

3. Automobiles 🔑245(72).

Contributory negligence of pedestrian struck while pushing lawn mower along street about five feet from curb with back toward automobile *held* for jury.

4. Automobiles 🔑226(2).

To establish pedestrian's violation of traffic ordinance constituted negligence preventing recovery, it must appear that violation proximately caused injury.

> Ordinance prohibited a pedestrian from crossing a highway outside the central traffic district, except at right angles to the curb, and provided that when so crossing he should yield the right of way to all vehicles.

5. Evidence 🔑59, 87.

Presumption that one takes ordinary care for his own safety is evidence and may outweigh positive evidence to contrary (Code Civ. Proc. § 1963).

6. Automobiles 🔑245(90).

Even if pedestrian struck by automobile while pushing lawn mower along street five feet from curb violated traffic ordinance, question whether violation thereof was proximate cause of injury *held* for jury (Code Civ. Proc. § 1963).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Jennie Blodget as administratrix of the estate of D. Newton Blodget, deceased, against Don C. Preston and another. Verdict for defendant, and order granting a new trial. Defendants appeal.

Affirmed.

Swing & Wilson, of San Bernardino, for appellants.

George H. Johnson, of Los Angeles, for respondent.

BARNARD, P. J.

This action was brought by the plaintiff as administratrix, to recover for the death of her husband, D. Newton Blodget, which resulted from an automobile accident which occurred between 9 and 10 o'clock on the morning of March 26, 1929. At that time the defendant May, who was an employee of the defendant Preston, was driving a Ford truck north on Arrowhead avenue in the city of San

Bernardino. Some forty or fifty feet north of the intersection of this street with Twenty-First street, the truck driven by May ran into Blodget, at a point about 5 feet from the east curb of Arrowhead avenue. At the time he was struck, Blodget was pushing a lawn mower and had certain garden tools over his shoulder. There was evidence that after he was struck, Blodget was carried on the fender of the car to a point about 140 feet from the point of impact, in a northwesterly direction, to approximately the center of Arrowhead avenue where the automobile stopped and Blodget dropped to the pavement. At the conclusion of the evidence the court granted a motion for a directed verdict and instructed the jury to bring in a verdict in favor of the defendants, which the jury did. This appeal is from an order granting a new trial.

[1] In its order granting a new trial, the court stated that the motion "is granted upon the ground that the court erred in withdrawing the case from the jury." While the court did not specify the insufficiency of the evidence as one of the reasons for granting a new trial, and while the question of whether the instruction referred to was or was not erroneous is a question of law, its solution depends upon the circumstances in the case and requires an examination of the evidence. Montgomery v. Globe Grain & Milling Co. (Cal. App.) 293 P. 856. The question presented is whether the instruction for a directed verdict should have been given under the circumstances disclosed by the evidence. Appellants contend that the instruction was correct for the following reasons: First, there was no substantial evidence of appellant's negligence; second, the uncontradicted evidence establishes that the decedent was guilty of contributory negligence as a matter of law. We will take up these points in the order named.

The appellant May testified that he was driving the truck in question north on Arrowhead avenue at the time of the accident; that as he arrived some 40 or 50 feet north of the intersection of this street with Twenty-First street, he was driving at about 20 miles an hour, about 5 feet from the east curb of Arrowhead avenue; that the deceased, when he first saw him, was about 5 feet in front of his truck and also about 5 feet from the east curb of Arrowhead avenue; and that he did not see where the deceased came from. He testified as follows:

"Q. Where did Mr. Blodget come from? A. I don't know.

"Q. You didn't see him at all? A. I didn't see where he came from; he was just there."

He also testified that he had his eyes on the road in front of him; that he was not looking for a house number; that he had not told any one he was looking for a house number; that the deceased was pushing a lawn mower and carrying a lawn trimmer and spade across his shoulder; that the deceased was walking in a northwesterly direction and with his back towards the witness; that he applied his brakes as soon as he saw Blodget and swerved to the right attempting to pass between him and the curb; that he struck Blodget with his left-hand fender; that he did not hear the lawn mower and that his truck was quite a noisy Ford; that there was no other traffic coming in either direction; that his brakes were in fair condition; and that he did not have time to sound his horn. He also testified:

"I was not looking for him in particular; I was looking ahead of me; I didn't expect to find him there.

"Q. Now, then, what was Mr. Blodget doing when you first saw him? A. Mr. Blodget was walking in a northwesterly direction with his back to me; he did not see me.

"Q. Was he walking? A. Yes, sir.

"Q. How many steps did he take? A. I couldn't account for the steps; I could say he was in motion.

"Q. He was in motion? A. Yes, sir.

"Q. How far would you say this lawn mower was in front of him that he was shoving? A. Oh, about 2 or 3 feet.

"Q. That is, on the pavement in front of him? A. Yes, sir.

"Q. You could see the mower, could you? A. Yes, sir. * * *

"Q. How fast was he moving when he was walking? A. Well, the usual gait I guess—just about—he didn't move very far after I saw him; it happened so quick I don't believe he had a chance to make another step.

"Q. You think from the time you first saw him until you struck him he did not take another step? A. He did not—he had not made a full step—just about.

"Q. He had his back to you so that you could not see any part of his face? A. Yes, sir."

[2] It is undisputed that this accident happened in broad daylight on a straight street where there were no obstructions, and that there was no other traffic at the time. There is no evidence as to when or where the deceased entered the street. When the driver of the truck first saw him he was 5 feet from the east curb of the street, with a lawn mower in front of him and certain implements over his shoulder. If the appellants' theory is correct, that the deceased had just come from the curb and was proceeding diagonally across the street, a somewhat different situation is presented from the ordinary case where a pedestrian suddenly steps into the street in front of an oncoming vehicle. While the time necessary for an ordinary person to proceed 5 feet from the curb would be very short, it would take considerably longer for

a man sixty-nine years old to cover that distance while pushing a lawn mower and carrying the other tools referred to, with the necessity of lowering the lawn mower over the curb before he began to push it ahead. It does not seem reasonable that the driver of the truck, if he was looking ahead, could have failed to see this performance in time to have avoided the accident, especially when a slight swerve to the left would have been sufficient and the rest of the roadway was clear. The driver admits that he did not see the deceased come from the curb, or from anywhere, but says he was "just there." If the deceased was standing still, he would have been visible before the truck got within 5 feet of him, and it is equally certain that if he was walking for a few feet before he reached the spot where he was first seen by the driver, he was not invisible during that time. It would reasonably appear that the appellant May was either not looking or if he was looking, that he must have seen the decedent and then failed to sound his horn or take any other precaution to avoid the collision. The driver testified that his brakes were in "fair" condition. At that time the Motor Vehicle Act provided that it was unlawful to operate a car which could not be brought to a complete stop within 37 feet when traveling at 20 miles an hour (St. 1923, p. 545, § 94, as amended by St. 1929, p. 530, § 36). A car traveling 20 miles an hour would cover 37 feet in less time than it would take for a man to lower a lawn mower from a curb and push it 5 feet. In view of the facts, including the distance the deceased was carried, the inference is possible that the driver of the automobile saw the deceased but was unable to stop in time because of the condition of his brakes. In any view of the evidence we think there was sufficient substantial evidence of negligence on the part of the driver of the truck to require the submission of that question to the jury. Hoy v. Tornich, 199 Cal. 545, 250 P. 565.

[3] The remaining question is whether the evidence shows the decedent to have been guilty of contributory negligence as a matter of law. There is absolutely no evidence as to any precaution or lack of precaution on the part of the decedent before he entered the highway. There is no evidence as to when or where the decedent left the curb. He may have left the curb a little farther back, he may have looked before he did so, the weight of the lawn mower going off the curb may have pulled him into the street faster than he intended or desired, he may have looked just before the driver saw him, and may even have been trying to get back to the curb, as the driver testified he was not able to see even the side of his face but that his back was directly toward him. He may have seen the truck approaching some distance away and traveled close to the curb in the belief that the driver of the automobile would continue in the usual course of travel, nearer the center of the road, and that this would be a safe course of procedure in the absence of all other traffic; the paved portion of the street being 54.5 feet in width. Such a course and such a belief would have been more or less reasonable under the circumstances, and we think that it is not true that an inference of negligence on his part must certainly be drawn from the meager facts shown in the record as to what the deceased did. How or when the decedent got into the street and what he did is entirely a matter of speculation, and under the circumstances shown by the evidence, with the ample opportunity the driver apparently had to avoid the accident, we think it may not be said that reasonable men could not differ upon the question whether the deceased was guilty of negligence, and upon the further question whether such negligence, if any, was a proximate cause of the accident.

[4-6] The appellants introduced in evidence an ordinance of the city of San Bernardino which prohibits a pedestrian from crossing a highway outside of the central traffic district, except at right angles to the curb, and provides that when so crossing he must yield the right of way to all vehicles. It is earnestly insisted that the deceased was violating this ordinance and that this fact alone constituted contributory negligence, as a matter of law. Assuming that the deceased was violating this ordinance, which fact itself appears only from inference and not from any direct evidence, since no one saw him leave the curb, no one saw him take more than one step, and his position at the time he was first seen by the driver of the truck may have been due to his effort to get out of the way, this fact alone does not show such contributory negligence as will prevent a recovery. To establish such contributory negligence it must not only appear that the ordinance was violated but that the violation thereof was a proximate cause of the injuries received. Thomas v. German General Benevolent Society, 168 Cal. 183, 141 P. 1186; Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132. When the appellant May first saw the deceased, he was 5 feet from the curb line. As far as the appellant is concerned, it would make no difference whether the deceased arrived at that point by coming at right angles from the curb, or coming more diagonally. So far as the question we are considering is concerned, the important consideration is not how the deceased arrived at the point where he was struck, but whether he looked and took such precaution for his own safety as was reasonable. Even if he violated the ordinance this may not have been a proximate cause of his injury. We are asked to presume that the deceased did not look, and that he exercised no care for his own safety. On the other hand, a person is presumed to take ordinary care for his own

safety. Section 1963, Code Civ. Proc. This presumption is itself evidence and may even be sufficient to outweigh positive evidence to the contrary. Smellie v. Southern Pacific Co. (Cal. Sup.) 299 P. 529; Rogers v. Interstate Transit Co. (Cal. Sup.) 297 P. 884. Assuming that the deceased violated this ordinance, we think that the question as to whether or not his violation thereof was a proximate cause of his injury was a question for the jury. Coakley v. Ajuria, 209 Cal. 745, 290 P. 33.

The appellants cite and rely upon such cases as Moss v. H. R. Boynton Co., 44 Cal. App. 474, 186 P. 631; Finkle v. Tait, 55 Cal. App. 425, 203 P. 1031; Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649; Ogden v. Lee, 61 Cal. App. 493, 215 P. 122; Atkins v. Bouchet, 65 Cal. App. 94, 223 P. 87; Lord v. Stacy, 68 Cal. App. 517, 229 P. 874; Bence v. Teddy's Taxi, 101 Cal. App. 748, 282 P. 392, 283 P. 86. In all of these cases there was sufficient evidence to show that the injured party either walked into the street when his view was so obstructed that he could not see, or without looking, stepped from a place of safety into the path of oncoming traffic. Under the circumstances shown by this record we think these cases are not controlling, and that under the facts before us, with the reasonable inferences therefrom, and the presumption provided by law, the question of contributory negligence on the part of the deceased was one of fact for the jury and not one of law.

We conclude, therefore, that the instruction directing the jury to bring in a verdict for the appellants should not have been given, and that the order granting a new trial was properly made.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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118 Cal.App. 306

HOWE v. BOARD OF SUP'RS OF SAN DIEGO COUNTY.

Civ. 909.

District Court of Appeal, Fourth District, California.

Nov. 13, 1931.

1. Pleading ⚷218(5).

Sustaining demurrer to complaint in election contest asking ouster of incumbent supervisor and recount of recall vote, without leave to amend, on motion to reconsider order overruling demurrer *held* not error.

Trial court had ample power to sustain demurrer after having overruled it, since it retained complete jurisdiction over case until final judgment and could properly reconsider overruling demurrer and correct prior ruling if convinced it was erroneous.

2. Elections ⚷269.

Action by sole candidate for supervisor if recall had been successful, for ouster of incumbent supervisor and recount of recall vote, containing essential elements of contest under statute, *held* statutory election contest (Code Civ. Proc. §§ 1111–1127).

Action was election contest and essentially adversary proceeding, since it was fundamentally a contest instituted by individual who was sole candidate for election to office of county supervisor, if recall of incumbent should be successful.

3. Officers ⚷119.

For purposes of adjudicating in court official acts of public officer, any citizen is proper party plaintiff.

4. Constitutional law ⚷72.

Official acts of public officers are always open to scrutiny by courts in proper actions.

5. Elections ⚷269.

Right to contest election is purely statutory, and must be determined in accordance with statutory provisions (Code Civ. Proc. §§ 1111–1127).

6. Elections ⚷269.

Code provisions regarding election contests *held* inapplicable to contest by sole candidate for supervisor if recall had been successful, for ouster of incumbent supervisor and recount of recall vote (Code Civ. Proc. §§ 1111–1127).

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Action by Vincent L. Howe against Board of Supervisors of San Diego County. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

W. S. Staley, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and F. T. Dunn, E. I. Kendall, and E. W. Goodman, Deputies Dist. Atty., all of San Diego, for respondent.

JENNINGS, J.

A demurrer was sustained to plaintiff's complaint, and judgment was entered dismissing the action. This appeal is from the judgment and for the purpose of reviewing the court's order sustaining the demurrer. The complaint herein, which is entitled "petition

—statement—complaint," contains, in substance, the following allegation:

That appellant for more than a year prior to April 8, 1931, was a resident in and registered voter of the Second supervisor district of San Diego county, Cal., and eligible to fill the office of supervisor of said Second supervisor district; that prior to said April 8, 1931, petitions demanding the recall of the incumbent supervisor were circulated and signed by qualified voters of said district; that such petitions were filed with the county clerk of San Diego county and were by said county clerk checked and certified to as containing the required number of signatures of duly qualified voters residing in the Second supervisor district and such petitions were thereupon submitted to the board of supervisors, which board forthwith called a special election to be held in said Second supervisor district on May 19, 1931, for the purpose of submitting to the vote of the electors of said district the question of the recall of the incumbent supervisor of said district; that the special election was duly held on the date appointed and the returns were made as provided by law and forwarded to the county clerk and on May 25, 1931, said election returns were officially canvassed and the official records of the canvass were properly and regularly made by the county clerk; that the returns thus made and recorded and filed in the county clerk's office showed that 3,082 electors had voted "Yes" on the question of the recall and that 3,409 electors had voted "No" on such question; that thereupon the board of supervisors declared that the question of the recall had not carried and that the incumbent supervisor was entitled to continue in office as supervisor; that illegal votes were cast and counted by the election officials and canvassed by the board of supervisors and legal votes were by said election officials thrown out and not counted, which legal votes should have been counted as cast for the recall; that the election officials in various precincts were guilty of specified malconduct; that, upon the calling of the special election, appellant circulated nomination petitions and secured the required number of signatures of registered voters, which petitions were certified by the county clerk as containing signatures of the required number of legal voters in the district, and appellant's name was thereupon printed upon the official ballot as the only candidate for the office of supervisor if the recall should succeed.

The complaint then alleges various grounds for his demand for a recount of the votes cast on the recall proposition and particularly various acts of malconduct on the part of election officials by means of which it is alleged that it was made to appear that a greater number of electors voting on the proposition of the recall had voted against the recall, whereas in truth the greater number of electors had voted in favor of the recall; that a recount of all legal votes cast at the special election is necessary for the proper determination of the question of the recall and for the proper determination of the person legally entitled to fill the office of supervisor of said Second supervisor district. The prayer of the complaint asks that it be decreed that the incumbent supervisor is not entitled to the office and that he be ousted therefrom, and that, on a recount of the votes cast at the election, the correct returns be made and the returns heretofore made be annulled and vacated.

The demurrer interposed to the complaint was general and on the further ground that the respondent board is not a proper party defendant in the action. The record indicates that, upon hearing argument of counsel upon the demurrer, it was overruled by the court, and appellant was given leave to file an amended complaint. Thereafter a document entitled "amendment to petition, statement, complaint" was filed which recites that the court had granted to appellant permission to amend his complaint theretofore filed to the end that the incumbent supervisor should be made a codefendant, and that such incumbent is hereby named and made a party defendant in the action. Thereupon the incumbent supervisor appeared specially in the action for the purpose of moving the court for an order quashing the citation issued in the action and for an order quashing the service of the complaint and the amendment to the complaint. At the time the motions of the incumbent supervisor were presented, counsel for the respondent board appeared and moved the court to reconsider its ruling on the demurrer theretofore made. The court granted the motions to quash the service of citation and the service of the complaint and amendment to the complaint upon the incumbent supervisor and dismissed the action as to the incumbent. No appeal was taken from this order. The court then proceeded to reconsider its prior ruling on respondent's demurrer, and upon such reconsideration sustained the demurrer without leave to amend and made its order dismissing the action. The appeal herein is from the last-named order.

[1] Appellant makes some point of the fact that the court after first overruling respondent's demurrer reconsidered its ruling and sustained the demurrer without leave to amend. This the court had ample power to do, as it retained complete jurisdiction over the case until final judgment and could properly reconsider a ruling overruling a demurrer and correct its prior ruling if convinced that it was erroneous. De La Beckwith v. Superior Court, 146 Cal. 496, 80 P. 717.

[2-4] The principal contention advanced by appellant is that the action instituted by him

is not an election contest. Whether this contention can be successfully maintained depends not upon his declaration to that effect, but upon the allegations contained in the complaint. These allegations indicate that, despite appellant's statement to the contrary, the complaint filed by him does in fact set forth a contest. It contains the allegations required under the provisions of title 2, part 3, of the Code of Civil Procedure (sections 1111-1127). It contains the various essential elements of such a proceeding, and in all respects conforms to the requirements of an action of this character.

Appellant declares that two principles are controlling in this appeal. The first of these principles is that the official acts of any public officer can, by proper action, be adjudicated by the courts. The second is that for such a purpose any citizen is a proper party plaintiff. So far as the latter of the two principles is concerned, there is no attack upon the proposition that appellant is the proper party plaintiff. If, as we think, the action is one for the contest of an election, he is without doubt and peculiarly the proper party plaintiff. Nor is there occasion to dispute the very broad and general statement that the official acts of public officers are always open to scrutiny by the courts in proper actions. The very question involved herein is whether we have a proper action and a proper party defendant.

Appellant urges that his action herein is equitable in character; that the proposition of the recall of the incumbent official is one of general interest to the electors of the district; that the remedy of recall has been specifically established by statute; and that, if no machinery has been set up by law for enforcing the will of the people, jurisdiction is by implication conferred upon a court of equity to do so by suitable and appropriate procedure. The decision in Gibson v. Board of Supervisors, 80 Cal. 359, 22 P. 225, is relied upon as establishing the above-stated principle. In the case cited, the board of supervisors had submitted to the electors of a county the question of issuance of county bonds for the purpose of building certain bridges. Upon a canvass of the votes cast at such election, it appeared that there was not a two-thirds majority in favor of the bonds, whereupon the board declared that the proposition was lost. Plaintiff, a citizen and taxpayer, instituted an action against the board averring that at several precincts a large number of ballots cast for the bond issue were not counted by the election officials and asked that the board's order declaring the proposition lost be annulled and the true result of such election be declared. A demurrer on the grounds of lack of legal capacity of plaintiff to bring the suit, lack of jurisdiction in the court to entertain the action, and failure of the complaint to state facts sufficient to constitute a cause of action was overruled. The court found that the averments of the complaint were true and entered judgment decreeing that the bond issue had carried. The principal question on appeal was the contention that the court had no jurisdiction or authority to inquire into the result of the election. It was decided that the court, as a court of equity, possessed the necessary jurisdiction to make the inquiry, which jurisdiction was conferred by necessary implication for protecting and enforcing the will of the people, although no procedure had been established by statute for the contest of such an election. The premise upon which the court's reasoning was based was that the proposition for the issuance of bonds was one of general interest to the electors. In People v. Wiant, 48 Ill. 263, cited with approval in the decision, the result of an election for the removal of a county seat was involved. The Supreme Court of Illinois pointed out the distinction between an ordinary election contest between two individuals as to which should occupy the office and the contest of an election of the character under consideration, and made the following pertinent observation: "In that case [an election contest between individuals] the individuals are immediately interested, and the public remotely; but, in this case, it is a matter of public concern to the people of the county."

In Roche v. Superior Court, 30 Cal. App. 255, 157 P. 830, 832, the question before the court was the right of an elector of a city to contest an election held pursuant to the provisions of the "Wyllie Local Option Act" (St. 1911, p. 599) and the jurisdiction of the superior court to entertain such an action. The court pointed out that the statute under which the proposition was submitted to a vote of the people provided that any elector was specifically given the right to contest the election, which contest should be subject to all the provisions of law relating to the contesting of elections. It was recognized that it was difficult to make all the Code provisions relative to election contests applicable to the contest of an election of the character under consideration, but it was held that, since the statute expressly provided for the right of contest, the duty devolved upon the superior court to adopt a suitable procedure which should protect and enforce the right of contest thus conferred. The court noted the distinction between an ordinary election contest and a contest of the character under consideration, and made the following observation: "It is not in the ordinary sense an adversary proceeding. The public—that is to say, the people of the city of Oceanside—are interested in having a correct determination of the result of the election, and, since it is provided that any elector may contest the declared result of the election, it is implied that the court will permit any other elector to oppose such contest so far as necessary for a just and lawful disposition of that proceeding."

[5, 6] But the contest herein is essentially an adversary proceeding. It is fundamentally a contest instituted by the individual who was the sole candidate for election to the office of county supervisor if the recall of the incumbent should be successful. The right to contest an election is purely statutory, and must be determined in accordance with the provisions of the statute. Powers v. Hitchcock, 129 Cal. 325, 61 P. 1076; Austin v. Dick, 100 Cal. 201, 34 P. 655. The Code provisions (title 2, part 3, Code Civ. Proc.) relating to the contesting of certain elections are not applicable to a contest of the character which is here attempted.

It follows therefore that the court's order sustaining respondent's demurrer without leave to amend was proper, and the judgment of dismissal as to respondent is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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118 Cal.App. 279

PEOPLE v. ELMOTT.

Cr. 1636.

District Court of Appeal, First District, Division 2, California.

Nov. 12, 1931.

1. Forgery 🔑34(1).

Though forgery in indorsement of check was not pleaded in information, such evidence was admissible as proof of forger's handwriting and as preliminary to expert evidence that face of check and indorsement were written by same person.

2. Forgery 🔑44(2).

In forgery prosecution, evidence showed check was signed with intent to defraud, and maker's signature was either that of fictitious person or of real person who had not given authority (Pen. Code, § 470).

3. Criminal law 🔑1153(2).

Trial court determines qualifications of expert witness.

4. Criminal law 🔑1169(5).

Defendant *held* not prejudiced by expert testimony that defendant signed check in forgery information, even if witness was not qualified, where defendant admitted such fact as a witness in her own behalf.

Appeal from Superior Court, Santa Cruz County; R. M. Rankin, Judge.

Zener Elmott was convicted of forgery, and she appeals.

Affirmed.

Stanford G. Smith, of Santa Cruz, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., and Seibert Sefton, of San Francisco, for the People.

NOURSE, P. J.

Defendant was tried before a jury upon an information charging forgery in the making and passing of a written instrument. Upon her conviction she appealed from the judgment and from an order denying her motion for a new trial.

The instrument was a check for $10 drawn upon the Watsonville branch of the Bank of Italy, made payable to Jessie Thomas, and signed "R. C. Duncan." The defendant presented the check to the proprietress of a hotel in Watsonville, and it was accepted in payment of room rent after the defendant had forged the indorsement of Jessie Thomas in her presence. The prosecution was based on the theory that R. C. Duncan was a fictitious person. Proof was made that no one by that name resided in Santa Cruz county, and that there was no account in the Watsonville bank in that name. The defendant took the stand, and admitted writing the face of the check, but denied writing the indorsement. As to the latter, she was directly contradicted by the party to whom the check was passed. The defendant gave a weird story of having been authorized to draw checks in an unlimited amount by her husband, who, she said, was named R. C. A. Duncan. This authority she claimed to have been given some three or four years prior to the transaction charged in the information when she was living with her husband in San Jose. Thereafter she was committed to the state penitentiary upon a conviction of issuing fictitious checks. She served fourteen and a half months, was released on parole, and voluntarily returned to the penitentiary in order to receive hospital treatment. She had met her husband but once during the past three years, had not corresponded with him, but believed that he was somewhere in Los Angeles. She admitted that he had not authorized her to draw on the Watsonville bank; that she knew he had no account in that bank; that he had never resided in nor been engaged in business in Santa Cruz county. She testified that her husband's business was "auto accessories and real estate." She then offered in evidence page 83 of the Santa Cruz county directory upon which the name "Robt. Duncan" appeared as residing in the city of Santa Cruz.

The occupation of this Robt. Duncan was given as a restaurant worker. From this evidence she argues that the check might have been drawn by this Robt. Duncan.

On the issue of the sufficiency of the evidence to sustain the verdict, little need be said. The state proved every essential element of the crime charged. The appellant admitted the execution and passing of the check and that she obtained credit thereby. She claimed that she had signed the name "R. C. Duncan" under express authority, and also claimed that the check might have been written by "Robt. Duncan," a person to her unknown.

[1] The appellant assigns error in the admission of evidence showing that she indorsed the check in the name of Jessie Thomas. The point is that forgery in the indorsement was not pleaded in the information. But the evidence was not admitted for that purpose. It had been shown that Jessie Thomas was a natural person, and hence, she having been made the payee, the check as drawn was capable of being used to defraud. This fact alone distinguishes the case from People v. Thornburgh, 4 Cal. App. 38, 87 P. 234, cited by appellant. However, this evidence was admissible as proof of appellant's handwriting and as preliminary to the expert evidence which was later offered that the face of the check and the indorsement were written by one and the same person.

[2] Appellant argues that the state failed to prove that "R. C. Duncan" was a real person and that the check was signed without his authority. She cites People v. Whiteman, 114 Cal. 338, 46 P. 99, to the point. That case was decided in 1896. In 1905 section 470 of the Penal Code defining the crime of forgery was amended so that it now reads: "Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do. * * *" The purpose of the amendment, according to the note of the code commissioner, was "to make the forging of the name of a fictitious person, or knowingly signing the name of another, criminal if done with intent to defraud." Here the state proceeded on the theory that the name "R. C. Duncan" was fictitious. If the jury believed its evidence, the verdict was sound. To offset this proof the appellant offered evidence that she had been married in 1925 to "Richard Arthur Duncan"; then she testified that she was married to "Richard Charles Arthur Duncan," and that he was commonly known as "Charley." She did not claim that she was authorized to sign checks in the name of "R. C. Duncan," and she admitted that she knew that her husband had no account in the Watsonville bank. Hence, whether "R. C. Duncan" be real or fictitious, the evidence is complete that the check was signed with intent to defraud, and that the signature which was used was either that of a fictitious person or of a real person who had not given authority.

[3, 4] Appellant argues that the trial court erred in permitting the witness Tompkins to testify as an expert in handwriting. The qualifications of one appearing as an expert witness are to be determined by the trial court, and we find nothing in the record tending to show that error was committed in this instance. However, the appellant was not prejudiced by this evidence. The witness was put on to prove that appellant signed the check pleaded in the information—a fact which she later admitted as a witness on her own behalf.

Appellant criticizes certain rulings of the trial court upon the admission of evidence and upon her cross-examination of the witness Jessie Thomas. The criticisms are merely stated without argument or citation of authority. We have examined the record with care, and are satisfied that the appellant was accorded a fair and impartial trial free from prejudicial error.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

118 Cal.App. 361

STEERS et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 7953.

District Court of Appeal, First District, Division 2, California.

Nov. 17, 1931.

1. Appeal and error ⟹1060(1).

Remark of plaintiff's counsel in examining one of defendants, terming his answer perjury, *held* not prejudicial error.

In action for personal injuries due to collision of street car and truck, plaintiff's counsel called as witness, under Code Civ. Proc. § 2055, the defendant owning the truck. He showed from defendant that plaintiff, who was standing on corner, was not guilty of contributory negligence, and that pleading it was false. The counsel termed it perjury; and this remark was assigned as prejudicial misconduct. The court admonished the jury. The witness' testimony fully exonerated him from wrong intention and perjury. The record demonstrated that the verdict for plaintiff was based on clear evidence, and not on intimation that defendant had committed perjury.

2. Trial ⟹241.

Instructions, by reading Code provision that person suffering detriment may recover and giving ordinary definition of negligence, *held* confined to issues (Civ. Code, § 3281).

3. Automobiles ⟹246(2).

Instruction stating reciprocal rights of street cars, vehicles, and persons in street, addressed to street car's duties, placed no burden on truck owner.

4. Street railroads ⟹118(1).

Instruction that duties of street car are defined in California Vehicle Act *held* properly refused since they are not (St. 1923, p. 517, as amended).

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Mary C. Steers and another against the City and County of San Francisco and another. From an adverse judgment, defendants appeal.

Affirmed.

Emery F. Mitchell and Charles V. Barfield, both of San Francisco, for appellant C. M. Camp.

Harry A. McKenzie and Edwin V. McKenzie, both of San Francisco, for respondents.

STURTEVANT, J.

At about 5 p. m. on the evening of March 18, 1930, the plaintiff Mary Steers walked east on Cabrillo street in San Francisco. She reached the northwest corner of the street and Tenth avenue and was intending to cross the latter street. She saw a street car owned by the city and county of San Francisco coming north on Tenth avenue and a truck owned by the defendant C. M. Camp coming west on Cabrillo street. She paused at the corner to allow them to pass, but they collided in the intersection and the fender on the street car was knocked through the air towards the plaintiff and struck and broke her left leg. She commenced this action and joined as defendants the city, the motorman on the street car, and the owner of the truck. The action was tried before the trial court sitting with a jury. The jury returned a verdict against all of the defendants, and from a judgment entered thereon they have appealed.

[1] A joint answer was filed for the city and the motorman. A separate answer was filed for the defendant Camp, and in that verified answer the defendant pleaded (1) certain denials, (2) the contributory negligence of the plaintiffs, and (3) the proximate and sole negligence of the plaintiff and of the city. The first witness called by the plaintiff was the defendant C. M. Camp. Counsel stated that he called the witness under section 2055, Code of Civil Procedure. Thereupon the plaintiff's attorney proceeded to elicit the fact that the plaintiff was not guilty of contributory negligence and that the defendants' answer in so far as it pleaded contributory negligence was false. Indeed, at one place it was termed "perjury." The remark was assigned as prejudicial misconduct. The court fully and completely admonished the jury. It is now claimed the admonition was not effective. We think it was in this case. The answers of the witness fully exonerated him of any wrongful intention and fully cleared him of any imputation of perjury. The defendant testified most cogently that the plaintiff had not been guilty of contributory negligence. Testifying further he showed that the language of his answer was the language of his attorney and not his own. The rest of the record contains such testimony as to demonstrate that the verdict was based on clear evidence and not on any intimation of the plaintiff's attorney that the defendant Camp had committed perjury.

[2] In giving instructions the trial court read section 3281 of the Civil Code. It also gave the ordinary definition of negligence. Montijo v. Goldwyn, Inc. (Cal. App.) 297 P. 949. The defendant Camp states that it is elementary that instructions should be confined to the issues. The foregoing instructions were so confined.

[3] The defendant Camp quotes instruction XXXI, which states the reciprocal rights of street cars and other vehicles and persons in the street. He then argues that the instruction placed on this defendant an undue burden. But the instruction placed no burden on him. It was addressed to the rights and duties of the street car and not to the driver of the truck.

[4] The same defendant quotes two instructions which he asked and which the trial court refused to give. Both purport to state that the duties and obligations of a street car are defined in the California Vehicle Act (St. 1923, p. 517, as amended). Of course, they are not. McKinnon v. United Railroads, 55 Cal. App. 96, 100, 203 P. 122.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

118 Cal.App. 140

COAST COUNTIES GAS & ELECTRIC CO. v. MILLER & LUX, Inc., et al.

Civ. 7631.

District Court of Appeal, First District, Division 2, California.

Nov. 4, 1931.

1. **Evidence 🔑535.**

Where witness is asked to give opinion on value, proper foundation must be laid by showing qualifications.

2. **Appeal and error 🔑971(2).**
Evidence 🔑546.

Whether witness is qualified to express opinion is question largely within trial court's discretion, whose ruling will not be disturbed unless discretion is abused.

3. **Evidence 🔑543(3).**

Witness *held* not qualified to express opinion as to value of agricultural land, sought to be condemned, for filling station sites.

Facts disclosed that, though witness was engaged in selection and leasing of sites for service stations for an oil company, he had not had any experience in locating service stations on agricultural land; that there was but one station of the 52 in his district which was so located, and in the selection of which he had not participated, in addition to which it appeared that the site was in another county more than 50 miles from the property involved, and there being no testimony to show that witness had any experience with any sales of land within the vicinity, qualifying him to give his opinion.

4. **Evidence 🔑543½.**

Witnesses *held* not qualified to express opinion as to amount of severance damage resulting from location of gas pipe line on agricultural land.

Facts failed to show that witnesses had any sufficient experience based upon sales of land with similar easements to qualify them as experts on the amount of severance damage, but did show that they were basing their opinions upon remote possibilities of damage which were highly speculative and conjectural.

5. **Eminent domain 🔑113.**

Severance damage must be based upon some real physical disturbance of property right which naturally tends to and actually does decrease market value.

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Jr., Judge.

Condemnation proceeding by the Coast Counties Gas & Electric Company against Miller & Lux, Incorporated, and others. From a judgment condemning a right of way for gas pipe line, defendants appeal.

Affirmed.

A. M. Runnells, of Hollister, and Rea & Caldwell, of San Jose, for appellants.

Rittenhouse & Snyder and Bert B. Snyder all of Santa Cruz (Thomas E. O'Donnell, of Hollister, Eugene D. Bennett and Pillsbury Madison & Sutro, all of San Francisco, of counsel), for respondent.

SPENCE, J.

Plaintiff, a public utility corporation, recovered judgment condemning a right of way for a gas pipe line across two parcels of farming and grazing land owned by defendants. Defendants appeal from the judgment.

The only issue in the trial court was the amount of compensation to which defendants were entitled. The two parcels may be referred to as the Ayer property and the Thomas property, as the interest of the other defendants in said parcels has no bearing upon the questions raised on this appeal. The easement consisted of the right to maintain upon a strip of land 16½ feet in width and 3,901 feet in length, a steel pipe 10¾ inches in outside diameter, wrapped and buried under ground at a minimum depth of 36 inches where the land was cultivated, otherwise 24 inches, and the right during the period of construction to pass to and fro over an additional contiguous strip of land 20 feet in width. The plaintiff corporation was not permitted to fence or otherwise inclose any part of the right of way and the use and enjoyment of the strip for any purpose not inconsistent with the maintenance of the pipe line was reserved to defendants. The area of the strip amounted to .54 of an acre over the Ayer property, and .93 of an acre over the Thomas property. Defendants' own witness testified that the full value of the strip of land on the Ayer property was $216, and on the Thomas property was $198. The evidence showed that it would not require over two or three weeks to construct and lay the pipe, and that the plaintiff corporation would seldom, if ever, have any occasion to pass over or use the right of way after the pipe was laid. Plaintiff introduced evidence to show that the use of this strip for the purposes of the pipe line would make no difference in the use or value of the strip to the landowner, and would not result in any damage to the balance of the land. Defendants introduced evidence by which it sought to establish severance damage. The jury, however, found that the value of the easement over the Ayer property was $87, and that the value of the easement over the Thomas property was $150. It further found that there was no severance damage to either parcel.

[1-3] Appellants do not question the sufficiency of the evidence to sustain the jury's findings, but contend that the trial court erred in excluding certain evidence offered by appellants. It is claimed that the trial court erred in sustaining respondents' objections to certain questions asked of the witness Pease, but we find no error in these rulings. Appellants sought to elicit the opinion of this witness with respect to the market value of a portion of the Thomas property consisting of several acres at the corner, which portion this witness had declared to be suitable for a service station site. It is well settled that where a witness is asked to give his opinion on the subject of value a proper foundation for the introduction of his opinion must be laid by showing his qualifications. 10 Cal. Jur. 1021.

It is likewise fundamental that the question of whether a witness has been shown to be qualified to express his opinion is one largely within the discretion of the trial court, and its ruling will not be disturbed unless a clear abuse of discretion appears. 10 Cal. Jur. 963; Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 547, 147 P. 238. No abuse of discretion is shown in the present case. Although this witness had testified that he was engaged in the selection and leasing of sites for service stations for the Associated Oil Company, he had not had any experience in locating service stations on agricultural land. There was but one station of the fifty-two in his district which was so located, but it did not appear that he had participated in the selection, leasing, or purchase of this site. In any event, the site referred to was in another county and more than fifty miles distant from the property in question, and there was no testimony offered to show that the witness had any experience with any sales of land in the vicinity which would qualify him to give his opinion.

[4, 5] It is further claimed that the trial court erred in its rulings upon the testimony of the witnesses Geusenhoff and Clayton. It was through these and other witnesses that appellant sought to establish the alleged severance damage. Here again we find no abuse of the trial court's discretion in ruling against the opinions of these witnesses on the amount of the severance damage, as the evidence failed to show that these witnesses had any sufficient experience based upon sales of land with similar easements to qualify them as experts on the amount of such damage, if any. Furthermore, it appears from the testimony that the witnesses were basing their opinions upon remote possibilities of damage which were highly speculative and conjectural. The elements mentioned by the witnesses were the possibility of damage to crops upon the remaining land in the event that respondent's employees wrongfully trespassed thereon; the possibility of fires resulting from carelessness on the part of said employees; the possibility of escaping gas and possible fire which might result from a break in the pipe caused by earthquake, lightning, or a bullet from a high-power rifle penetrating the ground and piercing the pipe; the possibility of interference with irrigation pipes, although no such irrigation pipes had been used and appellants' witness admitted that no great difficulty would be encountered in the event that appellants desired to lay such pipes; the possibility that damage might result from the flow of the streams in the event that respondent cut the banks of said streams rather than boring thereunder, although it did not appear that it was anticipated or necessary to cut such banks; and the possibility that some prospective buyers might be prejudiced against easements of any kind, although numerous witnesses owning property in the vicinity testified that neither the use nor value of their land was affected by similar easements. The rule is that severance damage must be based upon some real physical disturbance of a property right which naturally tends to and actually does decrease the market value, and that mere fears of remote or contingent possibilities of damage are not sufficient. Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149; Illinois Power & Light Corporation v. Peterson, 322 Ill. 342, 153 N. E. 577, 579, 49 A. L. R. 692; Illinois Power & Light Corporation v. Cooper, 322 Ill. 11, 152 N. E. 491; Alabama Power Co. v. Keystone Lime Co., 191 Ala. 58, 67 So. 833; Central Georgia Power Co. v. Mays, 137 Ga. 120, 72 S. E. 900; Yazoo & M. V. R. Co. v. Jennings, 90 Miss. 93, 43 So. 469, 122 Am. St. Rep. 312. As was said in Illinois Power & Light Corp. v. Peterson, supra: "Since damages are recoverable only where there is a physical disturbance of a right of property, the fear of a remote and contingent injury which may possibly occur, but the happening of which is altogether speculative and uncertain, is not regarded by the law as an element entering into the damages which may be allowed to the owner. The damage must be direct and proximate and not such as is merely possible or may be conceived by the imagination."

Under the heading "Attitude of the Lower Court During the Trial," appellants discuss the participation of the trial judge in the examination of witnesses and also discuss the action of the trial court in giving, refusing, and modifying certain instructions to the jury. An examination of the evidence convinces us that appellants were not prejudiced by the attitude of the trial judge in examining the witnesses nor by any of his remarks, and an examination of the charge to the jury shows that it was fully and fairly instructed upon the law applicable to the case.

A review of the entire proceedings shows that appellants were attempting to recover large sums by way of severance damages based upon alleged elements of damage which were fanciful rather than real. It did not appear that the right granted to respondent to maintain a properly guarded gas pipe well below the surface of the ground would have any appreciable effect upon the use or value of appellants' land. Although the trial court admitted a large amount of evidence offered by appellant in an endeavor to show possible severance damage, and permitted the appellants' witness Read to give his opinion on the amount of severance damage, the jury found under proper instructions against appellants' claims. There is abundant evidence to support the jury's findings, and the record is free from any prejudicial error.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 290

MAURER v. BERNARDO.

Civ. 4426.

District Court of Appeal, Third District,
California.
Nov. 13, 1931.

1. Limitation of actions 🔑151(2).

Acknowledgment or promise to pay debt before limitation expired vitalizes old debt for another statutory period from date thereof.

2. Limitation of actions 🔑151(2).

Acknowledgment of debt after limitation period gives new cause of action, and action must be upon new acknowledgment or promise.

3. Limitation of actions 🔑148(2).

If written acknowledgment of debt is sufficient to take case out of statute of limitations, law implies promise to pay (Code Civ. Proc. § 360).

4. Limitation of actions 🔑149(1).

Written acknowledgment of debt, whether before or after limitation period, must be distinct unqualified unconditional recognition of obligation.

5. Limitation of actions 🔑149(1).

Letter of maker of note to attorney conditionally promising to pay note *held* insufficient to raise bar of statute of limitations.

Letter written by maker of note to attorney for holder thereof stated that he could not pay anything on the note at present, but would do all he could in the near future, with excuse therefor that business had been so quiet that he had not been able to do anything different.

6. Limitation of actions 🔑151(1).

Correspondence between attorneys for maker and holder of note and payment thereon did not extend limitation period, except in accordance with agreement.

Correspondence between attorneys in respect to payment of note resulted in an agreement or understanding that, as long as specified payments every month were made on note, no action would be brought thereon; it being expressly stipulated that payments specified were by way of settlement and made without admitting any liability on behalf of maker.

7. Limitation of actions 🔑149(1).

Correspondence between attorneys for maker and holder of note and letter of maker containing conditional promise of payment *held* not acknowledgment implying promise to pay sufficient to raise bar of limitation.

Correspondence between attorneys resulted in agreement to pay specified amount per month until note was fully paid without admitting any liability on behalf of maker of note, while letter of maker written to attorney for holder of note contained merely a conditional promise of payment in the future, not according to any particular terms, but solely upon his financial ability to pay.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by . M. Maurer against M. Bernardo. Judgment for defendant, and plaintiff appeals.

Affirmed.

Daniel Rygel, of Oakland, and Frank A. Prior, of Sacramento, for appellant.

Ware & Ware, of Chico, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

This is an appeal by plaintiff, J. M. Maurer, from a judgment entered in favor of the defendant, M. Bernardo, in an action upon a promissory note. The facts are not in dispute and are briefly these:

On December 2, 1922, defendant executed and delivered to the assignor of plaintiff a conditional promissory note in the sum of $500. The condition precedent, contained in the note, was performed, and the note became due and payable on November 26, 1923. The note was not paid. It was assigned to plaintiff and placed in the hands of his attorney, Daniel Rygel, of Oakland, Cal., for collection. Mr. Rygel demanded payment of the defendant, whereupon defendant, who resides in Chico, Butte county, Cal., placed the matter in the hands of his attorneys, Ware & Ware, of Chico. A series of letters were exchanged between Ware & Ware and Mr. Rygel, between November 22, 1926, and February 10, 1927. This correspondence was all had before the statute of limitation ran against the note. The result of this correspondence was an agreement or understanding that, "as long as" payments of $50 per month were made on the note, no action would be brought thereon. None of this correspondence was signed by either principal.

It was expressly stated by Ware & Ware that this proposal to pay $50 per month until the note was fully paid was by way of settlement and was made "without admitting any liability on behalf of Mr. Bernardo."

Pursuant to this arrangement and understanding, defendant, through his attorneys, paid plaintiff and appellant $50 on February 11, 1927, on account of said note. No further payments of any kind were made, and nothing further occurred until over six months later. On August 29, 1927, Mr. Rygel wrote Ware & Ware again regarding said indebtedness, in part, as follows: "Unless I receive a substantial remittance by return mail, I am instructed to proceed."

This letter was referred directly to defendant, who on August 31, 1927, wrote to Mr. Rygel, the attorney for plaintiff, the following letter:

"* * * Dear Sir: In regard to the letter you wrote to Mr. Ware about the Maurer note. Mr. Rygel, I cannot pay anything on the note at present, but will do all I can in the near future. I realize I have not paid Mr. Maurer anything since February, but business has been so quiet I have not been able to do anything different.

"Yours very truly,
"M. Bernardo."

After defendant wrote this letter, nothing was said or done by either party or their attorneys until March 21, 1928, when the original complaint herein was filed and summons issued.

The note, as above set forth, became due and payable on November 26, 1923, and became barred by the statute of limitation on November 26, 1927. Therefore this action was not commenced until long after the statute of limitation had run against the note.

Appellant contends in effect: First, that the correspondence between the attorneys, coupled with the payment by defendant of the $50, constituted a waiver of so much of the period of limitation as had run on the note in favor of defendant, or, in other words, the correspondence between the attorneys and the payment of the $50 by defendant started a new period of limitation dating from the time the installment of $50 was paid; second, that said letter written by defendant himself to plaintiff's attorney on August 31, 1927, also raised the bar of the statute of limitation on said original note.

[1-3] We will first consider the letter written by defendant himself on August 31, 1927, which was before the note had outlawed. The only distinction between an acknowledgment of a debt before and one after the statute has run is that the acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period dating from the time of the acknowledgment or promise, and the action must in that event be upon the original obligation and not upon the new promise, while an acknowledgment made after the statute has run gives a new cause of action, and the action must be upon the new acknowledgment or new promise, for which the old debt is a consideration. S. P. Co. v. Prosser, 122 Cal. 413, 52 P. 836, 55 P. 145; Rodgers v. Byers, 127 Cal. 528, 60 P. 42, 43; Foristiere v. Alonge, 98 Cal. App. 563, 277 P. 367; Dixon v. Bartlett, 176 Cal. 572, 169 P. 236; Wahl v. McCaddon, 79 Cal. App. 294, 249 P. 222; Curtis v. Holee, 184 Cal. 726, 195 P. 395, 18 A. L. R. 1024; Searles v. Gonzalez, 191 Cal. 426-430, 216 P. 1003, 28 A. L. R. 78. It is true that, in either case, there need be no express promise to pay, and, if the written acknowledgment is sufficient within the contemplation of section 360, Code of Civil Procedure, to take the case out of the operation of the statute of limitations, the law implies a promise to pay from such acknowledgment. Foster v. Bowles, 138 Cal. 346, 71 P. 494, 649; Searles v. Gonzalez, supra; Concannon v. Smith, 134 Cal. 14, 66 P. 40; First Nat. Bank, etc. v. Pray, 86 Cal. App. 484, 260 P. 933; Foristiere v. Alonge, supra.

[4, 5] But the rule is well established that the written acknowledgment, whether made before or after the statute has run on the original indebtedness, must be a distinct unqualified unconditional recognition of the obligation for which the person making such admission is liable. Powell v. Petch, 166 Cal. 329, 136 P. 55; McCormick v. Brown, 36 Cal. 185, 95 Am. Dec. 170; Biddel v. Brizzolara, 56 Cal. 382; Pierce v. Merrill, 128 Cal. 476, 61 P. 67, 79 Am. St. Rep. 63; Snyder v. Dederichs, 39 Cal. App. 628, 179 P. 535; Nixon v. Ramsey, 40 Cal. App. 240, 180 P. 649; Hayes v. O'Marr, 81 Cal. App. 210, 253 P. 749;

Foristiere v. Alonge, 98 Cal. App. 563, 277 P. 367; Clunin v. First Fed. Trust Co., 189 Cal. 248, 207 P. 1009; Rodgers v. Byers, supra; S. P. Co. v. Prosser, supra. Measured by these well-recognized rules, it is readily apparent that the letter of August 31, 1927, written by defendant to plaintiff's attorney, is wholly insufficient to raise the bar of the statute.

The letter in question was a conditional promise to pay the note when he could, not according to any particular terms, but solely upon his financial ability to pay. If the defendant in this case made any promise at all, it was a conditional promise upon his ability to pay, and, in order to rely upon that promise, plaintiff must plead it as a new cause of action, and prove defendant's ability to pay. Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 588, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932; Snyder v. Dederichs, supra; Rodgers v. Byers, supra, and Curtis v. City of Sacramento, 70 Cal. 412, 11 P. 748. This plaintiff failed to do.

The language used by defendant in his letter is very similar to that relied upon in Rodgers v. Byers, supra, and there the Supreme Court held such writing to be insufficient to raise the bar of the statute.

In Van Buskirk v. Kuhns, supra, the Supreme Court said: "If the promise is conditional upon such ability, it is, as is said in Rodgers v. Byers [127 Cal. 528, 60 P. 42], supra, incumbent upon the plaintiff to allege and prove that the condition has been complied with. This is not, like the plea of the statute of limitations, matter of defense. It is a substantive part of the cause of action, and the burden of proof with respect to it is upon the plaintiff. * * * The complaint contains no allegation of such ability, and the court does not find it. There is therefore a want of averment and finding of facts establishing the existence of a cause of action."

[6] The correspondence between the attorneys and the payment of $50 can be of no assistance to plaintiff in this case for a number of reasons: (1) It is perfectly clear from an examination of all the correspondence that plaintiff can only claim from such correspondence that the statute of limitations was suspended for one month, to wit, from February 10, 1927, to March 10, 1927, at which date the installment payments upon which the suspension depends were in default. This would extend the final period of limitations from November 26, 1927, to December 26, 1927, and that is what the court found; or, in other words, the effect of this arrangement between the attorneys was simply to toll and interrupt the running of the statute for such time, and for such time only, as the agreement was in force; when defendant failed to pay the second installment at the time specified, the agreement was ended, and plaintiff was no longer bound to withhold suit. (2) None of this correspondence was signed by defendant, "the party to be charged," as required by section 360, Code of Civil Procedure.

Appellant insists that defendant ratified the acts of his attorneys by making the $50 payment. This is possibly true, but the agreement made by said attorneys was that suit should be withheld so long as the payments were made. Defendant violated and annulled this agreement by not making the second payment. Plaintiff was therefore no longer bound to withhold suit. The statute was only suspended while the agreement was in force.

[7] Counsel for appellant seem to contend that appellant may reject the promise made by defendant, if it be insufficient to raise the bar of the statute, and rely upon the acknowledgment of the debt inferred from all the writings, both by the attorneys and defendant himself, and, having established an acknowledgment, the law will imply a promise to pay and thereby raise the bar of the statute of limitation.

Neither the complaint upon which the case was finally submitted to the trial court, nor the undisputed facts, will permit such a course. As we have already shown, the promise made by defendant was a conditional one, dependent upon his ability to pay. In Rodgers v. Byers, supra, the court said: "* * * If the debtor promises to pay the debt when he is able, or by installments, etc., the creditor can claim nothing more than the promise gives him. This decision is abundantly supported. Richardson v. Bricker, 1 West Coast Rep. 270; 2 Greenl. Ev. § 440; Wood, Lim. Act. § 78; 13 Am. & Eng. Enc. Law, p. 754. Nor can the respondent, under the showing made, be permitted to reject the promise, and rely upon an acknowledgment from which the law will imply a promise; for, as is said in McCormick v. Brown, supra: 'When the express promise is shown, the acknowledgment, if there be one, has no effect, for the law will not imply a promise in the presence of an express promise.'"

Furthermore, and irrespective of the pleadings, the acknowledgment contained in the writings cannot be construed to be a direct unconditional admission of the debt within the meaning of the statute. In McCormick v. Brown, supra, the court, in dealing with a similar statute, said: "The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt, or to pay the whole debt in a particular manner, or at a specified time, or upon specified conditions. The acknowledgment, say the cases, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay."

It follows from what has been said that we are of the opinion that neither the correspondence between the attorneys nor the letter written by defendant himself nor the correspondence and letter of defendant combined are sufficient to raise the bar of the statute of limitations against said note, even though a complaint has been filed containing proper and the most elaborate averments in consonance with the facts.

Plaintiff slept upon his rights, and must bear the consequence of his own neglect.

We deem a further discussion entirely unnecessary.

Judgment affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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118 Cal.App. 227

JOHNSON v. NATIONAL SURETY CO.

Civ. 8091.

District Court of Appeal, First District, Division 2, California.

Nov. 7, 1931.

1. Property 🔑4.

In action to establish trust in realty, note and trust deed, if "collateral security," would be merely "evidences of debt" within statutory definition of personalty (Civ. Code, § 14, subd. 3).

"Collateral security" is a separate obligation attached to another contract to guarantee its performance.

[Ed. Note.—For other definitions of "Collateral Security," and "Evidence of Debt," see Words and Phrases.]

2. Husband and wife 🔑270(1).

Husband must bring all actions concerning community property (Civ. Code, § 172; Code Civ. Proc. § 370).

Code Civ. Proc. § 370, empowers a married woman to sue in her own name without joining her husband as a party to the action, but it confers no authority on her to sue in her name, where the right of action is given to the husband alone.

3. Husband and wife 🔑265.

Wife, during marriage, may resort to appropriate judicial remedies to safeguard community property against husband's inconsiderate and fraudulent acts (Civ. Code, § 172; Code Civ. Proc. § 370).

4. Trusts 🔑371(2).

Wife's complaint in action to establish trust in realty *held* ambiguous and without facts sufficient to constitute cause of action (Civ. Code, §§ 172, 863; Code Civ. Proc. § 370).

Complaint alleged that plaintiff and her husband owned, as community property, note and trust deed which defendant, without plaintiff's consent, and without her receiving any consideration, obtained possession of, and later sold such collateral security and purchased it at private sale; that defendant had foreclosed trust deed and claimed to be owner of property; and that defendant held property in trust for plaintiff and her husband.

5. Pleading 🔑254.

Where demurrer to amended complaint was sustained, and plaintiff refused to amend further, court could not do otherwise than render judgment for defendant.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Ellen M. Johnson against the National Surety Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

Bailie, Turner & Lake and Allen T. Lynch, all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Plaintiff brought this action to establish a trust in real property, for an accounting, and for the appointment of a receiver. Defendant demurred to the amended complaint. The demurrer was sustained, and, plaintiff refusing to further amend, judgment was rendered for defendant, and from this judgment plaintiff has appealed.

The amended complaint alleged that plaintiff and one H. T. Johnson are husband and wife; that on February 19, 1926, she and her husband owned as community property a certain deed of trust and note, executed by Carrie E. Craig and Jeanette Lohrum to her said husband; that on December 26, 1926, without assignment in writing or indorsement by appellant's said husband, and against her consent, respondent obtained possession of said note and deed of trust; that on September 27, 1927, without the knowledge or consent of appellant, and without consideration having passed from respondent to her, the respondent sold said collateral security, to wit, said note and deed of trust at private sale; that thereupon respondent, without consideration, valuable or otherwise, pretended to purchase said collateral security covering the real property described in the said complaint; that, the said Carrie E. Craig and Jeanette Lohrum having defaulted in the payment of certain installments due under the terms of said note, thereupon respondent, pursuant to the provisions of said deed of trust, foreclosed same, and now claims to be the owner of the property thereby covered; that respondent is not the owner of the property described in said deed of trust, but holds said property in trust for appellant and her said husband; that respondent is a foreign corporation organized under the laws of the state of New York and has not filed with the county clerk of Los Angeles county a certified copy of its articles of incorporation pursuant to section 299 of the Civil Code.

Respondent demurred to the amended complaint upon the grounds:

(1) That it did not state facts sufficient to constitute a cause of action; (2) that appellant has not legal capacity to sue; (3) that said complaint is ambiguous for the following reasons: That it cannot be ascertained therefrom how or in what manner or from whom respondent obtained possession of said note and trust deed nor from whom respondent "pretended to purchase said collateral security" as alleged in paragraph IV of said complaint, that it cannot be ascertained upon what facts appellant bases her conclusion that respondent did not own said note and deed of trust, and that it held and possessed said trust deed and note in trust for appellant and her said husband and upon what facts she bases her conclusion that a receiver is necessary, and that for the foregoing reasons the said complaint is uncertain and unintelligible.

Appellant claims that this action to establish a trust is not an action to declare a trust in personal property, but is an action to declare a trust in real property. On the other hand, respondent contends that the note and deed of trust referred to in said complaint as "collateral security" was personal community property of appellant and her husband.

[1-3] "Collateral Security," as defined by Bouvier's Law Dictionary, volume 1, page 520, is a separate obligation attached to another contract to guarantee its performance. Therefore the inference would be, from the language used in the complaint, that the said note and deed of trust were given to appellant's husband to secure some obligation owing to him by the makers of the note. The said note and trust deed would therefore merely be evidences of debt, and would be included in the definition of personal property as set out in subdivision 3 of section 14 of the Civil Code. Section 863 of said Code, relating to trusts in real property, provides that the beneficiary takes no interest or estate in the property. C. A. Warren Co. v. All Persons, etc., 153 Cal. 771, 96 P. 807. Section 172 of the Civil Code provides that the husband has the management and control of the community personal property with like absolute power of disposition, other than testamentary, as he has of his seperate estate, except that he cannot make a gift of it, or dispose of the same without a valuable consideration. The husband must bring all actions that concern the property of the community. 5 Cal Jur. 337; Chance v. Kobsted, 66 Cal. App. 434, 226 P. 632; Caputo v. Fusco, 54 Cal. App. 191, 201 P. 604; Sternes v. Sutter Butte Canal Co., 99 Cal. App. 465, 278 P. 921. However, during the continuance of the marriage relation, the wife may resort to appropriate judicial remedies to protect and safeguard the community property against the inconsiderate and fraudulent acts of the husband. McKay v. Lauriston, 204 Cal. 557, 564, 269 P. 519.

[4] But it is not alleged in the said complaint that appellant's husband was guilty of any fraud, or that he gave said note and trust deed to respondent, or that he did not receive a valuable consideration for them. Section 370 of the Code of Civil Procedure empowers a married woman to sue in her own name without joining her husband as a party to the action, but it confers no authority upon her to sue in her name where the right of action is given to the husband alone. We are of the opinion that the action of the trial court in sustaining the demurrer was right, for the reasons that: (1) The facts stated in said complaint are not sufficient to constitute a cause of action; (2) appellant has not legal capacity to sue; (3) said complaint is ambiguous.

[5] Appellant complains in her brief that the court did not grant her leave to amend her first amended complaint. The record in this case shows that she did not ask permission of the court to amend her said complaint, but, on the contrary, refused to amend. Such being the case, the court could not do otherwise than render judgment against her. Murphy v. Murphy, 57 Cal. App. 182, 207 P. 43.

In view of the decision we have reached, we do not deem it necessary to pass upon the contention of appellant that respondent is a foreign corporation and that it has not filed its articles of incorporation with the county clerk of Los Angeles county pursuant to section 299 of the Civil Code. However, it was held in the case of South Yuba Water Co. v. Rosa, 80 Cal. 333, 22 P. 222, that said section 299 does not apply to foreign corporations.

The judgment is affirmed.

We concur: **NOURSE, P. J.; SPENCE, J.**

118 Cal.App. 185

CALIFORNIA STANDARD FINANCE CORPORATION v. J. D. MILLAR REALTY CO. et al.

Civ. 4309.

District Court of Appeal, Third District, California.

Nov. 5, 1931.

Rehearing Denied Dec. 5, 1931. Hearing Denied by Supreme Court Jan. 4, 1932.

1. Bills and notes ⚿502.

In action on note indorsed by corporation payee by its president, note *held* competent as prima facie evidence of delivery, transferee's ownership, and authority of payee's president to indorse it (Civ. Code, § 3140).

2. Bills and notes ⚿338.

Phrase "in due course" implies holder's good faith in acquiring negotiable instrument and lack of knowledge of infirmity affecting validity (Civ. Code, § 3133).

[Ed. Note.—For other definitions of "Holder in Due Course," see Words and Phrases.]

3. Bills and notes ⚿497(1).

Holder or owner of negotiable instrument is presumed to have acquired it in due course (Civ. Code, § 3133).

4. Bills and notes ⚿524.

Rebuttable presumption of ownership and delivery of negotiable instrument duly indorsed arises from its possession (Civ. Code, § 3133).

5. Corporations ⚿432(12).

Possession of note payable to corporation, unqualifiedly and regularly indorsed by president or general manager, is prima facie evidence of officer's authority to indorse note.

6. Bills and notes ⚿310.

Assignment of negotiable instrument technically differs from negotiation by indorsement, since assignment may transfer instrument subject to equities, while negotiation by indorsement is not presumed to be so restricted (Civ. Code, § 3140).

7. Bills and notes ⚿508.

Either assignment or indorsement is evidence of title to negotiable instrument intended to be transferred, and proof of either, under proper pleadings, renders instrument admissible.

8. Bills and notes ⚿467(2).

Allegation that payee, for valuable consideration, assigned and transferred payee's title and interest in note, *held* sufficiently broad to include transfer by indorsement.

While the complaint alleged an assignment of the note, it also pleaded execution and transfer thereof by setting it out in full including the indorsement.

9. Bills and notes ⚿476(1).

Where complaint alleged note was given and assigned for valuable consideration, answer, merely denying "this defendant for a valuable consideration or any consideration at all delivered to defendant [payee] its promissory note," *held* not to plead lack of consideration.

10. Bills and notes ⚿478.

That note represented payment for securities illegally sold was special defense which should have been pleaded in action on note (St. 1917, pp. 673, 679, § 2, subd. 6, and § 12).

11. Bills and notes ⚿476(1).

Want of consideration for note is special defense which should be pleaded.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the California Standard Finance Corporation against the J. D. Millar Realty Company and another. Judgment for plaintiff, and the named defendant appeals.

Affirmed.

Superseding opinion in 3 P.(2d) 363.

L. B. Stanton, of Los Angeles, for appellant.

Rollinson, McGann, Becker & Nelson, of Los Angeles (Don S. Irwin, of Los Angeles, of counsel), and Henry E. Phister, of Los Angeles, for respondent.

R. L. THOMPSON, J.

This is a rehearing upon an appeal from a judgment on a promissory note in favor of the holder thereof in due course. It is contended the plaintiff took the note subject to all defects of title since the complaint alleges that it was assigned to it and failed to allege the note was endorsed by the payee prior to maturity. It is also asserted the court erred in precluding the appellant from offering proof of plaintiff's alleged knowledge of defect of title to the note for lack of consideration therefor.

The complaint, which was filed April 30, 1928, alleged that on September 27, 1927, for a valuable consideration, the defendant J. D. Millar Realty Company, a corporation, made and delivered to the defendant Hollywood Granite Company, Inc., its promissory note in the following words and figures:

"Los Angeles, Cal., Sept. 27, 1927.

"Six months after date, for value received

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

the undersigned promises to pay to the order of Hollywood Granite Company, Inc., a corporation, at West Hollywood National Bank, Los Angeles, Calif., Seven Thousand Five Hundred Dollars, $7500.00, with interest from date until paid, at the rate of 7 per cent per annum, payable quarterly, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection undersigned agrees to pay an additional sum of ten per cent on the principal as attorney's fees, principal and interest payable in gold coin of the United States.

"J. D. Millar Realty Company,
"J. D. Millar, President.
"G. T. Dolan, Secretary."

"Indorsed:
"Hollywood Granite Company, Inc.
"By Hy Stebbens, Pres."

The complaint further alleges that on the same date which the note bears, for a valuable consideration, the payee "duly assigned, transferred and set over to the plaintiff herein all of its right, title and interest in and to said promissory note and plaintiff then became, and is now, the lawful owner and holder thereof."

Separate answers were filed by the respective defendants. Upon information and belief, the appellant's answer controverted the material allegations of the complaint. The due execution of the note was admitted.

At the trial of the cause, the general manager of the plaintiff corporation testified that it purchased the note about October 1, 1927, from the Hollywood Granite Company, paying therefor the sum of $4,000, the balance being represented by a credit due to the plaintiff from the Hollywood Granite Company. The witness testified in that regard:

"Q. Did you pay the Hollywood Granite Company for it? A. Yes sir.

"Q. You are the owner of the note now? A. Yes sir.

"Q. And has there been anything paid on it? A. No sir.

"Q. At the time you purchased the note, Mr. Von Schlegell, did you know the people that executed it? A. Yes sir.

"Q. And did you have any knowledge of any irregularity of any kind in connection with it? A. No sir.

"Q. You purchased the note in good faith? A. Yes sir.

"Q. Who delivered the note to you? A. Mr. Stebbens, president of the Hollywood Granite Company. * * *

"Q. Just what was done? A. I gave him a check.

"Q. For how much? A. I gave him a check —I don't remember for how much, I think it was four thousand and some dollars plus credits on other items that they owed us."

[1] Upon this showing, the note was received in evidence over the objection of the appellant that "there is no proof of delivery." The note contained an unqualified indorsement, as follows: "Hollywood Granite Company, Inc. By Hy Stebbens, Pres." The note was properly admitted in evidence. It was competent as prima facie evidence of the delivery of the instrument, the ownership thereof by the plaintiff, and the authority of the president of the corporation payee to endorse it. "Every holder is deemed prima facie to be a holder in due course." Section 3140, Civ. Code.

[2-4] Under the Negotiable Instruments Act (Civ. Code, § 3133), a holder of a negotiable promissory note in due course is one who takes the instrument in good faith for a valuable consideration complete and regular on its face, before maturity, without notice of previous dishonor, and without notice at the time of negotiation of any infirmity in the instrument or defect of title. The phrase "in due course" implies good faith on the part of the holder in acquiring the instrument, and a lack of knowledge of any infirmity which would affect the validity of the instrument. The holder or owner of a negotiable instrument is presumed to have acquired it in due course. The presumption of ownership and delivery of the instrument duly indorsed arises from its possession. This presumption is, however, rebuttable. Section 3133, Civ. Code; 8 C. J. 465, § 684; 1 Joyce on Defenses to Commercial Paper (2d Ed.) 874, § 645.

The evidence in the present case is that the plaintiff acquired the note in question for a valuable consideration. The note containing an unqualified indorsement of the corporation named in the instrument as payee thereof, purporting to have been signed by its president, was delivered by him to the plaintiff and offered in evidence as prima facie showing of the obligation due to it. The evidence shows it was delivered to the plaintiff for a valuable consideration by "Mr. Stebbens, president of Hollywood Granite Company." It is contended there was no preliminary evidence that the president was authorized to endorse or deliver the instrument.

[5] The possession of a negotiable note payable to a corporation, and bearing the indorsement of the corporation, unqualified and regular in form, signed by its president or general manager, is prima facie evidence of the authority of the officer indorsing the instrument entitling a holder thereof in due course to recover, in the absence of evidence to the contrary. Citizens' National Bank of Tacoma v. Wintler, 14 Wash. 558, 45 P. 38, 39, 53 Am. St. Rep. 890. In the case last cited, similar to the case at bar, suit was brought

by the holder of a promissory note which was indorsed by the general manager of the corporation payee. The answer admitted the execution of the note, but denied it was issued for consideration or duly indorsed by the corporation. Evidence was adduced to the effect that Brown, who indorsed the note, was in fact the general manager of the corporation payee. The court said: "The possession by a third person of a negotiable promissory note, payable to a corporation, bearing the indorsement of such corporation, regular in form, and signed by its general manager, is sufficient to raise the presumption that the officer so indorsing it had authority to make the indorsement, and that the person having the possession thereof is the owner of the note. The production in evidence of the note in question, bearing the indorsement as above set forth, coupled with the proof that Brown was the general manager at the time when said note was so indorsed and delivered, was sufficient, prima facie, to entitle appellant to recover."

[6-8] The appellant contends there is a fatal variance between the allegation of the complaint with respect to the assignment of the note and the proof of its indorsement; that the note was therefore erroneously admitted in evidence. It is true there is a technical distinction between the transfer of a negotiable instrument by assignment and the negotiation thereof by indorsement. The former may convey the instrument to the holder subject to equities, while the latter is not presumed to be so restricted. 8 C. J. 384, § 568. Both an assignment and an indorsement are evidences of the title to the instrument intended to be transferred thereby. Proof of either an assignment or an indorsement under proper pleadings would entitle the note to be admitted in evidence. While the complaint alleged an assignment of the note, it also pleaded the execution and transfer of the note by setting it out in full, including the indorsement thereon. The complaint then alleged that for a valuable consideration the Hollywood Granite Company duly assigned, transferred and set over unto the plaintiff all of its right, title, and interest in the note, and that the plaintiff thereupon became the owner and holder thereof. This allegation is broad enough in its terms to include a transfer of the note by indorsement. Moreover, the objection to the introduction of the note in evidence was placed upon the sole ground that "there is no proof of delivery." The objection was not made upon the ground of variance between the allegation of transfer and the proof thereof, nor even upon the ground of incompetency. The note was properly admitted in evidence.

[9-11] The appellant contends it was erroneously precluded from adducing evidence tending to show the consideration for the note failed because the note was executed in payment of a beneficial interest in securities which were sold in conflict with the Corporate Securities Act of California (St. 1917, p. 673), and that the plaintiff was charged with knowledge thereof. Imperial Livestock, etc., Co. v. Tracy, 208 Cal. 205, 281 P. 50.

Section 12 of that act provides that "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void. * * *" Section 2, subdivision 6, of the same act, defines the term "security" to include "all bonds, debentures, and evidences of indebtedness issued by any company."

The complaint alleges that the promissory note was given for a valuable consideration. It was also alleged the note was assigned and transferred from the payee to the plaintiff for a valuable consideration. The answer fails to deny the note was originally executed for a valuable consideration. It merely denies "this defendant for a valuable consideration or any consideration at all delivered to the defendant, Hollywood Granite Company, its promissory note." The answer fails to plead a lack of consideration. It does not set up the asserted invalidity of the note on account of the pretended violation of the Corporate Securities Act of California, or otherwise. This is a special defense which should have been pleaded. The defense respecting the want of consideration was therefore not an issue in the case, and the trial court properly sustained objections to the proffered testimony thereof. Upon rehearing, our attention is called to the authorities which definitely determine this matter of pleading. Pastene v. Pardini, 135 Cal. 431, 67 P. 681, 682; Kruce v. Parlier Winery, 208 Cal. 723, 284 P. 671; Fierce v. Reed, 106 Cal. App. 673, 677, 289 P. 855; Flint v. Giguiere, 50 Cal. App. 314, 318, 195 P. 85; 6 Cal. Jur. 209, § 138. The Pastene Case first above cited was a suit on a promissory note. The complaint alleged the note was given "for a consideration." The answer merely denied that "Pardini, for a valuable consideration or otherwise," executed or delivered the note. The trial court declared that the only issue which was involved in that case was a question of the due execution of the note, and precluded the defendant from offering evidence of a lack of consideration. This ruling was assigned as error and was sustained on appeal. Mr. Justice Henshaw says: "As to the second and third contentions, that the defendant was deprived of his defenses of lack of consideration and payment, it is sufficient to say that such defenses are affirmative defenses to be pleaded, and this [the] defendant did not do. He contented himself in his answer with a naked denial of the averments of the complaint, and this, as has been repeatedly held in this and in other code states, is not sufficient to raise either of these issues. '* * * If there was no consideration, the defendant should have filed an answer setting up a want of it as a defense to the action.' Winters v. Rush, 34 Cal. 136. * * * Defendant has no just cause for complaint that he was excluded by the ruling of the court from offering evidence upon defenses which he had not raised."

Upon the foregoing authorities we are satisfied the appellant in this action may not complain of the exclusion of the offered proof of the want of consideration. This defense was waived by its failure to specially plead a want of consideration.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

HOFFMAN v. SOUTHERN PAC. CO. et al.*

Civ. 4368.

District Court of Appeal, Third District, California.

Nov. 13, 1931.

Rehearing Denied Dec. 12, 1931. Hearing Granted by Supreme Court Jan. 11, 1932.

1. Appeal and error ⚿1097(3).

Where substantial difference exists on second appeal, in evidence to which principle of law is applied, or weight or sufficiency of evidence is involved, rule of law of case is inapplicable.

2. Appeal and error ⚿1097(1).

Rule of law of case is based on principle that appellate court may not ordinarily modify its own judgment except on rehearing.

3. Appeal and error ⚿1099(7).

Trial court's finding will not be disturbed, under rule of law of case, where evidence is substantially conflicting.

4. Appeal and error ⚿1097(1).

On successive appeals, determination of issues previously decided on substantially same evidence is controlling.

5. Appeal and error ⚿1002.

Implied finding of jury based on conflicting evidence is controlling on appeal.

6. Appeal and error ⚿1053(3).

Plaintiff's examination of engineer regarding slackening of speed of train at highway crossing, though excessive speed was not in issue, *held* not prejudicial error, in view of instructions.

In action for personal injuries sustained in crossing collision between plaintiff's automobile and train, negligence was predicated on engineer's failure to ring bell or blow whistle of engine before reaching crossing, as required by Civ. Code, § 486. Plaintiff, during examination of engineer, asked him if he did not approach crossing without slackening speed of train. Jury, however, was repeatedly and clearly informed in charge of court that judgment against the defendant could not be predicated on the excessive speed, if any, of the train.

7. Railroads ⚿327(7).

Automobile driver, if vision of track is unobstructed for reasonable distance, and hearing is not impaired by extraneous conditions, need not actually stop before crossing.

8. Railroads ⚿327(7).

Automobile driver, if view and ability to hear approaching train would not be improved by actually stopping, need not stop before crossing.

9. Trial ⚿234(4).

In action for injuries sustained in crossing collision between automobile and train, alleged formula instruction on circumstances necessary to warrant recovery *held* not fatally defective.

Alleged formula instruction complained of in substance authorized judgment for the plaintiff, if proximate cause of action was operation of train in negligent and careless manner as alleged and at a dangerous and excessive rate of speed without warning of its approach, provided that plaintiff used due care in approaching crossing and was without fault himself. Instruction further stated that ordinary care depended on circumstances of each particular case, and was such care as reasonably prudent man would have exercised under the same circumstances.

10. Appeal and error ⚿1004(1).

Judgment will not be disturbed merely because verdict appears larger than court sitting without jury would have awarded, unless result of passion or prejudice (Code Civ. Proc. § 657).

11. Damages ⚿132(3).

$50,000 for triangular fracture of frontal bone of skull, necessitating trephining of skull, and resulting in epilepsy, *held* not excessive.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by R. A. Hoffman against the Southern Pacific Company and another. Judgment for the plaintiff, and the defendants appeal. Affirmed.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 11 P.2d 387.

Arthur L. Levinsky and Gilbert L. Jones, both of Stockton, and Devlin, Devlin & Diepenbrock, of Sacramento (W. R. Dunn, of Sacramento, of counsel), for appellants.

F. M. Ostrander, of Merced, and Philip M. Carey, of Oakland, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was entered upon the rendering of a verdict for damages for personal injuries which were sustained as the result of a railroad crossing collision which occurred between defendant's passenger train and the plaintiff's automobile. At the time of the accident, the plaintiff was engaged in driving his machine, through a dense fog, over a country crossing, when it was struck by the locomotive engine, and he was seriously injured.

This case has been twice before this court on appeals from previous judgments which were rendered in the same cause. 84 Cal. App. 337, 258 P. 397; 101 Cal. App. 218, 281 P. 681. We have carefully compared the evidence which is contained in the present record with the facts which are recited in the former opinion of this court as they appear in the last appeal reported in Hoffman v. Southern Pac. Co., 101 Cal. App. 218, 281 P. 681, and find them to be in substantial accord. It is therefore unnecessary to restate the facts of this case. Except for the giving and refusing of certain instructions, together with the alleged prejudicial misconduct of counsel and the court, which will be hereafter considered, the judgment in this case is founded upon substantially the same facts and instructions respecting the law of the case which were disposed of in the opinion last cited.

[1-4] The respondent invokes the application of the doctrine of the "law of the case." This doctrine generally presupposes error in the determination of principles of law with relation to ascertained facts. Where there is a substantial difference in the evidence to which the principle of law is applied, or the weight or sufficiency of the evidence is involved, the rule may not be invoked. Allen v. Bryant, 155 Cal. 256, 100 P, 704. The reason assigned for the enforcement of the rule of the law of the case is that an appellate court may not ordinarily modify its own judgment except upon a rehearing of the same cause. 4 C. J. 1096, § 3075; Sharon v. Sharon, 79 Cal. 633, 654, 22 P. 26, 131. The findings of a trial court will not be disturbed on appeal, under the rule of the law of the case, where there is a substantial conflict of evidence upon the disputed issues. Sharon v. Sharon, 79 Cal. 633, 655, 22 P. 26, 131. It is, however, true that in successive appeals the determination of all issues which were formerly decided upon substantially the same evidence will be controlling on the court as the settled law of the case. 2 Cal. Jur. 944, § 555; 4 C. J. 1093, § 3075; 2 R. C. L. 223, § 187; United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 712, 284 P. 922. Assuming that the evidence in the present record is substantially the same as our recitation thereof in the previous opinion, upon all material issues, we therefore adopt that opinion as the law of this case.

The judgment in this case was reversed upon the last appeal for the giving of an erroneous instruction which authorized the jury to render a verdict for the plaintiff based solely upon the theory of defendant's negligent operation of its passenger train over a crossing in an open country district, at an excessive rate of speed. The record was devoid of evidence of excessive speed. At the present trial that erroneous instruction was not given. The question of excessive speed of the railroad train is not here involved.

[5] The theory upon which this case was finally tried is that the defendant was negligent in failing to ring the bell or blow the whistle of the locomotive engine before reaching the crossing where the accident occurred, as required by section 486 of the Civil Code. Upon this issue there is a sharp conflict of evidence. The implied finding of the jury that the defendant failed to comply with this statute is therefore controlling on appeal.

A conflict of evidence also exists respecting the alleged contributory negligence of the plaintiff in failing to stop his automobile or engine before he attempted to cross the railroad track. We are unable to hold, as a matter of law, that the plaintiff was guilty of contributory negligence in that regard. This feature of the evidence was fully reviewed in the former opinion of this court. We have no desire to modify that opinion.

[6] The plaintiff is charged with prejudicial error in the examination of defendant's engineer by asking him if he did not approach the crossing without slackening the speed of the train and without regard to the foggy condition which existed. The complaint alleged "that said train was being operated carelessly and negligently, at an excessive and dangerous rate of speed, without warning of its approach." This court held that under the circumstances of this case the mere rapid rate of speed of a train traveling through an open country, unobstructed by physical objects, did not constitute negligence, in spite of the presence of fog. It is true the negligence of the defendant, upon which the judgment is predicated in the present case, is the failure to ring the bell or blow the whistle of the locomotive engine before reaching the crossing, as provided by section 486 of the Civil Code. The jury was repeatedly and clearly informed in the charge of the court that a judgment against the defendant could

not be predicated upon excessive speed of the train. Upon this point the jury was admonished in the following language: "I instruct you that you cannot award any damages to the plaintiff for any injuries claimed by him to have been sustained as a result of the collision between his automobile and the train, unless you find from the evidence in the case that such injuries are the proximate result of the alleged negligence of the defendant in operating the train of the defendant Southern Pacific Corporation without giving warning of its approach by ringing of a bell or blowing of a whistle as provided by law." At the request of the defendant, the following instructions were also given to the jury upon this subject: "I instruct you that there was no law or ordinance controlling the rate of speed of this train at the time of the accident, and, in the absence of any law or ordinance regulating the speed of the train, a rate of over sixty miles per hour was not of itself negligence." And: "You are further instructed that the rapid speed of a train traveling through an open country unobstructed by physical objects, regardless of the presence of fog, will not amount to negligence where the train gives reasonable warning of its approach." In view of these instructions, it does not seem possible the jury could have been influenced by the mere propounding of the challenged questions above referred to. These questions were not prejudicial.

[7-9] The appellant charges as erroneous the giving of an instruction at the request of the plaintiff, on the ground that it belongs to the condemned class which comes under the term "formula instructions." It is claimed this instruction is fatally defective because it charges the jury that a judgment may be awarded the plaintiff if the proximate cause of the accident was the operation of the train "in a negligent and careless manner as alleged in plaintiff's complaint, at a dangerous and excessive rate of speed without warning of its approach," provided the jury also found that the plaintiff used due care in approaching the crossing and "was without fault himself." This instruction then asserted that "ordinary care depends upon the circumstances of each particular case, and is such care as a reasonably prudent man would have exercised under the same circumstances." The appellant claims this instruction is erroneous because it fails to inform the jury that it was necessary for the plaintiff to "stop, look and listen" before attempting to cross the railroad track.

This instruction was not erroneous. It is not always necessary for one to actually stop before attempting to cross a railroad track. Where one's vision of the track in the direction from which an approaching train may be expected is unobstructed for a reasonable distance, and his hearing is not impaired by extraneous noise or conditions, it is not necessarily requisite for one to actually stop before crossing a railroad track. Where one's view of the track and ability to hear an approaching train would not be improved by actually stopping at the crossing, it is not imperative that he should do so. Under the circumstances of the present case, we are of the opinion the question of the plaintiff's contributory negligence in failing to stop his machine before crossing the track was a problem for the determination of the jury. The jury was elsewhere fully and clearly instructed in that regard. Nor was this challenged instruction fatally defective because of the omission of any essential element. In the case of Barham v. Widing, 210 Cal. 206, 217, 291 P. 173, 178, wherein a similar alleged "formula instruction" was under consideration, the Supreme Court said: "It is inconceivable that any jury could have been misled by the mere omission" of the condition complained of, in view of the clear and correct exposition of the law which was given in the charge to the jury. All of the essential elements of the other instructions which are challenged were passed upon and approved by this court on the former appeal in this case.

We observe no prejudicial misconduct on the part of either the court or counsel for the plaintiff in the trial of the case. The record indicates that the defendant was accorded a fair and an impartial trial.

[10, 11] Finally, it is asserted the judgment is excessive. The plaintiff was awarded damages in the sum of $50,000. This is a large sum. A judgment may not be disturbed merely because a verdict seems larger than a court sitting without a jury would have awarded, unless it appears to have been given under the influence of passion or prejudice. Section 657, Code Civ. Proc.; 20 Cal. Jur. 101, § 65. It is true the judgment is very much larger than that which was awarded at the first trial. It appears that the plaintiff sustained a triangular fracture of the frontal bone of the skull as a result of the accident. This fracture penetrated to the brain, exposing the cerebrum, and necessitated the trephining of the skull. Medical experts testified at the first trial that epilepsy might result from the injuries sustained. Dr. Parker testified at the present trial: "I consider that the injury was absolutely sufficient to cause epilepsy, and that in this particular case it has resulted in epilepsy." The latter portion of this answer was stricken out upon motion of the defendant, but the doctor subsequently testified: "A secondary operation is the only recourse to actually cure this man, to relieve him of these epileptic seizures." There is substantial evidence from which the jury was warranted in assuming the plaintiff is actually afflicted with epilepsy as a result of the injuries which he sustained.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

118 Cal.App. 105

JAMESON v. STATE BOARD OF DENTAL EXAMINERS et al.

Civ. 6975.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1931.

Rehearing Denied Dec. 2, 1931.

1. Physicians and surgeons 🔑11(3).

In proceedings to suspend dentist's license to practice, dental board exercised quasijudicial functions in determining that citation was legally issued and executed, and that jurisdiction had been acquired as regards review by certiorari (St. 1915, p. 706, § 14, as amended by St. 1921, p. 236, § 4).

2. Physicians and surgeons 🔑11(1).

Dental board prima facie had jurisdiction of proceeding to suspend dentist's license, where dentist was accused by verified charge presented to board for consideration, was cited to appear, and tried at specified time and place according to statutory procedure.

3. Appeal and error 🔑712.

Appellate court is not authorized to consider arguments on matters dehors record.

4. Physicians and surgeons 🔑11(3).

In proceedings to suspend license to practice dentistry, though intendments favor accused, order of dental board will be sustained on evidence sufficient to support it and to fulfill jurisdictional requirements.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Certiorari proceedings by Harry W. Jameson against the State Board of Dental Examiners and others. From a judgment annulling a judgment of the State Board of Dental Examiners which suspended the license of the petitioner to practice dentistry, defendants appeal.

Reversed.

Jesse W. Carter, of Redding, for appellants.

Schweitzer & Hutton, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The defendants and appellants here, respondents in a certiorari proceeding in the Superior Court of Los Angeles county, appealed from a judgment rendered therein annulling a judgment of said board which suspended the license of the petitioner to practice dentistry in this state.

Omitting formal parts of the accusation, it was charged that respondent used in his practice "a name other than the name under which he is licensed to practice dentistry * * * and whereby he did indicate and does now indicate that he is practicing dentistry under such name. * * *" A citation was issued and served pursuant to the statutory requirement that "said verified accusation has been presented to this board for its consideration, which this board deems sufficient," and, after plea of not guilty and the introduction of evidence, said board rendered its findings and judgment suspending the license in question.

[1] The appellants' first contention is that the act of the dental board in passing upon the sufficiency of the accusation was purely ministerial, and that its decision was conclusive and not subject to review in a certiorari proceeding. It has been decided that, while such bodies do not exercise "the judicial powers of the state" as the phrase is used in conferring judicial power upon the courts, they exercise a quasijudicial power in adjudicating valuable property rights of qualified members to practice their professions, and that their action is subject to revision by way of certiorari. Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625; Suckow v. Alderson, 182 Cal. 247, 187 P. 965. And in other jurisdictions it has also been held that, "where the act to be done involves the *exercise of discretion or judgment in determining whether the duty exists it is not to be deemed merely ministerial.*" (Italics ours.) Burnam v. Terrell, 97 Tex. 309, 78 S.W. 500. To the same effect are, Weaver v. Devendorf, 3 Denio (N. Y.) 117; Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431; Williams v. Weaver, 75 N. Y. 30; Chrisman v. Bruce, 1 Duv. 63, 85 Am. Dec. 603; Burton v. Fulton, 49 Pa. 151; Elmore v. Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343; 2 Freeman on Judgments (4th Ed.) § 531. We must therefore hold that the dental board exercised quasijudicial functions in determining that the citation was legally issued and executed, and that jurisdiction of the person and the subject-matter had been acquired.

On the other hand, it was contended by respondent in the Superior Court, and is here insisted, that the Board of Dental Examiners held said hearing and entered judgment purporting to suspend his license without first having acquired legal jurisdiction, and that its proceedings were void and ineffectual. Section 13, subdivision 3, of the statutes governing the procedure of dental boards (Stats. 1915, p. 698, c. 426), as amended (St. 1929, p. 1946, § 7), provides that:

"Any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes: * * *

"(3) For unprofessional conduct or for gross ignorance or inefficiency in his profession. Unprofessional conduct is hereby defined to be: * * * the use of any false, assumed or fictitious name, either as an individual, firm, corporation, or otherwise or any name other than the name under which he is licensed. * * *"

Section 14 of said act (St. 1921, p. 233, p. 236, c. 206, § 4), as amended, requires that: "The proceedings to revoke or suspend any license under the third subdivision of section thirteen, may be taken upon the information of another. All accusations must be in writing, verified by some party familiar with the facts therein charged, and three copies thereof must be filed with the secretary of the board. Upon receiving the accusation the board shall, if it deem the complaint sufficient, make an order setting the same for hearing, at a specified time and place, and the secretary shall cause a copy of the order and of the accusation to be served upon the accused at least ten days before the day appointed in the order for said hearing. * * *"

As heretofore observed, the record discloses that respondent was accused by a verified charge, which appears to have been presented to the board for consideration, was cited to appear, and was tried, at a specified time and place, in accordance wtih the foregoing statutory procedure. There is no scintilla of even pretended showing in the record before us that the board failed to comply with the jurisdictional mandates of the statute specifying its duties in such cases.

[2-4] The sole basis of argument in support of the judgment here attacked consists merely of the assertion that the jurisdiction of such boards may not, in the absence of proof thereof, be presumed to have been acquired. This hypothesis, though true in the abstract, ignores the prima facie showing made, in this case. To say as a matter of law that the board acted without jurisdiction would amount to holding that the Superior Court might, despite uncontradicted documentary evidence of regularity, entertain a converse presumption that it was not acquired. We are not authorized to consider other arguments, upon matters dehors the record, and, since it constitutes the only ground upon which the judgment below is sought to be sustained, we must in the absence of such presumption conclude that the judgment is without foundation. All intendments are in favor of the accused (Messner v. Board of Dental Examiners, 87 Cal. App. 199, 262 P. 58), but the order of a board will be sustained when there is competent evidence sufficient to support it and to fulfill jurisdictional requirements (Young v. Board of Medical Examiners, 93 Cal. App. 73, 268 P. 1089). We are aware of no presumption which overcomes undisputed evidence of jurisdiction, as claimed by the argument advanced by the respondent.

The judgment from which the appeal is taken is reversed.

I concur: IRA F. THOMPSON, J.

FRICKE, Justice pro tem.

I concur. The jurisdiction here attacked is not that of subject-matter, for the dental board clearly has legal authority to suspend or revoke a license to practice dentistry, but the attack is made that there was no jurisdiction of the person of respondent by reason of the failure of the board to make certain orders after the filing of the accusation. While respondent refers to the point as one of first impression in the appellate courts, it is not new in principle. In this case respondent demurred to the accusation, and, after the demurrer was overruled, interposed an answer denying all of the allegations of the accusation, and then went to a hearing on the merits. While it is true that jurisdiction of the person in civil cases is not acquired where the party is forcibly brought into court against his will (In re Edwards, 99 Cal. App. 541, 278 P. 910, 290 P. 591, distinguishing the rule in civil and criminal cases), it is also true that he who answers a complaint in a civil action thereby puts in a general appearance (section 1014, Code Civ. Proc.), and that the voluntary appearance of a defendant is equivalent to personal service of the summons and complaint upon him (Code Civ. Proc. §§ 416, 406). Further, one who voluntarily appears as a party to a proceeding, wherein the law requires that a specified notice shall be given, thereby waives the defect or omission of such notice (In re Yoell, 131 Cal. 581, 63 P. 913; Jones v. Lowe, 9 Cal. 68); and a defendant, by answering and going to trial on the merits, thereby makes a general appearance and submits himself to the jurisdiction of the court, even though he previously had entered a special appearance for the purpose of making a motion to set aside the service of the summons. Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792. By clear analogy, the respondent, by voluntarily appearing before the board of dental examiners by answering and going to a hearing on the merits, thereby waived any right which he might have had to insist that jurisdiction of his person had not been obtained.

118 Cal.App. 110

JAMESON v. STATE BOARD OF DENTAL EXAMINERS et al.

Civ. 6976.

District Court of Appeal, Second District, Division 2, California.

Nov. 2, 1931.

Rehearing Denied Dec. 2, 1931.

Physicians and surgeons ⚷11(3).

Board of dental examiners prima facie had jurisdiction of proceedings to suspend dentist's license to practice, where citation was issued and served, dentist entered not guilty plea, and after hearing evidence, board rendered findings and judgment (St. 1915, p. 706, § 14, as amended by St. 1921, p. 236, § 4).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Certiorari proceedings by Harry W. Jameson against the State Board of Dental Examiners and others. From a judgment annulling a judgment of the State Board of Dental Examiners which suspended the license of the petitioner to practice dentistry, defendants appeal.

Reversed.

Jesse W. Carter, of Redding, for appellants.

Schweitzer & Hutton, of Los Angeles, for respondent.

CRAIG, Acting P. J.

The defendants and appellants here, respondents in a certiorari proceeding in the Superior Court of Los Angeles county, appealed from a judgment rendered therein annulling a judgment of said board which suspended the license of the petitioner to practice denistry in this state.

Concisely stated, the respondent was charged before said board with unprofessional conduct, in that on various dates he knowingly and willfully permitted certain named unlicensed persons to have the use of his dental office and to use certain dental instruments and paraphernalia therein contained, for the purpose of practicing dentistry therein, and that he aided and abetted said unlicensed persons in so practicing, contrary to the provisions of the dental law of this state. A citation was issued and served pursuant to the statutory requirement that a verified accusation had been presented to the board for its consideration, which the board deemed sufficient; respondent entered a plea of not guilty, and, after the introduction of evidence, said board rendered its findings and judgment aforesaid.

It is contended that the act of the board in passing upon the sufficiency of the citation was purely ministerial, and that its decision was conclusive and not subject to review in a certiorari proceeding.

The record in these respects is not essentially dissimilar to that presented in Jameson v. Board of Dental Examiners (Cal. App.) 5 P.(2d) 47, wherein we discussed the foregoing questions of jurisdiction. We therefore hold in the instant case that the board of dental examiners had jurisdiction of the proceedings, and that the Superior Court was empowered to review the same. But, owing to a showing before the court below of jurisdiction in said board, the judgment vacating its proceedings without any evidence to the contrary was unsupported when rendered upon that ground alone.

The judgment from which the appeal is taken is reversed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

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118 Cal.App. 192

K. & K. BRICK CO. et al. v. BROOKE et al.

LOUNSBERRY & HARRIS v. SAME.

Civ. 4311.

District Court of Appeal, Third District, California.

Nov. 5, 1931.

As Modified on Denial of Rehearing Dec. 5, 1931.
Hearing Denied by Supreme Court Jan. 4, 1932.

Mortgages ⚷151(3).

There being no general contract for construction of building, deed of trust recorded after commencement of construction, but prior to time, labor, or materials for which lien was claimed were furnished, takes priority over such lien (Code Civ. Proc. § 1186).

> Deeds of trust were entitled to priority under Code Civ. Proc. § 1186, as construed prior to amendment by St. 1931, p. 1699, since, under such construction, where there is no general contract for the construction of a building, mechanic's liens for labor and materials furnished attach only when such labor or materials are commenced to be furnished.

Appeals from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Actions to foreclose mechanic's liens by the K. & K. Brick Company and George H. Whyte, Jr., and by Lounsberry & Harris, a corporation, against W. S. Brooke and others, the actions being tried and considered on

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

appeal as one. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Culver & Nourse, of Los Angeles, for appellants.

Newby & Newby and Dee Holder, all of Los Angeles, for respondents.

PLUMMER, J.

In this action to foreclose certain mechanic's liens, the defendants, Title Insurance & Trust Company, a corporation, and Alhambra Hardware Company, a corporation, had judgment. From these judgments, the plaintiffs appeal. The record shows that two actions were involved, but were tried as one, and, for the purposes of this decision, we will consider the cases as one.

The findings of the court and the record show that on the 19th day of March, 1925, the defendant W. S. Brooke was the owner of the real property described in the complaint; that on or about said date, W. S. Brooke entered into a contract with the defendant George H. Whyte, whereby it was agreed that the defendant Whyte was to perform certain brick work in the construction of a building to be erected by the owner. On or about the 6th day of April, 1925, the K. & K. Brick Company agreed to furnish Whyte such brick as he should order, at the price of $12 per thousand, and thereafter, and prior to the 11th day of May, 1925, the brick company furnished to the defendant Whyte 327,750 bricks. On the 9th day of June, 1925, Lounsberry & Harris, a corporation, entered into an agreement with W. S. Brooke to furnish lumber for the use, and which was used in the construction of the building erected upon the premises described in the plaintiffs' complaint. On the 23d day of March, 1925, W. S. Brooke and his wife executed a trust deed to secure a promissory note in the sum of $40,000 drawn in favor of the respondent Golden States Securities Company. In this trust deed, the Title Insurance & Trust Company was named as a trustee. Thereafter, a second trust deed was executed in favor of the Alhambra Hardware Company to secure the payment of the sum of $20,000, evidenced by a promissory note in that sum. Both trust deeds were recorded on March 30, 1925.

The court found that the building was constructed by the owner, and that the owner began construction of the building on or about March 27, 1925. The court further found that none of the material mentioned herein, or mentioned in the lien filed by the different lien claimants, was furnished until some time after the recording of the two trust deeds.

Default having been made in the payment of the $40,000 secured by the first deed of trust, sale of the premises was had. There being no surplus realized from the sale of the premises, over and above the amount secured by the trust deeds, these actions were begun, based upon the theory that the liens took precedence over the trust deeds. The trial court held that as the building was constructed by the owner, there being no general contractor, the liens dated as of the date when the different materialmen began to deliver material, and, as the trust deeds were executed and recorded prior to any work being performed or materials furnished by any of those claiming liens, the trust deeds took precedence.

Upon this appeal, it is strongly contended that the construction heretofore given to section 1186 of the Code of Civil Procedure is erroneous, and that the lien claimants in this action are entitled to date back the institution of their rights as and of the date when the owner began work upon the premises, and not as and of the date when the claimants began work or began to deliver materials, and much space is given in the briefs for the purpose of inducing this court to re-examine the construction heretofore given to section 1186 of the Code of Civil Procedure, and then hold such construction erroneous, and to decide that in this case the liens take precedence over the trust deeds, notwithstanding the nonexistence of a general contractor, and notwithstanding that all work done and materials furnished by the lien claimants was subsequent to the recording of the trust deeds. A number of cases from other states are cited, wherein it is held that under somewhat similar statutes or Code provisions, the lien of a materialman dates back to the beginning of the work, even though the work is all done by the owner of the building, and the materials are not furnished until after the recording of the trust deed or mortgage covering the premises upon which the building is being erected.

However convincing these cases might be, were this a cause of first impression, and had this case arisen subsequent to the amendment of section 1186, Code of Civil Procedure, by the act approved June 12, 1931 (St. 1931, p. 1699), they might be cited as authority for the contentions made by the appellants. But as this case must be determined by the Code section as it read prior to March 12, 1931, we think the following cases, in view of the principle of stare decisis, have effectually foreclosed the discussion in this state.

In McClain v. Hutton, 131 Cal. 132, 61 P. 273, 276, and 63 P. 182, 622, the rule in this state, and which rule has been followed ever since, is thus stated (referring to the section of the code): "Under this provision the cases must be divided into two categories, distinguished by the existence or nonexistence of a valid contract. In the former case the priority of the liens is to be determined by the date of the commencement of the building; in the latter by the time the work was done or the materials commenced to be furnished"

—citing Davies, etc., Lumber Co. v. Gottschalk, 81 Cal. 642, 22 P 860; Avery v. Clark, 87 Cal. 619, 25 P. 919, 22 Am. St. Rep. 272; Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 236, 39 P. 758. The opinion in the Hutton Case was filed December 27, 1900. From that date down to the present, the construction given to section 1186, Code of Civil Procedure, has been followed.

This court, in the recent case of American Building Material Service Co. v. Wallin, 2 P. (2d) 1007, had before it the identical issues presented upon the present appeal, and, in an opinion prepared by Presiding Justice Preston, a number of cases were cited showing that the rule enunciated in the action against Hutton has been consistently followed for more than thirty years, and basing our decision upon what is said in that opinion, and upon the cases there cited, it must be held that the construction given to section 1186, Code of Civil Procedure, has become firmly fixed and must be considered as the rule governing priority as between lien claimants and mortgagees, or parties claiming under trust deeds, in all cases arising prior to the amendment of section 1186, Code of Civil Procedure, in 1931. This being true, we do not very well see how it would advantage any one to re-examine the cases involving the construction heretofore given to section 1186, Code of Civil Procedure, and especially in view of the fact that section 1186, Code of Civil Procedure, as amended in 1931, will require re-examination and further construction in all cases arising after the date of the amendment, and anything we might say in relation thereto as the section now stands amended would simply be obiter in this case.

The judgments are affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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118 Cal.App. 198

FOLLETT et al. v. BROWN et al.

Civ. 507.

District Court of Appeal, Fourth District, California.

Nov. 5, 1931.

Rehearing Denied Dec. 3, 1931. Hearing Denied by Supreme Court Jan. 4, 1932.

1. Automobiles ⚷245(72).

In action for death of pedestrian struck by automobile, pedestrian's contributory negligence in crossing roadway between intersections, contrary to ordinance, *held* for jury.

2. New trial ⚷41(3).

In death action, instruction on issue of damages authorizing recovery for "loss of love" *held* sufficiently prejudicial to justify new trial.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Nora Follett and others against W. D. Brown and another, doing business as the Chrysler Sales & Service Company. From an order granting a new trial, plaintiffs appeal.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for appellants.

Swing & Wilson and Fred A. Wilson, all of San Bernardino, for respondents.

MARKS, J.

Appellants are the children and widow of Leonard P. Follett, who was killed in a collision with an automobile belonging to L. J. Hayes and driven by W. D. Brown, on Third street in the city of San Bernardino at about 6 o'clock in the afternoon of December 24, 1928. The case was tried before a jury, which returned a verdict in favor of appellants in the sum of $5,000.

Respondents made a motion for new trial upon the following grounds: "1. Excessive damages, appearing to have been given under the influence of passion or prejudice. 2 Insufficiency of the evidence to justify the verdict. 3. Insufficiency of the evidence to justify the judgment. 4. That the verdict is against law. 5. That the judgment is against law. 6. Errors in law occurring at the trial, and excepted to by the said defendants." The order granting the motion for new trial appears in the record as follows: "Motion to vacate and set aside the verdict of the jury and grant a new trial herein, and heretofore submitted, is at this time granted."

Appellants' opening brief contains 118 pages with a 26-page supplement. The first 111 pages contain long quotations from the evidence and brief comments by counsel. The remaining seven pages contain an argument and citations on the following propositions: "The general minute order of the court which merely recites that the motion is granted, without specifying specifically the grounds thereof, excludes the question of 'insufficiency of the evidence'"; and: "The damages allowed herein by the verdict and judgment thereon are not excessive." There is no mention in the brief of any of the other grounds specified in the motion for new trial upon which the motion might have been granted.

Counsel for appellants should read the case of Burns v. Renaker (Cal. App.) 2 P.(2d)

408, and rule 8 of Rules of the Supreme Court and District Courts of Appeal and consider the insufficiency of his brief in the light of the language there used.

The following quotations from 2 California Jurisprudence are appropriate: "The appellate court can not be expected to prosecute an independent inquiry for errors upon which the appellant may possibly be relying. It will notice only those assignments pointed out in the brief. All others are deemed to have been waived or abandoned." (Page 728.) "An appellate court cannot assume the task of discovering the error in a ruling, and it is the duty of counsel by argument and the citation of authority to show the reasons why the rulings complained of are erroneous. Contentions supported neither by argument nor by citation of authority are deemed to be without foundation, and to have been abandoned. Such contentions will not be considered by an appellate court, unless they are embraced in a discussion of other points. This has been repeatedly declared by the courts." (Page 732.) "All presumptions are in favor of an order granting or denying a new trial, and the burden is upon the appellant to make it affirmatively appear by a proper record that the order complained of is erroneous." (Page 887.) "When an order granting a new trial is silent as to the ground upon which it is made and the record shows the existence of a valid ground, it will be presumed that the order was based on that ground. And where the order is granted upon a discretionary ground, every presumption will be indulged in favor of the proper exercise by the trial court of its judicial discretion." (Page 891.)

But two questions need be considered by us: First, does the evidence show that the deceased was guilty of contributory negligence as a matter of law? and, second, was plaintiffs' instruction No. 1, on the measure of damages, sufficiently prejudicial to support the order granting the motion for new trial?

[1] The record contains an ordinance of the city of San Bernardino which prohibits pedestrians crossing the roadway between street intersections in the district where the accident happened. The evidence discloses that the deceased alighted from his son's automobile on the south side of Third street, a street running east and west, between G and H streets in San Bernardino, and proceeded northerly into the roadway until he was about ten feet north of the south curb, where he was standing when hit. According to the evidence offered by appellants, W. D. Brown was driving the automobile easterly on the south half of Third street in the business district of San Bernardino at a speed of thirty or more miles per hour, and that a very few feet west of the point of impact Brown swerved the car to his right, striking deceased with the edge of the right front fender, throwing him to the pavement and causing his death. Brown denied a speed in excess of fifteen miles per hour or that he swerved his car to the right, and maintained that the deceased walked into the right side of his car in front of its center.

We may assume, but not hold, that deceased was negligent immediately preceding the accident, yet we must conclude that the question of whether or not such negligence contributed to the injury of the deceased was one of fact for the jury and not one of law for the court. The evidence is sharply conflicting, yet there is evidence in the record which would support the conclusions that both Brown and the deceased were negligent. Assuming, but not holding, that the deceased attempted to cross the roadway on Third street contrary to the terms of the city ordinance, we may concede, but not hold, that this was evidence of negligence on his part. Whether or not this contributed to his injury and subsequent death depends upon the weight to be given other evidence and the reasonable deductions to be drawn therefrom. The evidence most favorable to appellants shows that deceased was standing still at the time of the impact, and was struck by the right edge of the front portion of the right fender of the automobile. It is evident that, had deceased and the automobile been separated by a very few inches, there would have been no collision. If Brown swerved the automobile to the right and towards deceased just before the impact, the reasonable inference might be drawn that this swerving of the automobile from its direct course into the deceased, coupled with the speed at which it was traveling, if more than fifteen miles per hour, was the sole and proximate cause of the accident. Thus a question of fact was presented for determination by the jury as to whether or not the negligence of Brown, if any, was the sole and proximate cause of the accident to which the negligence of the deceased, if any, might or might not have contributed. This being a question of fact prohibits us from holding the deceased guilty of contributory negligence as a matter of law.

[2] The first instruction given by the trial court was one, requested by appellants, upon the measure of damages to be applied and used by the jury. It included, within the elements of pecuniary damages for which appellants might be compensated, "loss of love" of their father and husband. Love cannot be purchased with money, nor can a person be hired to bestow it. The value of love cannot be weighed against the coin of the realm. Therefore our courts, adopting the rule prevailing in older jurisdictions, have excluded the loss of love as an element of damage in cases such as we are considering. In Parsons v. Easton, 184 Cal. 764, 195 P. 419, 423, it was said: "But it is pecuni-

ary loss only, and not the loss of an object of love and affection, that the law recognizes as ground for allowing damages to the heirs of one whose death has been caused by the negligence of a third person."

The trial court evidently considered that there were errors of law occurring at the trial prejudicial to respondents. The instruction we have noted constituted an error of law. It is said in 2 California Jurisprudence, 905: "The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter. It has been said 'that it is only in rare instances and upon very strong grounds that the Supreme Court will set aside an order granting a new trial.'" The authorities cited support the rule announced in the text.

The court below did not abuse its discretion in granting the motion for new trial.

Order affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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118 Cal.App. 759

HELM v. WASHINGTON et al.

SHEPHERD v. SAME.

Civ. 7596.

District Court of Appeal, First District, Division 1, California.

Nov. 12, 1931.

Automobiles ⚷197(1).

Admiral in United States Navy *held* not liable, under respondeat superior doctrine, for negligence of enlisted man acting as chauffeur in driving government automobile on return to headquarters after taking admiral to private club.

Driver of government automobile at time of accident was enlisted in United States Navy and was acting as chauffeur for the admiral. Driver was directed to drive to place admiral went for recreation, and, after having transported admiral to desired place, he proceeded to return to headquarters as ordered by his superiors, and while returning he had a collision with automobile of plaintiffs.

Appeals from Superior Court, Alameda County; Warren V. Tryon, Judge.

Actions by W. E. Helm, and by Kenneth Shepherd, against Thomas Washington and others. From portion of judgment for plaintiffs denying relief against defendant Washington, plaintiffs appeal.

Affirmed.

John L. McVey, of Oakland, for appellants.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent Washington.

TYLER, P. J.

These actions were brought to recover damages against the same defendants as the result of an automobile accident. The two actions were consolidated and tried together and are before this court upon a joint transcript. The facts are undisputed and the question of negligence is not an issue.

Briefly stated, defendant Washington was, at the times mentioned in the complaint, an admiral in the United States Navy assigned as commandant of the Twelfth naval district wherein the accident occurred. Defendant Brown was an enlisted man in the United States Navy and was acting as chauffeur for the admiral. Brown was directed to drive to Bohemian Grove where the admiral frequently went for recreation and exercise. Having transported him to the place mentioned, defendant Brown proceeded to return to navy headquarters as originally directed and ordered by his superiors. It was on his return, and while the admiral was not with him, that the car he was driving and which was owned by the government collided with the car of plaintiff, as a result of which collision this action was brought.

The case was tried before the court, sitting without a jury. Damages were assessed in the sum of $3,500 in both cases. The trial court, however, held the driver of the navy automobile, Brown, solely responsible and found that at none of the times mentioned in the complaint was defendant Brown the servant or agent of defendant Washington. Plaintiffs have appealed from that portion of the judgment denying them relief against defendant Washington. Defendant Brown has not appealed.

Appellant claims that the relation of master and servant existed between defendants Brown and Washington at the time of the accident, for which reason Washington was liable with Brown. Respondents insist, in support of the judgment, that the doctrine of respondeat superior cannot be invoked for various reasons. It is argued that respondent Washington had no voice in the selection or retention of Brown, who was an employee of the government and controlled by the bureau of navigation of the United States government. The point here involved has been passed upon by this court in a recent case growing out of the same accident. Guild v. Brown and Washington (Cal. App.) 1 P.(2d) 528. There it was held that the evidence was insufficient to support a judgment against defendant Washington upon the theory of respondeat superior. The facts and the law in relation thereto are extensively discussed. A further discussion would be an idle act.

Upon the authority of the case cited, the judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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118 Cal.App. 157

CITY OF LOS ANGELES v. CARR et al.

Civ. 8049.

District Court of Appeal, First District, Division 2, California.

Nov. 5, 1931.

Witnesses ⚿74.

Referee in condemnation proceeding was competent witness on hearing of referees' report and exceptions thereto (St. 1903, p. 376; Code Civ. Proc. § 1879).

Code Civ. Proc. § 1879, provides that all persons, without exception, otherwise than specified in the next two sections, may be witnesses, and no pertinent exception is found in the sections mentioned.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by City of Los Angeles against J. D. Carr and others, including Emanuel Cohen. Judgment for plaintiff, and last-named defendant appeals.

Affirmed.

Patterson, Bailey & Montgomery, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., Leslie K. Floyd and Royal G. Wilke, Deputy City Attys., all of Los Angeles, for respondent.

SPENCE, J.

This action was brought against numerous defendants to condemn certain lands in the city of Los Angeles under the Street Opening Act of 1903. St. 1903, p. 376. The three referees appointed pursuant to the provisions of that act to ascertain the compensation to be paid to defendants filed their report, and defendant Cohen, the appellant herein, filed exceptions thereto. Upon the hearing of the report and exceptions, E. S. Butterworth, one of the referees, was called as a witness by plaintiff. Defendant Cohen objected on the ground that the witness was disqualified because he had acted as one of the referees. The objection was overruled, and a motion thereafter made to strike out his testimony was denied. Said defendant Cohen appeals from the judgment subsequently entered, and the sole ground urged for reversal is that the trial court erred in allowing said witness who had acted as one of the referees to testify on the hearing of the exceptions to the referees' report.

In our opinion, there was no error in the rulings of the trial court. Counsel for appellant concedes that there is no statutory provision declaring such witness to be incompetent, and frankly states that he can find no similar case sustaining his contention. Section 1879 of the Code of Civil Procedure provides that: "All persons, without exception, otherwise than is specified in the next two sections, * * * may be witnesses." No pertinent exception is found in the sections mentioned. Similar objections were raised in Appeal of Brooks & Josephs, 32 Cal. 559, and School District v. Phœnix Land & Improvement Co., 297 Mo. 332, 249 S. W. 51, and in each case the commissioners who had assessed the damages were held to be competent witnesses upon the hearing of the objections to the report. We are in accord with the reasons given in the above-mentioned cases for declaring the commissioners to be competent witnesses, and believe those reasons to be equally applicable in the present case.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 236

Neilson MASTEN, by Annette Van R. Masten, his Guardian ad Litem, Plaintiff and Appellant, v. FOX WEST COAST THEATRES (a Corporation), and Guardian Western Company (a Corporation), Defendants and Respondents.

Civ. 882.

District Court of Appeal, Fourth District, California.

Nov. 7, 1931.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

See also 3 P.(2d) 610.

Edward J. Kelly, of San Diego, for appellant.

Alfred Wright and Albert W. Leeds, both of Los Angeles, and John B. Bertero, of San Diego, for respondent Fox West Coast Theatres.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Shreve & Shreve, of San Diego, for respondent Guardian Western Co.

PER CURIAM.

An order having been issued in the above-entitled cause requiring the respondents herein to appear and show cause why their petition for rehearing should not be stricken from the files and the order denying said petition set aside, and cause having been duly shown in response thereto, and the matter submitted to the court, it is hereby ordered that the said order to show cause be discharged and the proceeding dismissed.

MARKS, J.

I dissent. I cannot agree with my associates in their conclusions which resulted in dismissal of the order to show cause in this case.

The decision of this court was filed on October 1, 1931. A petition for rehearing was filed on October 21, 1931, and was denied on October 23, 1931. Subsequently, and before the expiration of thirty days from the filing of the decision, it was called to our attention that no service of the petition for rehearing had been made upon the attorney for appellant. This court thereupon issued an order to show cause requiring respondents to show cause why the petition for rehearing should not be stricken from the records of this court, and why the order denying a rehearing should not be vacated.

The order was made returnable on November 4, 1931, at which time it was stipulated that counsel for respondents, petitioner for the rehearing, had delegated the service of the petition to the printers who had printed it; that service was made upon Edward J. Kelly, an attorney at law with offices in the city of Los Angeles, instead of upon Edward J. Kelly, an attorney at law with offices in the city of San Diego, who was the only Edward J. Kelly, attorney of record in this case; and that no service of the petition was made upon Edward J. Kelly of San Diego. It was further stipulated that the mistake made in service of the petition for rehearing was the mistake of the printer. He was acting as the agent for the attorneys of the respondents who are petitioning for a rehearing. Neither the respondents nor their attorneys had any actual or any other knowledge of this mistake in service except that imputed to them by the agency of the clerk of the printer making it until after the service on the wrong attorney and the filing of the petition here.

Section 1 of rule 30 of the Rules of the Supreme Court and of the District Courts of Appeal of the state of California provides in part as follows: "Application for a rehearing of any cause decided by the Supreme Court in bank or for a hearing in bank after a decision in department, and application for a rehearing of any cause, except a criminal cause, decided by a District Court of Appeal must be served on the adverse party and filed with proof of service within twenty days after the judgment is pronounced." Section 6 of the same rule provides in part as follows: "Petitions for hearing in the Supreme Court after decisions by the District Courts of Appeal will be considered only in cases wherein a petition for a rehearing in the District Court of Appeal has been filed and denied."

Under the authority of the foregoing rule it is my conclusion that no service was had of the petition for rehearing as required therein. Therefore the petition should be stricken from the records of this court.

PEOPLE v. BROAD (GENERAL MOTORS ACCEPTANCE CORPORATION, Intervener).*

Civ. 7910.

District Court of Appeal, First District, Division 1, California.

Nov. 7, 1931.

Rehearing Denied Nov. 21, 1931. Hearing Granted by Supreme Court Jan. 4, 1932.

1. Constitutional law 🔑305.

To constitute "due process of law" respecting taking of property, statute should give interested parties some adequate remedy to vindicate their rights.

[Ed. Note.—For other definitions of "Due Process of Law," see Words and Phrases.]

2. Constitutional law 🔑309(1).

For due process respecting taking of property, statute itself must provide for notice of time and place to hear orderly presentment of issues.

3. Constitutional law 🔑309(1).

Regarding due process, defect for not requiring hearing or notice, actual or constructive, in statute authorizing taking of property is not supplied by public officers' rules thereon.

4. Constitutional law 🔑305.

Respecting statute authorizing taking of property, extra-official, casual, or discretionary hearing is not substantial substitute for due process constitutionally required.

5. Constitutional law 🔑309(1).

That owner had no defense is immaterial, where property was taken under statute defec-

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*For subsequent opinion see 12 P.2d 941.

tive in not requiring notice and hearing to him.

6. Constitutional law ⚷309(1).
Forfeitures ⚷2.

Portion of Narcotic Act purporting to authorize forfeitures of vehicles used to transport drugs without notice to owner *held* invalid (St. 1929, p. 388, § 15).

The state Narcotic Act (St. 1929, p. 388, § 15), declares that vehicles used in transporting unlawfully drugs mentioned in section 1 may be seized, considered as evidence, and, upon conviction of the party charged with violating act, be delivered to Department of Finance. The car seized had been sold conditionally. The person operating it appeared as registered owner, and seller's assignee as legal owner. The person operating the car was arrested and pleaded guilty to violating the statute, and the car was forfeited without notice to legal owner, which was unaware that car was being used for an illegal purpose.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by the People of the State of California against Philip Broad to forfeit an automobile used to transport narcotics, in which General Motors Acceptance Corporation sought to intervene. From an order denying intervention, the intervener appeals.

Reversed.

William S. Downing and Philander B. Beadle, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Dep. Atty. Gen., for the People.

John H. Corning and John R. Flor, both of San Francisco, Amici Curiæ.

PER CURIAM.

An appeal by General Motors Acceptance Corporation from an order of the superior court of the city and county of San Francisco, denying the prayer of its complaint in intervention and ordering a certain automobile to be delivered to the department of finance of the state of California.

On November 15, 1930, defendant Broad was apprehended and subsequently charged in the above court with a violation of the state narcotic law (Stats. 1929, p. 380). He entered a plea of guilty to the charge.

On October 17, 1930, Broad entered into a contract with Don Lee, Inc., for the purchase of the automobile for $2,435, upon which has been paid the sum of $750. Title was retained by the seller. The contract provided that the purchaser should not use the car illegally, and that, if the same became in danger of confiscation, the seller or its assignee might terminate the purchaser's interest and repossess the car. On the date of the execution of the contract, the interest of the seller therein with title to the automobile was transferred to General Motors Acceptance Corporation. Registration of the car was effected with the division of motor vehicles, defendant Broad appearing as the registered owner, and the corporation last named as the legal owner.

It was testified that at the time of Broad's arrest the officer also took possession of the automobile; that the same had been used by Broad to transport narcotics; and that a quantity of morphine was found in the car. It is conceded that the corporation was unaware of the unlawful use of the car.

The latter in its complaint set forth the facts constituting its ownership of the car, which is not denied, and alleged that the portion of the act under which forfeiture was sought contravened the due process clause both of the state and Federal Constitutions. After a hearing, the order appealed from was entered.

Section 15 of the state narcotic act (page 388) provides:

"Seizure and forfeiture of vehicles used to transport drugs.

"Any automobile or other vehicle used to convey, carry or transport any of the drugs mentioned in section 1 of this act, which are not lawfully possessed or transported, is hereby declared to be forfeited to the state, and may be seized by any duly authorized peace officer and when such seizure is made shall be considered as part of the evidence under this act and the magistrate shall upon conviction of the party charged with the violation of said act, turn the automobile or other vehicle over to the department of finance of the State of California and said department of finance shall deliver to the division of narcotic enforcement of the State of California such number of said automobiles or other vehicles as may be needed by the said narcotic division in enforcing the provisions of this act; provided, that nothing contained herein shall apply to common carriers, or to an employee acting within the scope of his employment under this act."

The corporation admits that regardless of his guilt or innocence an owner's interest in an automobile used in the violation of the laws prohibiting traffic in narcotics may be forfeited; but it contends that, since no provision is made in the act for notice of the intended forfeiture or a hearing, the above section of the act is void.

[1-4] The rule is well settled that to constitute due process of law in regard to the taking of property the statute should give the parties interested some adequate remedy for the vindication of their rights (12 Cor.

Jur., Constitutional Law, § 997, p. 1220); and while it is a proper exercise of legislative power to provide for the destruction of property without notice when the public welfare demands summary action—instances of this kind being the power to destroy diseased meat or decayed fruit, to kill diseased cattle, or to destroy property kept in violation of law which is incapable of lawful use (12 Cor. Jur., Constitutional Law, § 999, p. 1224)—nevertheless, where the property involved is what is sometimes termed innocent property, threatening no danger to the public welfare, the owner must be afforded a fair opportunity to be heard (Modern Loan Co. v. Police Court, 12 Cal. App. 582, 108 P. 56); and it has accordingly been held that to constitute due process the statute itself must provide for notice of the time and place of hearing where the parties may present in a regular and orderly manner issues of law and fact (Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 115). The same rule was declared in Moffat v. Hecke, etc., 68 Cal. App. 35, 228 P. 546, where it was held that the essential validity of the law was to be tested not by what has been done under it, but by what may by its authority be done; and where a statute authorizes the taking of private property, but makes no provision for hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules covering the situation. So in Security Trust Co. v. Lexington, 203 U. S. 323, 27 S. Ct. 87, 89, 51 L. Ed. 204, a case involving the validity of an assessment, it was held that, if a statute makes no provision for notice in any form, it is not material that as a matter of grace or favor notice may be given. As the court stated, "it is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case, that is material, but the question is whether any notice is provided for by the statute." Nor can extra-official or casual notice, or a hearing granted as a matter of discretion, be deemed a substantial substitute for the due process that the Constitution requires. Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Coe v. Armour Fertilizer Works, 237 U. S. 413, 35 S. Ct. 625, 59 L. Ed. 1027; Louisville & Nashville R. R. v. Central Stockyards Co., 212 U. S. 132, 29 S. Ct. 246, 53 L. Ed. 441.

To the same effect are the following cases: State v. Rose, 3 W. W. Harr. (Del.) 168, 132 A. 864, 45 A. L. R. 85; Savannah, etc., R. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 847; Beebe v. Magoun, 122 Iowa, 94, 97 N. W. 986, 101 Am. St. Rep. 259; People v. Marquis, 291 Ill. 121, 125 N. E. 757, 8 A. L. R. 874; Randall v. Patch, 118 Me. 303, 108 A. 97, 8 A. L. R. 65; Chicago, M. & St. Paul R. R. Co. v. Commissioners, 76 Mont. 305, 247 P. 162; In re Rutherford, 72 Pa. 82, 13 Am. Rep. 655; National Auto Corp. v. Barfod, 289 Pa. 307, 137 A. 601; Matter of Grout, 105 App. Div. 98, 93 N. Y. S. 711; People ex rel. Robert Simpson Co. v. Kempner, 154 App. Div. 674, 139 N. Y. S. 440, affirmed 208 N. Y. 16, 101 N. E. 794, 46 L. R. A. (N. S.) 970, Ann. Cas. 1914D, 169; Lacey v. Lemmons, 22 N. M. 54, 159 P. 949, L. R. A. 1917A, 1185; Stillwater Bd. of Education v. Aldredge, 13 Okl. 205, 73 P. 1104; Boggs v. Commonwealth, 76 Va. 989.

[5] It is admitted by plaintiff that notice and an opportunity to be heard are necessary to constitute due process; but it is urged that, where the owner cannot possibly show facts that would relieve him from forfeiture, notice to him would be an idle act; that the person using the automobile is the only one in a position to make a defense, and, consequently, notice to him with an opportunity to be heard was sufficient to meet the constitutional requirements.

Whatever the effect of the criminal proceedings upon Broad's interest in the automobile (and this we do not decide), he was not appellant's agent for any purpose; and the sole question here is the sufficiency of the statute as against the latter. As held in the cases above cited, the question of the sufficiency of the statute does not depend upon the notice or hearing actually afforded by the court (Stuart v. Palmer, supra), and it is no answer to one who protests against the taking of his property that in his particular case due process would have led to the same result because he had no adequate defense on the merits (Rees v. Watertown, 19 Wall. 107, 123, 22 L. Ed. 72; Coe v. Armour Fertilizer Co., supra, page 424 of 237 U. S., 35 S. Ct. 625.

The cases of Van Oster v. Kansas, 272 U. S. 465, 47 S. Ct. 133, 71 L. Ed. 354, 47 A. L. R. 1044, and Goldsmith Jr.-Grant Co. v. United States, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376, cited by plaintiff, are authorities for the rule that the fact that the owner's interest in an automobile is subject to forfeiture regardless of his guilt or innocence does not render a statute unconstitutional, but not for plaintiff's contention that there need be no provision by statute for notice to the owner. In the case first cited, the statute declared an automobile or other vehicle used for the transportation of intoxicating liquor to be a common nuisance, and established a procedure to be followed in case of forfeiture, including notice to all claiming an interest therein. In the second case, the statute under consideration, namely, section 3450, Revised Statutes, provided for the forfeiture of property used to evade the revenue acts, but made no provision for notice to the owner. No objection to the sufficiency of the statute on this ground was raised, however, and it was decided, this being the only question involved, that the property of an innocent owner might be declared forfeited without depriving him of property in violation of the fifth Amendment.

[6] According to some authorities, a requirement of notice is to be implied from the fact that it is a constitutional requirement, irrespective of the particular provisions of the statute under which the proceeding is had; and, according to this view, a statute is not unconstitutional unless it undertakes to dispense with notice. 12 Cor. Jur., Constitutional Law, § 1006, p. 1229, and cases cited. But in this jurisdiction the cases have established the rule that to constitute due process the statute must itself provide for notice; and, consequently, we must hold the portion of the act which purports to authorize forfeitures without notice to the owner to be invalid.

The order is reversed.

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118 Cal.App. 344

CLARK v. PACIFIC GAS & ELECTRIC CO.

Civ. 4415.

District Court of Appeal, Third District, California.

Nov. 16, 1931.

Rehearing Denied Dec. 16, 1931. Hearing Denied by Supreme Court Jan. 14, 1932.

1. Negligence 🔑23(1).

Liability under attractive nuisance doctrine attaches only when contrivance is novel in character and is of character virtually constituting trap into which children are led.

2. Negligence 🔑23(1).

Liability under attractive nuisance doctrine is not imposed merely because thing is attractive to children, but it must be novel in character, dangerous, and easily rendered safe.

3. Negligence 🔑23(1).

One having control of apparatus must be under affirmative duty to prevent children from playing thereon to be liable under attractive nuisance doctrine.

4. Negligence 🔑24.

Owner must have known, or as reasonably prudent man should have known of dangerous character of contrivance to be liable under attractive nuisance doctrine.

5. Negligence 🔑136(19).

Whether electric pole in street having spikes for climbing was attractive to children *held* for jury.

6. Electricity 🔑19(6).

Whether danger to children from electric pole in street having spikes therein could have been easily guarded against *held* fact question.

7. Negligence 🔑136(19).

Whether method of construction of electric pole in street which had spikes for climbing was new or novel *held* fact question.

8. Negligence 🔑136(19).

Whether spikes placed upon electric pole constituted virtual invitation to boys to climb thereon *held* fact question.

9. Electricity 🔑19(6).

Whether electric company should have reasonably anticipated danger of making it readily accessible for boys to climb pole in street *held* for jury.

10. Negligence 🔑23(1).

Where boy 12 years old climbed electric pole in street having spikes therein, in violation of railroad regulations, and was injured, attractive nuisance doctrine applied.

11. Electricity 🔑19(6).

Electric company's maintaining spikes in electric pole in contravention of regulation of railroad commission constituted negligence per se.

12. Evidence 🔑66.

It must be presumed electric company had knowledge of railroad commission's order applying to steps on electric pole on which boy climbed.

13. Trial 🔑260(1).

Refusing instructions which, in so far as giving correct statements, were covered by instructions given, *held* not error.

14. Trial 🔑253(4).

In action for injuries to boy climbing electric pole, instruction respecting negligence *held* not erroneous because ignoring contributory negligence, in view of other instructions.

> The instruction complained of stated in part that, if defendant was negligent and such negligence was proximate cause of injury to plaintiff, plaintiff was entitled to recover for injury sustained, if any. In another instruction court told jury that child involved was bound to exercise such care as children of his age would ordinarily exercise, and if jury found he failed to exercise care of ordinarily prudent boy of his age and experience in climbing pole and bringing himself in contact with wires, and that if he had exercised such care he would not have been injured by contact with wires, verdict should be for defendant.

15. Trial 🔑**133(2).**

In personal injury action, reference in opening statement to wealth of corporation and poverty of plaintiff *held* not prejudicial, in view of action of court.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by Murray Clark, by his guardian ad litem, A. W. Clark, against the Pacific Gas & Electric Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Thomas J. Straub, of San Francisco, and W. R. Dunn, of Sacramento, for appellant.

E. S. Mitchell, of Eureka, for respondent.

PLUMMER, J.

The plaintiff had judgment in the sum of $4,250 for and on account of damages alleged to have been suffered by reason of coming in contact with a high-powered electric transmission line, negligently maintained by the defendant. From this judgment the defendant appeals, and also from an order denying defendant's motion for judgment in its favor, notwithstanding the verdict.

The complaint alleges that on the 3d day of May, 1929, the defendant was maintaining a power transmission line suspended on poles, in and over the Cutten-McDonald tract, near or adjacent to the city of Eureka; that the volume of electricity carried in said line amounted to about 2,300 volts; that upon the poles the defendant caused steps to be maintained from the top thereof to within a few feet of the ground (the testimony showing about 18 inches); that said steps were maintained contrary to an order of the railroad commission known as and called "General Order 64–A"; that the order referred to became effective March 1, 1929, and specifies that the lowest step on any pole supporting an electric power line shall not be less than 7 feet 6 inches from the ground. It is further alleged in the complaint that the defendant so negligently maintained the pole involved in this action, and carelessly and recklessly maintained the steps thereon, so as to become attractive to children, and in such a manner as to constitute an invitation to children to climb thereon, to the danger of said children's lives. It is further alleged that no provisions were made to safeguard and prevent children from climbing the pole involved in this action, or to advise them of the danger thereof, and that the pole was maintained as an attractive nuisance. It is further alleged that on the 3d day of May, 1929, the plaintiff, a minor of the age of 12 years, at that time, while playing with other children, was attracted by the steps on said pole line and climbed from the ground to the top thereof, seizing one of the wires on said pole conducting electricity as aforesaid; that the plaintiff was severely injured, to his damage in the sum of $15,000.

In the second count contained in plaintiff's complaint, after alleging the negligent maintenance of the poles and of the steps, as herein referred to, that the plaintiff, a minor of the age of 12 years, on the 3d day of May, 1929, was playing on the streets of said Cutten-McDonald tract, and, observing the invitation of the defendant in so equipping said high-powered line, and not knowing the danger thereof, and not knowing that said line was a high-powered line or dangerous, the plaintiff being attracted thereto, climbed said pole on the steps provided for that purpose, and accidentally seized a line on such pole then conducting 2,300 volts, and was greatly shocked and injured, etc.

The answer denies the allegations of the complaint, save and except that it admits the maintenance of the power line and the steps thereon.

The appellant summarizes the facts as follows: "Defendant is shown to have maintained, along and inside of the right of way line of a public street in the city of Eureka, and alongside the block where the plaintiff had lived for 9 years, a pole line consisting of wooden poles carrying electric light and power wires. (Just how long the line had existed does not appear.) On the pole involved there were three lag screws on one side, beginning 12 inches from the ground, and so spaced that they might be used for steps climbing to a regular step 80 inches from the ground. From thence, steps continued to the top of the pole 35 feet from the ground, where there was a single crossarm carrying wires. At the time of the accident plaintiff was 12 years and 9 months of age, 5 feet tall; he had been warned by his father not to climb the poles because of the danger that existed in high-powered electric currents. Plaintiff had been warned by other boys to watch out for the wires. At the time of the accident, the plaintiff and several other boys were playing 'cowboy and Indian,' and desired to place a can upon the pole and use it as a signal. Joe, a brother of the plaintiff, went up the pole first to attach the signal, and then came down, and afterwards Murray went up. Murray went up the pole to place the can at a higher place. It appears that on the top of the pole there was a spike or nail inserted. According to the testimony of some of the witnesses the plaintiff was elected to climb the pole, as the one 'that mostly does all the dangerous work.' The plaintiff climbed the pole, using the lag screws as steps. The plaintiff picked out the pole in question because it was easy to climb. Plaintiff climbed to the top of the pole and sat astride of the crossarm, with one leg on each side of the tip of the pole where it extended above the crossarm."

The record further shows that as the plaintiff was going to tie a string fastening the can to the nail on the top of the pole, he started falling backward and grabbed hold of one of the wires to keep himself from falling, testifying that he was not thinking of the danger. In this manner the plaintiff was injured. The plaintiff further testified that he saw the steps on the pole and saw that it was easy to climb.

The cause appears to have been tried on the "attractive nuisance" doctrine that the steps maintained by the defendant constituted an invitation for boys to climb thereon, and that the steps, or spikes answering the purpose of steps, were maintained in violation of general order No. 64–A of the railroad commission. The pole in question was maintained by the defendant on a public street or highway, and therefore all cases dealing with private premises upon which poles are erected are inapplicable to any of the issues involved herein. Both the plaintiff and the defendant had equal rights to be upon the public highway, and the trespass, if any, as claimed by the defendant, could only consist in the climbing of the pole.

Upon this appeal the defendant urges that there is no evidence that the defendant knew or had reason to believe that the pole constituted a dangerous attraction to children; that there is no evidence that the pole was novel or uncommon to the plaintiff, etc.; that the evidence fails to bring the plaintiff within the class designated as of tender and immature years, etc.; that the danger could not have been remedied easily as to boys of plaintiff's age and size; and, finally, that the evidence shows that plaintiff was injured as a result of the common and usual risk and hazard, etc. It is further urged that the court erred in its instructions to the jury.

[1-10] The rule as to the character of instrumentality is thus stated in 19 California Jurisprudence, p. 625 et seq.: "An owner of a thing dangerous and attractive to children is not always and universally liable for injury to a child tempted by the attraction. His liability is said to bear a relation to the character of the thing, whether natural and common, or artificial and uncommon, and to the comparative ease or difficulty of preventing the danger without destroying the usefulness of the thing. Liability attaches only when the contrivance is novel in character, and is of such a nature as to virtually constitute a trap into which children, because of their ignorance and inexperience, are led, for it is the duty of parents to warn their children, and children are presumed to know, of common dangers existing in the order of nature. * * * It is an essential ingredient of an action based upon the attractive nuisance doctrine that a child should be attracted to the premise by a natural curiosity and desire to play upon or with the contrivance. * * * However, liability is not imposed in all cases merely because a thing is attractive to children; it must also be novel in character, dangerous, easily guarded and rendered safe, and the one having control of the apparatus must be under an affirmative duty to prevent children from playing thereon. It is for the jury to determine whether an instrumentality is attractive to children, and whether or not an owner is obliged to guard against injuries to trespassing children." And further: "In order that an owner of an attractive and dangerous instrumentality be held liable it must be shown that he knows, or as a reasonably prudent man ought to know, of the dangerous character of the contrivance. * * * The attractive nuisance doctrine applies only where the instrumentality which causes the injury is some novel and dangerous appliance, the consequences of meddling with which are not fully comprehended by infant minds." All of these propositions involve questions of fact as well as of law. Thus, it is for the jury to determine whether the instrumentality is attractive to children. It is likewise a question of fact whether the danger could have been easily guarded against. It is also a question of fact whether the method of construction was new or novel, and a question of fact whether the spikes placed upon the pole in question, from a few inches above the ground to the top thereof, constituted a virtual invitation to boys to climb thereon; and it is a question of fact, also, as to whether the defendant ought to have reasonably anticipated the danger of making it readily accessible for boys to climb up the pole in question. The rule in this particular we think applies to the present case just as in the case of Cahill v. Stone & Co., 153 Cal. 571, 96 P. 84, 85, 19 L. R. A. (N. S.) 1094, where, in considering a complaint based upon attractive nuisance, approval is given to the decision in the case of Barrett v. So. Pac. Co., 91 Cal. 302, 27 P. 666, 25 Am. St. Rep. 186, where it is said: "If defendant ought reasonably to have anticipated that leaving this turn table unguarded and exposed, an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. * * * A child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this and required to govern his actions accordingly." In the opinion in the Cahill Case the court further said (quoting from Consolidated Ry. Co. v. Carlson, 58 Kan. 66, 48 P. 635): "The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger is one of fact, falling within the province of a jury to determine."

And quoting with approval from the case of Biggs v. Consolidated Wire Co., 60 Kan. 223, 56 P. 4, 44 L. R. A. 655, where it is said: "We cannot say as a matter of law at what age a boy would be possessed of such intelligence, foresight and judgment as to charge him with contributory negligence." (The boy in that case was 14 years of age.)

In the case of Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L. R. A. 1915F, 638, the danger was open and apparent, to wit, a cellar from which the building had been removed, and into which the plaintiff was pushed in a fit of anger by a younger brother.

In Wallace v. Great Western Power Co., 204 Cal. 15, 266 P. 281, 282, where a boy had climbed an electric pole where there were no steps provided for climbing the same, but ascent was made by "shinnying" up one of the vertical supports until a horizontal brace was reached which was 8 feet from the ground, the court, in sustaining a motion for a nonsuit, used the following language: "In determining this question [the contributory negligence of the plaintiff], it may be conceded that the question of contributory negligence, especially where the evidence is in any material degree conflicting, is a question of fact for the jury, and it may also be conceded that the question as to whether children of the age of about 14 years or younger have been guilty of contributory negligence in relation to the instrumentality which has caused their injury or death, is as a general rule, a question of fact for the jury. The determination of this question, however, depends upon what the evidence discloses as to the degree of intelligence of the minor, and as to his opportunity for knowing or being aware of the danger which attends his coming or bringing himself in contact with such dangerous instrumentalities or agencies as are high powered electric wires. * * * The trial court was still in a position, upon motion for nonsuit, to determine from all of the circumstances of the case whether the deceased boy, though a minor, was sufficiently intelligent and sufficiently familiar with the dangers incident to contact with highpowered electric wires that his action in ascending this tower by the difficult means of ascent afforded and to the height and place of danger to which he did thus succeed in climbing, was to be held guilty of negligence as a matter of law." This case further shows, as we have stated, that no steps were provided for ascending the tower; it was not in a public highway, though it appears that it was in an open space where people occasionally congregated.

[11] In the instant case it is conceded that the spikes or steps upon which one might climb in ascending the pole were maintained in contravention of a rule or regulation or order of the railroad commission. Such act constitutes negligence per se.

In the case of Howell v. San Joaquin Light & Power Corp., 87 Cal. App. 44, 261 P. 1107, this court had occasion to consider the question of a violation of an order of the railroad commission relative to the height at which power lines should be suspended, and there held that a failure to comply with the order of the railroad commission constituted negligence. The holding of this court is supported by a large number of cases there cited showing that the rule is firmly established.

In the case of Minter v. San Diego Consol. Gas & Electric Co., 180 Cal. 723, 182 P. 749, relied upon by appellant, it was held that a corporation maintaining an electric power line strung upon wooden poles along a public highway in a country district, one wire being strung at a height of about 27 feet from the ground, and at about 14 or 16 inches from a tree in front of the plaintiff's premises, and another wire 8 feet higher and at a distance from the tree of about 3 feet, was not bound to anticipate that children might be attracted to climb into the tree where they might be endangered by the wires. The tree in this case, however, was about 3 feet in diameter and the first limb over 6 feet from the ground. and for a considerable distance between the lower branches and the defendant's wire the tree was practically bare of limbs. These facts we think render the holding in that case inapplicable here.

The facts in the case of Howard v. Transmission Co., 316 Mo. 317, 289 S. W. 597, 49 A. L. R. 1034, distinguish it from the case at bar. In the Howard Case the defendant corporation was maintaining a high-power line suspended on poles along the margin of a highway close to a stream used by boys in swimming and fishing. The pole was without any attachments to make climbing easy. Under these circumstances it was held that the defendant was not liable. The opinion in the Howard Case takes up the cases having to do with poles upon which climbing attachments or contrivances are installed, and thus points out the distinguishing facts. In our investigations, however, we find two cases supporting the appellant's contention, save and except that the maintenance of the poles involved was not violative of any order, ordinance, or statute rendering the manner of maintenance negligence per se.

In the case of State of Missouri ex rel. Kansas City Light & Power Co. v. Trimble, 315 Mo. 32, 285 S. W. 455, 49 A. L. R. 1047, it was held: "A pole carrying electric wires placed in the parkway between the roadway and the sidewalk of a public street is not an attractive nuisance which will render the electric company liable for injury to a child climbing it, by reason of the fact that it contains climbing steps beginning so close to the ground as to be easily reached by children." It was further held that a bright, intelligent boy 14 years old, doing well in school, living in the city, was guilty of negligence in attempting to climb a pole carrying a dangerous current of electricity, especially where he was warned of the danger before reaching the wire. In discussing the evidence in that case the court said: "There is no evidence in the record showing that the pole, as it existed, presented an attractive lure to boys to climb or to play upon." And, further, that the evidence shows that boys did not climb such poles, or at least that the boys in the neighborhood were not in the habit of doing so. In the instant case the testimony is to the effect that boys did climb the poles. It may be remarked that the opinion further shows that the dangers attending the climbing of the pole in that case were quite forcibly called to his attention while he was climbing upon the pole, the testimony showing that another boy had thrown a rock at him in an endeavor to cause him to desist from his climbing enterprise.

In the case of Reddy v. City of Watertown, 53 S. D. 347, 220 N. W. 851, it was held by the Supreme Court of South Dakota that the city was not liable in maintaining an electric transformer and choke coil on a pole 20 feet above the ground, and that a boy who climbed the pole and grasped the choke coil, which was uninsulated, was guilty of contributory negligence. The boy in that case was 14 years of age. There were spikes driven into the pole, the lowest one being 32 inches from the ground, the others 18 inches apart. These spikes enabled workmen to climb the pole to a platform upon which a transformer was placed. At the conclusion of the testimony the trial court directed the jury to find a verdict in favor of the defendant, and the judgment based thereon was affirmed. It may be further stated the facts show that in order to reach the platform where the boy was injured, he had to crawl through a very small hole in the platform upon which the transformer was placed, showing that it was a question of fact as to whether the dangerous instrumentality was readily accessible.

As against the authorities relied upon by the appellant are several well-considered cases which we think establish the true rule, especially in view of the fact that the act of the defendant in violating general order No. 64–A of the railroad commission must be held negligence per se, which distinguishes the questions we are considering upon this appeal from the cases relied upon by the appellant.

In Robertson v. Rockland Light & Power Co., 187 App. Div. 720, 176 N. Y. S. 281, the facts show that there were two poles in close proximity, one of which carried a telephone line, the other an electric power line. The poles were unguarded; were equipped with steps just as in the case at bar. The boy climbed the telephone pole and crossed over to the electric power pole standing near it, and was injured. The power company was held liable. Appellant claims that the holding in this case is overruled by the case of Parkes v. New York Telephone Co., 120 Misc. Rep. 459, 198 N. Y. S. 698, 700, which went to the Court of Appeals and was affirmed. Here, again, the case is readily distinguishable from the case at bar. It appears that what was called a "bos'n" chair was left attached to cables on a telephone pole. A boy climbed to the chair, and was precipitated to the ground. The chair was being used by workmen, and about 5 p. m. of the day on which the accident occurred, was anchored on one of the cables about 4 or 5 feet from the telephone pole. After the men had left, two or three 15 year old boys came along, climbed the pole, untied the rope which had been left on the pole, and swung back and forth on the rope, and a younger boy came along, reached out, and swung on the rope, and as a part of his play, voluntarily dropped to the ground. The court held, as we have stated, that the defendant was not liable, and in so doing said: "The defendant must not be cast in damages, unless it appears (1) that the appliance attracted children; (2) that it was inherently dangerous, or led or attracted the child into or upon another object inherently dangerous; and (3) that defendant knew or ought to have known both these things." All of which are different from the facts involved in the Robertson Case, and also different from the facts involved in the instant case, as we are dealing with an instrumentality inherently dangerous and, at the same time, an instrumentality that *appears* to be entirely harmless; electricity being *felt*, not *seen*.

In Znidersich v. Minnesota Utilities Co., 155 Minn. 293, 193 N. W. 449, 450, it was held that the rule of liability for maintaining dangerous instrumentalities attractive to children applies to the maintenance of poles on public highways, carrying electric power lines, where the poles are equipped with permanent contrivances serving the purposes of a ladder for climbing the same, and being out in the open and no way guarded or otherwise protected from free interference by children and others. In that case, just as in this, the pole was equipped with spikes, so arranged as to make climbing the pole an easy matter. A 12 year old boy climbed to the top of the pole to disengage the strings of a kite which had fallen over one of the wires, and in disengaging the string, was injured by coming in contact with a power wire. The court said: "The facts bring the case within the rule, applied by the prevailing weight of authority, that one who keeps and maintains upon his premises dangerous instrumentalities or agencies likely to attract children of tender years in play, or permits such conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement and pastime, is liable to a child who is injured." It was further said that the appliance involved in that case was upon a public street, and not upon private property; was at a point readily accessible to children. After citing a number of cases relating to trespassers, the court said: "The differentiating element is found in the fact that the child injured has as much right in the street where the alluring instrumentality is maintained, as the owner thereof, thus removing in a substantial way the element of unquestioned trespass necessarily presented where private property and premises are invaded." Citing Barrett v. Village of Princeton, 135 Minn. 56, 160 N. W. 190, where it is said: "The only element of trespass in the case where a public street is thus occupied is found in the technical wrong of the child in attempting to play with the offending attraction. And that act the jury may excuse, in the particular case, depending upon the alluring character of the article and the age and discretion of the child, with less hesitation perhaps than where there has been an actual invasion of the inclosed premises of another."

In McKiddy v. Des Moines Electric Co., 202 Iowa, 225, 206 N. W. 815, the Supreme Court of Iowa, in a well-considered case, held the defendant liable where the testimony showed that the company erected a pole bearing a large number of wires carrying an electric current of high voltage, on land adjoining a city park, with no warning sign, as required by ordinance, and no fence around it, but with spikes driven in it which were means of climbing to the wires. This case is identical with the case at bar. There, the company violated an ordinance in relation to the maintenance of the pole. Here the defendant violated an order of the railroad commission, which had power to direct and prescribe the method of maintenance, to wit, that there should be no steps or climbing spikes within 80 inches of the ground.

Again in Talkington v. Washington W. P. Co., 96 Wash. 386, 165 P. 87, the Supreme Court of Washington had occasion to consider the questions here presented, and held the defendant liable. In the opinion in that case a number of instances are cited where power wires were strung through or near trees of the kind that boys would be inclined to climb, in which cases the power company was held liable. It was further held that the question of contributory negligence of the boy involved was for the jury. It was further held that the owner of such a contrivance must be presumed to know of the tendency of boys to climb trees and poles.

In the recent case of Cooper v. North Coast Power Co., 117 Or. 652, 244 P. 665, 245 P. 317, the Supreme Court of Oregon went into the subject of the negligence of a defendant in maintaining an electric power line, and it was held, among other things, that the question of contributory negligence of the boy involved was for the jury. (The boy was 12 years of age). The opinion in the Cooper Case is replete with citations supporting the rule that one maintaining a highly dangerous instrumentality, readily reached by climbing a tree or a pole, must be held to have knowledge of the tendency of boys to climb trees and poles—in that case a tree. The Cooper Case also contains an answer to the appellant's contention that the primary and inducing cause of the plaintiff's injury in this action was his falling backward. In the Cooper Case the boy had climbed a tree and came in contact with the wires. The opinion in the Cooper Case cites other cases showing instances where boys had climbed trees and were injured by reason of the breaking of the branches, causing the boys to come in contact with the wires suspended through the trees.

Again, the case of Robertson v. Rockland Light & Power Co., supra, shows that the teacher of the school where the injured boy attended, had warned the children of the danger of coming in contact with the wires, and had warned them not to climb the pole. Nevertheless, it was a question of fact for the jury as to whether the injured boy understood the danger to which he was exposed. In the Parkes Case, supra, had the telephone wire been a high-power electric wire, it would have been a fact for the jury whether the company should have been charged with knowledge, or should have been held to have reasonably anticipated that children would climb the pole and come in contact with the death-dealing current. It was the boy's voluntary act in that case which caused his injury, and not the negligent maintenance of conditions which might allure a small child to come in contact with a wire carrying a high voltage of electricity.

In Heller v. New York, N. H. & H. Ry. Co. (C. C. A.) 265 F. 192, 17 A. L. R. 823, a case relied upon by the appellant, the circumstances show that it could not have been reasonably anticipated by the defendant that boys would climb to the heights which was done in that case, and come in contact with an electric wire.

In Stedwell v. City of Chicago, 297 Ill. 486, 130 N. E. 729, 17 A. L. R. 829, it was held that a municipal corporation which places a defectively insulated electric wire in such close proximity to a latticed pillar erected in a highway to support an electric railway, as to be dangerous to children who, following their instincts of play, may climb the pillar and come in contact with the wire, is liable. It was further held that it was a question for the jury to determine whether the latticed pillar was so attractive to children as to suggest the possibility of accident to one placing a wire near the top of the pillar. The annotations to this case, as found in 17 A. L. R., supra, are replete with cases adjudging the liability of a defendant, constructing wires, under circumstances similar to those presented upon this appeal.

In Thompson v. City of Slater, 197 Mo. App. 247, 193 S. W. 971, an 8 year old boy was injured by coming in contact with an uninsulated wire extending through a tree, when the limb above the wires upon which the boy was sitting broke, causing him to come in contact with one of the wires.

In Benton v. North Carolina Public-Service Co., 165 N. C. 354, 81 S. E. 448, the defendant was held liable where it strung high-power wire through the limbs of a tree. The lower limbs of the tree in question were 7 feet from the ground. It was held that the boy climbing the tree was not a trespasser.

In Wolf v. Ford, 7 Ohio App. 461, it was held the defendant was liable for injury to an 11 year old boy who in playing climbed a tree and came in contact with a wire. In that case stress was laid upon the fact that the wire was not properly insulated.

Appellant calls our attention to the case of Bradley v. Thompson, 65 Cal. App. 226, 223 P. 572, where a boy had trespassed upon the premises of the owner, took a dynamite cap from an open box, exploded it, and was severely injured. Upon these facts the court held the defendant not liable. In this connection we may call attention to the case of Town of Depew, Creek County, v. Kilgore, 117 Okl. 263, 246 P. 606, where it was held by the Supreme Court of Oklahoma that a child between the ages of 7 and 14 years is presumed incapable of more than a technical trespass as affecting the duty of owner of premises; that the duty of the owner of premises in guarding against danger is commensurate with the character of the instrumentality, appliance, or object upon the premises. It was further held that in the handling and keeping of dynamite caps, to protect children from danger, the utmost care was required. In that case the municipality using dynamite caps left them in an exposed position near a sidewalk used by children. One of the boys passing by picked up one of the caps, caused it to be exploded, was injured thereby, and the defendant was held liable.

[12] From what we have said it clearly appears that both the Reddy and Trimble Cases, supra, are against the great weight of authority and are furthermore readily distinguishable from the case at bar in that the violation of no order, ordinance, or statute regulating the construction of electric power lines was involved. Again, it must be presumed that the defendant had knowledge of general order No. 64–A of the railroad commission, which imparted knowledge of the fact of the inherent danger of placing spikes or steps upon poles carrying high-power electric lines, and of the allurement that would thereby be created for children with propensity to climb.

[13, 14] Appellant further urges as ground of reversal the refusal of the court to give certain requested instructions, and also in giving certain instructions. As to the instructions asked for by the defendant and refused, it is sufficient to say that most of them are not correct statements of the law, and in so far as they contain correct statements of the law, they are covered by the instructions given by the court to the jury. Particular objection is made to the following instruction, to wit: "The right of the plaintiff to recover damages in this case is dependent upon the negligence of the defendant. The negligence of the defendant if any, may be either the acts or omissions of the defendant or its agents and servants while in the course of their employment, or a violation of a statute, rule or ordinance which proximately caused the injury, if any, complained of. Proximate cause is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces injury and without which the injury would not have occurred. The efficient cause mentioned above is the one that necessarily sets the other cause in motion; the cause without which an injury would not have occurred. If the defendant was negligent, either through the acts and conduct of itself, its employees or its agents in the course of agency and employment or by violation of a rule of the Railroad Commission, and such negligence was the proximate cause of the injury to plaintiff, then plaintiff is entitled to recover for the injury sustained, if any." The contention being that no reference is made, in this instruction, to the contributory negligence of the plaintiff.

Objection is also made to instruction No. 20, which reads: "I instruct you that if you find that defendant violated General Order No. 64–A of the Railroad Commission and that such violation thereof proximately caused the injury, and that the doctrine of attractive nuisance applies as herein instructed thereon, and that plaintiff exercised such care as an ordinary child of like years would under like circumstances, then I instruct you plaintiff is entitled to a verdict for damages at your hands, if he has suffered injury."

Instruction No. 23 told the jury that the child involved in this action was bound to exercise such care as children of his age would ordinarily exercise; and, further, that if the jury found from the evidence that at the time Murray Clark climbed the pole, he knew of the danger attendant upon contact with the wires thereon, the verdict should be for the defendant.

The court further instructed the jury that if it found that Murray Clark failed to exercise the care of an ordinarily prudent boy of his age and experience, under the same or similar circumstances, in climbing the pole and bringing himself in contact with the wires, and that if the plaintiff exercised such care he would not have been injured by contact with the wires, the verdict should be for the defendant.

The cases which we have cited heretofore in this opinion relative to the law applicable show that the instructions given to the jury are in strict accord therewith, and do not require further consideration.

[15] Some contention is also made that counsel for the plaintiff was guilty of prejudicial misconduct in his opening statement. The length of this opinion already precludes any detailed mention of this objection. It was a reference to, in substance, the wealth of the corporation and the poverty of the plaintiff, the court promptly stating that testimony to that effect was inadmissible, and no testimony was offered.

While there is some conflict in the cases cited, we think that the weight of authority supports the judgment in this case, based upon the fact that an unseen danger, the presence of which can only be ascertained by an act which renders knowledge of its presence of no avail, demands great care and caution on the part of those maintaining such instrumentalities in order that the lives of children may not be destroyed. A consideration of the injuries sustained by the plaintiff, without reciting them, shows that the verdict is not excessive.

The order denying defendant's motion for judgment, notwithstanding the verdict, and the judgment, are affirmed.

We concur: PRESTON, P. J.; THOMPSON, J.

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118 Cal.App. 373

CARLIN v. MASTEN et al. (SCOTTISH UNION & NATIONAL INS. CO. et al., Interveners).

Civ. 4421.

District Court of Appeal, Third District, California.

Nov. 17, 1931.

1. Parties 🔑93(2).

Alleged misjoinder of interveners, not raised by demurrer or answer, *held* waived under statute (Code Civ. Proc. §§ 378, 430, 433, 434).

2. Garnishment 🔑108.

Money received 🔑6(5).

Assumpsit for money had and received *held* proper to recover premiums which agent deposited in his own name after collecting them for insurance companies, which were entitled to prevail as against agent's garnishment creditor (Code Civ. Proc. § 307).

It appeared that moneys on deposit in bank, which were garnished by agent's creditor, consisted exclusively of moneys collected for and on behalf of insurance companies, and that no part thereof belonged to agent, who deposited no moneys of his own in such account, but drew thereon only to pay companies or persons for whom he had collected moneys.

3. Parties 🔑75(3).

Objection to alleged misjoinder or nonjoinder of parties, not being taken before issue joined, was too late thereafter (Code Civ. Proc. §§ 378, 430, 433, 434).

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by F. E. Carlin against C. E. Masten and another, doing business as copartners, wherein a bank deposit was garnished, and the Scottish Union & National Insurance Company and others intervened claiming the deposit. Judgment for the interveners, and plaintiff appeals.

Affirmed.

W. P. Rich and Alvin Weis, both of Marysville, for appellant.

Robert L. Levy, of San Francisco, for respondents.

Desmond A. Winship, of Yuba City, for defendants.

Mr. Justice PLUMMER delivered the opinion of the court.

The interveners in this action had judgment, from which judgment the plaintiff appeals.

The action was begun by the plaintiff against C. E. Masten and James A. Long, doing business as copartners, to recover the sum of $732.57 alleged to be due from said defendants to the plaintiff. Following the filing of the complaint, a writ of attachment was issued under, and by virtue of which the sum of $558.59, theretofore deposited by C. E. Masten in the Savings Bank of Sutter county, was garnished by service of said writ and notice upon said bank. The interveners thereupon filed a third party claim with the sheriff of Sutter county, and also filed a petition in intervention in this action, setting forth that the sum mentioned was money collected by

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

C. E. Masten on account of insurance policies issued by the interveners.

The testimony shows, and the court found, that C. E. Masten was the agent of all of the interveners, acting severally and not jointly, and that the money on deposit in the bank was solely and exclusively money which he had collected for and on account of the insurance policies, as aforesaid, and which money belonged to the interveners.

It further appears from the testimony that C. E. Masten, while acting as the agent for the several insurance companies, collected premiums upon insurance policies, and also collected rents for different persons (not involved in this action), and deposited the money so collected in his own name in the Savings Bank of Sutter county; that from the money so deposited he paid to the persons for whom he had collected rent the amount to which they were entitled and also from time to time paid to the insurance companies represented by him the amounts to which they were severally entitled. No moneys belonging to Masten individually were deposited in the fund just referred to, nor were any checks drawn by him against said fund to pay for any of his private indebtedness or living expenses. The fund created by such deposits was drawn upon only to pay the persons or companies for whom he had collected money. Upon the trial it developed that none of the moneys on deposit belonged to any of the persons for whom Masten had collected rent, but the whole thereof belonged to the interveners in this action. The trial court filed a written opinion in which appears the following statement, which seems to us to be amply sustained by the testimony, to wit: "I think the evidence in this case discloses that the money on deposit in the bank and the subject of this action, belongs to the Insurance Companies, interveners herein. It represents 'premiums collected from the insured by Mr. Masten, the agent of the companies.' It was his custom to collect these premiums for the Companies when due, place them to his credit in the bank, and forward by his check to the several companies. * * * The fact that he handled the affairs of the companies in this way did not divest the companies of their ownership of the moneys so deposited. * * *" The findings of the court are in accordance with the views expressed in the above quotation.

[1] Upon this appeal it is urged that there is a misjoinder of parties as interveners, and that the respective amounts due the interveners is not stated. An inspection of the record discloses that no demurrer was filed, and that no objection was taken to the complaint in intervention by the plaintiff's answer thereto. Section 430, Code of Civil Procedure, subd. 4, provides for taking advantage of any defect in this particular if it appears upon the face of the complaint. Section 433, Code of Civil Procedure, permits the taking advantage of such defects by answer in the event that such defect does not appear upon the face of the complaint. Section 434, Code of Civil Procedure, sets forth that, if no objection is taken either by demurrer or answer, the defect is waived.

[2] Again, it is objected that the form of the action does not permit recovery on the part of the interveners. Section 307, Code of Civil Procedure, specifies that there is only one form of civil action for the protection of private rights. As against the defendant in this action, we think the text of section 14 of 17 California Jurisprudence, 618, applies: "Assumpsit for money had and received is the proper remedy to recover money in the hands of the defendant which he admits belongs to the plaintiff, and which he has promised to pay. It will lie to recover money collected by the defendant which belongs to the plaintiff, but has not been paid over to him; money received and held by the defendants as trustees for the plaintiff," etc. As we have said, no objection to the form of the action was taken by the plaintiff. The relationship existing between the bank and Masten is not involved in this action, and therefore we need not consider cases bearing upon that question. Only one question is involved: Did the deposit of money by C. E. Masten, of the premiums collected by him, transmute the ownership of the moneys so deposited as to render it liable under garnishment proceedings or attachment proceedings, and liable to be taken in payment of debts owing third persons? The appellant insists that the moneys collected were so commingled by Masten as to render them so liable, and places his reliance upon the case of the Estate of Arms, 186 Cal. 554, quoting from page 561, 199 P. 1053, 1055, as follows: "Where property, with the consent of the trustor, has been in that manner commingled with the property of the trustee, so that no part of it can be definitely traced and segregated from that held by the trustee, or identified as a part of any specific fund or property, none of it can be considered as the property of the trustor. 'The right of pursuing it fails when the means of ascertainment fails. This is always the case where the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description.' Where the identity cannot be traced the trustor 'is forced to rely upon the personal liability of the trustee. * * * He has no special lien upon the general estate of the trustee which is superior to that of any other creditor,' and his only remedy is a personal action for damages or for money had and received." (Citing a large number of cases.) Appellant, however, does not quote all of the opinion, and does not quote the portion of the opinion which we think applicable here, to wit: "The case is

different, of course, where the money or property of the trustor can be traced into a particular fund or deposit, where it still remains, though mingled with other money, or where it is used to establish a particular business which was continued in existence and is carried on by the trustee or someone taking from him with knowledge of the trust"—citing Elizalde v. Elizalde, 137 Cal. 641, 66 P. 369, 70 P. 861; Moore v. Jones, 63 Cal. 13, and Byrne v. McGrath, 130 Cal. 316, 62 P. 559, 80 Am. St. Rep. 127. In the present case it is shown that the entire fund was made up of moneys collected for and on behalf of the interveners, and that no part of the fund in the bank belonged to the defendant Masten.

In Title Ins. & Trust Co. v. Ingersoll, 158 Cal. 474, on page 484, 111 P. 360, 364, we find the following statement: "The fact that the trust money was in part commingled with the community property so as to destroy its specific identity does not necessarily destroy the trust as to that part, nor prevent its enforcement. It prevents the court from tracing it and declaring any specific parcel of property to be trust property; but the trust may still be enforced by a personal judgment * * * for the amount of money not traceable into specific parcels." (Citing a number of cases.)

In the case of Elizalde v. Elizalde, supra, the court in its opinion said: "'If a trustee pay trust money into a bank to the account of himself, not in any way earmarked with the trust, and also keep private moneys of his own to the same account, the court will disentangle the account, and separate the trust from the private moneys, and award the former specifically to the cestui que trust.' If the trustee, after so mingling the funds, has drawn therefrom from time to time, it will be presumed that the moneys so drawn were from his own portion of the fund, rather than from the moneys held by him in trust." (Citing cases.) In that case it was held that the property could not be applied to the satisfaction of his debts owing to general creditors.

In Keeney v. Bank of Italy, 33 Cal. App. 515, 165 P. 735, 736, the court having under consideration a somewhat similar question, said: "It is equally well settled that the equitable owner of trust funds may follow them into the hands of all persons who acquire them with notice of the trust" (citing Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; 3 Pomeroy Juris § 1048), and that, where a trustee has mingled trust funds with his individual moneys, drawing upon the aggregate from time to time, it will be conclusively presumed, both against him and his creditors and persons claiming under him, that the residue thereof is attributable to the trust so far as may be necessary to keep the trust moneys intact. To the same effect is the case of Ohio Electric Car Co. v. Duffet, 48 Cal. App. 674, 192 P. 298.

In Newport v. Hatton, 195 Cal. 132, 231 P. 987, 993, it is held that, where money or property of a trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may follow the specific personal property and enforce the trust; although the identical pieces of coin cannot be ascertained, yet, if there is so much belonging to the trust in a general heap of private trust funds, the cestui que trust may take out such portion as equals the amount of the trust fund.

The question of notice is not material in this case. There is no contention that any credit was given by the plaintiff to Masten on account of the manner in which the moneys belonging to the interveners were deposited in the bank. The ownership of the money so deposited only is involved.

[3] The alleged misjoinder or nonjoinder of parties not having been taken before issue joined, it was too late to raise that objection thereafter. Section 378, Code Civ. Proc.; Chan Yo Chow v. Lim Sing, 87 Cal. App. 278, 261 P. 1039.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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118 Cal.App. 219

MERRICK & RUDDICK, Inc., v. TITLE INSURANCE & TRUST CO. et al.

Civ. 7995.

District Court of Appeal, First District, Division 2, California.

Nov. 6, 1931.

Brokers ⟹71.

Selling agent's rights to surplus funds after payment of commission under original agreement for sale of lots *held* terminated by supplemental agreement, on failure to meet conditions specified therein.

Original agreement for sale of lots on commission, in form of a declaration of trust, provided that after certain payments were made, remaining funds from sales of lots should be divided between beneficiaries of the trust and the selling agent, and that the interest of selling agent should terminate at a certain time, except as to its interest in the proceeds of lots sold by it during the sales period. Subsequently, a supplemental agreement was made giving sales agent an extension of time in which to sell lots, at the end of which all its right under the original declaration of trust should end if it failed to make certain sales.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Merrick & Ruddick, Inc., against the Title Insurance & Trust Company and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Schweitzer & Hutton, of Los Angeles (H. F. Clary, of Los Angeles, of counsel), for appellants.

Gesner Williams and Joseph Harris Brewer, both of Los Angeles, for respondent.

SPENCE, J.

Plaintiff brought this action against defendant Security Trust & Savings Bank, the trustee, and certain other defendants who were beneficiaries under a declaration of trust and its supplements seeking an accounting of alleged profits claimed to be due to plaintiff as selling agent of the property involved. After a reference for the purpose of an accounting, judgment was entered in favor of plaintiff in the sum of $18,209.06, together with interest. From this judgment, defendants appeal.

In 1923, Harry Merrick, the vice president of Sunday, Merrick & Ruddick, Inc., had an option on a large tract of land. He negotiated with the appellant beneficiaries for the purchase and subdivision of the tract, and the negotiations culminated in the original declaration of trust. The purchase of the tract was consummated by a loan from the Title Insurance & Trust Company and by the money advanced by the appellant beneficiaries. The property was conveyed to the appellant trustee for the purpose of subdivision and sale, and Sunday, Merrick & Ruddick, Inc., was appointed selling agent to direct the sales for a period of one year. The original declaration of trust dated March 9, 1923, provided, in paragraph III thereof, that the proceeds of the sales should be distributed "in the following order of priority": (1) To the payment of taxes, assessments and other expenses in the care and maintenance of the trust property. (2) To the payment of the compensation of the trustee as therein provided. (3) "A sum equal to twenty per cent (20%) of all sales made by the said Selling Agent during a period of one year from the date hereof, but not otherwise, shall be paid to said Selling Agent to cover its commission and selling costs, only, however if the property is sold by it at retail, that is to say, a subdivision." (4) Such sums as were authorized by the beneficiaries for the development and improvement of the property. (5) The sums set forth in a schedule of release prices to be paid to the Title Insurance & Trust Company. (6) "All of the balance shall be paid to the beneficiaries until they have received the entire sum of money paid in by them to the trustee for the purposes of this trust, plus interest thereon at six per cent (6%) per annum from the date of payment until repaid, and a sum equal to fifty per cent (50%) of the amount paid in by them in addition thereto, unless the beneficiaries direct the trustee to hold and apply such funds to the improvement of said tract, in which event such money shall be expended by the trustee for such improvements but such expenses shall not be charged against the beneficiaries as payments to them, or any of them, of the moneys to which they are entitled under the terms hereof."

Then follows this paragraph: "After the selling agent has been paid its commission as aforesaid, and the beneficiaries have been paid the amounts above provided to be paid to them and the said tract has been fully improved, then all remaining money shall be divided equally and one-half thereof shall be paid to the beneficiaries and the other one-half to the selling agent, provided, however, that the said selling agent shall only be entitled to moneys arising out of the sale of lots actually sold by it during the period of one year from the date hereof, it being specifically understood that at the expiration of said year all interest of the selling agent in and to this trust and in and to the property covered hereby shall ipso facto cease and determine except as to its interest in the proceeds of the lots which it has actually sold during said period of one year." The termination of the trust was provided for as follows: "This trust shall, unless otherwise terminated, continue to and until the sale and disposition in fee of all the property subject thereto and the distribution of all proceeds thereof, in accordance with the terms hereof, or until the expiration of twenty-five years, whichever event shall happen first."

Thereafter the improvement and subdivision of the property proceeded, and sales were made by the selling agent. Before the expiration of the year, the selling agent requested an extension of the term and an increase of its commission, and on November 9, 1923, the parties executed a supplemental declaration of trust. It provided, among other things, "that the said Selling Agent shall be and is entitled to twenty-five per cent (25%) of the selling price of all lots sold by it in Tract No. 5956, in lieu of twenty per cent (20%) as fixed by Subdivision 3 of Paragraph III of said Declaration of Trust, it being understood that out of said twenty-five per cent (25%) the said Selling Agent is to pay all of its selling expenses, including all advertising and publicity costs. * * * It is understood and agreed that the period in which said Selling Agent was entitled to direct the sale of the said real estate; that is to say one year from and after the date of said original Declaration of Trust, is hereby extended to a period of two years from the date of said Declaration of Trust; that is to say, until the 9th day of March, 1925."

After the incorporation of respondent Merrick & Ruddick, Inc., the original selling agent sold and transferred all of its assets to respondent, which sale was subject, however, to a prior partial assignment of its interest in the declaration of trust to James M. Canterbury. The interest of James M. Canterbury was subsequently assigned to one of the appellants, but the foregoing assignments other than that by the original selling agent to respondent are immaterial for the purpose of this discussion. Respondent requested that it be substituted as selling agent, and further requested a continuation of the selling agency after the date then fixed for its termination, to wit, March 9, 1925. Accordingly, on June 28, 1924, a second supplemental declaration of trust was executed by the parties, respondent, however, being substituted for the original selling agent. This document provided among other things, as follows:

"The selling agent is hereby authorized to sell the said property as shown by recorded subdivision maps, or by said plan or lay-out, and in the event that it sells, between the date hereof and the 9th day of March, 1925, sufficient of said property so that on the 9th day of March, 1925, there are in the hands of the trustee contracts in conformity with the provisions of said Trust No. 5500 and not in default and which are executed by bona fide purchasers and which cover lots not under contract at the date hereof, in the principal sum or amount of one hundred thousand ($100,000.00) dollars, minus such cash sales as have been made between the date hereof and the said 9th day of March, 1925, then the said selling agent shall be entitled to direct sales under the terms of said trust until the 9th day of March, 1926; and in the event that the said selling agent is entitled to said extension of time and if, during the period from March 9, 1925, to March 9, 1926, said selling agent sells sufficient property so that on the last-mentioned date there are in the hands of the trustee similar contracts not in default executed by bona fide purchasers and covering lots or parcels which had not been sold on March 9, 1925, of the total selling price of two hundred thousand ($200,000.00) dollars, minus such cash sales as have been made between March 9, 1925, and March 9, 1926, then the said selling agent shall be entitled to direct sales for a further period of one year expiring on the 9th day of March, 1927, at which time all their rights under said trust and in and to the trust estate shall wholly cease and end.

"Time is made strictly of the essence of the above paragraph, and unless the said contracts above specified are in the hands of the trustee in the principal amounts above specified, at the specified dates, then the rights of the selling agent hereunder shall in each case ipso facto cease and terminate."

On March 5, 1925, respondent's time to obtain contracts totalling $100,000 was extended to July 9, 1925, and respondent apparently produced the required contracts within the time as extended. However, it was unable prior to March 9, 1926, to obtain additional contracts in the amount required, and, by the terms of said second supplemental declaration of trust as well as the express declarations of the parties, the selling agency terminated. At that time about 40 per cent. of the property had been sold. It is conceded that all commissions provided for in these instruments totalling approximately $150,000 have been paid to respondent, but respondent brought this action for an accounting of additional money claimed to be due under the paragraph following subdivision 6 of paragraph III of the original declaration of trust above set forth.

Throughout the trial and upon this appeal, appellants have contended that respondent was not entitled to an accounting nor to judgment in any amount, as respondent's rights under the trust and in and to the trust estate had ceased and terminated by the agreement of the parties. In other words, appellants take the position that by the second amended declaration of trust respondent, in consideration of its substitution as sales agent upon the commission specified and the promise to extend its term, agreed that all of its interest in the trust should cease and terminate at the expiration of its term as selling agent. If appellants are correct in this contention, respondent would be entitled only to the commissions earned, all of which have been paid. Both appellants and respondent contend that the instruments are clear and unambiguous, but the varying constructions placed upon these instruments by the parties are diametrically opposed. At the expense of repetition of some of the salient features, we shall proceed to a further consideration of the terms of the declaration of trust and its supplements.

Under the original declaration of trust, respondent's precedessor in interest was designated as selling agent to direct the sales of the property during the first year at prices not less than those specified on a minimum schedule to be agreed upon. The selling agent under subdivision 3 of Paragraph III was to be paid a commission of 20 per cent. on all sales made by it during the year. The payment of this commission was given priority over certain other payments as above stated, Then under the paragraph following subdivision 6 of said paragraph III "all remaining money," after the selling agent's commissions had been paid and after the amount specified in subdivision 6 had been paid to the beneficiaries, and after the tract had been fully improved, was to be divided between the beneficiaries and the selling agent. It was "provided, however, that the said selling agent shall only be entitled to moneys arising out of the sale of the lots actually sold by it during the period of one year from the date hereof, it being specifically understood that after the expiration of said year all interest of the selling agent in and to this trust and in and to the property covered hereby shall ipso facto cease and determine except as to its interest in the proceeds of the lots which it has actually sold during said period of one year."

We may pause to observe that, although at first blush there may be no apparent ambiguity in the above-mentioned provisions, it is at least obvious that their practical application would be fraught with difficulties. What was the "remaining money" to which the parties had reference? Did they refer to cash on hand at the end of the selling agent's term of one year, or after all payments given priority in the preceding six subdivisions of paragraph III had been made or upon the termination of the trust? If the term "remaining money" was used synonymously with "profits" (which latter term was not employed in the declaration of trust), then upon what basis were the profits on the sales of a portion of the subdivision made by the selling agent during the first year of this 25-year trust to be determined? We may further observe that all of the interest of the selling agent in the trust and trust estate was to terminate at the end of one year, "except as to its interest in the proceeds of the lots which it had actually sold during said period of one year."

Turning to the supplemental declaration of trust executed on November 9, 1923, we find that the period in which said selling agent "was entitled to direct the sale of the said real estate" was extended to March 9, 1925, and that its commissions were increased from 20 per cent. to 25 per cent. This instrument contained no other reference to the compensation of the selling agent. It did not expressly extend the provisions of the paragraph following subdivision 6 of paragraph III of the original declaration of trust, and that paragraph remained limited by its terms "to moneys arising out of the sales of lots actually sold by it (the selling agent) during the period of one year," unless an extension thereof may be implied.

Referring now to the second supplemental declaration of trust dated June 28, 1924, we find a recital of the assignment by the original selling agent to respondent, and the agreement of all parties to respondent's substitution as such selling agent. We find the further recital that the previous supplemental declaration had extended the period of time, in which the selling agent "was entitled to direct the sale of said real estate" until the 9th day of March, 1925, and that the parties desired to amend the "Declaration and said Supplemental Declaration in certain particulars." Then follows an agreement to extend the time in which the selling agent would be "entitled to direct sales" to March 9, 1926, in the event that sufficient sales were made prior to March 5, 1925, and a further agreement to again extend the time in which the selling agent would be "entitled to direct sales" to March 9, 1927, in the event that sufficient sales were made prior to March 9, 1926. This paragraph ended with the words "at which time all their rights under said trust and in and in and to the trust estate shall wholly cease and end."

The paragraph following read: "Time is made strictly the essence of the above paragraph and unless the said contracts above specified are in the hands of the Trustee in the principal amounts above specified, at the specified dates, then the rights of the Selling Agent hereunder shall in each case ipso facto cease and terminate."

We are of the opinion that appellants' contention that respondent's rights under the paragraph following subdivision 6 of paragraph III of the original declaration of trust have terminated by virtue of the provisions of the second supplemental declaration of trust must be sustained. The language of that instrument can be given no other construction. The broad provisions therein contained to the effect that "all the rights under said trust and in and to the trust estate shall wholly cease and end" and that in the event of failure to make the specified sales at the specified times "the rights of the Selling Agent hereunder shall in each case ipso facto cease and terminate" are not qualified in any manner. Unlike the provisions of the paragraph following subdivision 6 of paragraph III of the original declaration, it was here agreed that all rights would be terminated without any exception.

Counsel for respondent contends that such construction is unreasonable, but we do not believe that it is. Respondent and its predecessor obtained extensions of their term as selling agents and were entitled to large commissions on the gross sales made during that term as extended. They acted as selling agents for three years, earning a total of approximately $150,000 in commissions, and, under their agreement, were entitled to act for another year in the event that a specified amount of sales were made. It is not unreasonable to assume that respondent was willing to waive any right which it had to participate in the "remaining money" in consideration of appellants' agreement to allow such extensions and to substitute respondent as selling agent at the commissions specified. In our opinion, this is precisely what respondent agreed to do, for the language of the second supplemental declaration of trust with respect to the termination of its rights is clear and explicit and must govern in the construction of the instrument. Civ. Code, § 1638. From what has been said, it follows that respondent was not entitled to an accounting of the "remaining money."

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 758

MERRICK & RUDDICK, Inc., a Corporation, Plaintiff and Appellant, v. TITLE INSURANCE & TRUST COMPANY, a Corporation, et al., Defendants; Security Trust & Savings Bank, a Corporation, C. M. Church, C. M. Church, Executor of the Estate of D. W. Horst, Deceased, L. H. Roseberry, W. D. Longyear and L. W. Craig, Respondents.

Civ. 7996.

District Court of Appeal, First District,
Division 2, California.
Nov. 6, 1931.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Gesner Williams and Joseph Harris Brewer, both of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles (H. F. Clary, of Los Angeles, of counsel), for respondents.

SPENCE, J.

This is an appeal by plaintiff from the same judgment which we had under consideration in Merrick & Ruddick, Inc., v. Title Ins. & Trust Co., 5 P.(2d) 67. Plaintiff here complains of the method adopted in computing the amount of the judgment, contending that it was entitled to judgment in a larger sum. We deem it unnecessary to discuss the propriety of the method adopted, as we are of the opinion that plaintiff was not entitled to an accounting nor to any judgment against defendants.

For the reasons stated in the opinion this day filed in Merrick & Ruddick, Inc., v. Title Ins. & Trust Co. (Cal. App.) 5 P.(2d) 67, the judgment is reversed, respondents herein to recover their costs.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 367

WESTERN CONCRETE PIPE CO. v. GRABOVICH et al. (SMITH, Intervener).

Civ. 6876, 6877.

District Court of Appeal, Second District,
Division 1, California.
Nov. 17, 1931.

Rehearing Denied Dec. 15, 1931. Hearing Denied by Supreme Court Jan. 14, 1932.

1. Appeal and error 🔑612(1).

Appellants, in absence of stipulation authorized by statute, *held* not entitled to certificate of judge on partial reporter's transcript called for by notice (Code Civ. Proc. § 953a).

Appellants at time of filing notice of appeal also filed with clerk a document entitled "notice demanding clerk's transcript and stenographic report of trial," limited to request that reporter prepare a transcript of phonographic report of portion of trial only wherein motions were made by defendants, that order of arrest be issued, directed to witnesses subpœnaed for and on behalf of defendants who failed to appear, also motion of defendants for continuance based on ground of absence of witnesses and sickness of defendant, and all matters pertaining thereto, which transcript called for by notice filed with clerk was not the transcript authorized by Code Civ. Proc. § 953a.

2. Appeal and error 🔑607(1).

Appellants' delay in proceeding to obtain from reporter transcript warranted order dismissing proceedings (Code Civ. Proc. § 953a).

Delay in proceeding to obtain from reporter transcript resulted from appellants' failure to give undertaking for reporter's costs, or promptly complete their arrangement with him for payment of costs, and was in part natural outcome of efforts to obtain from reporter different kind of transcript from that to which they were entitled under Code Civ. Proc. § 953a.

Appeals from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by the Western Concrete Pipe Company against Joe Grabovich, and another, wherein Sidney Smith intervened. Judgment for plaintiff, and, from subsequent orders granting plaintiff's motion to dismiss proceedings theretofore taken for purpose of securing transcript for use on appeal, and denying motion of defendants for an order relieving default, if any, in perfecting appeal, and obtaining reporter's transcript, defendants and intervener appeal.

Affirmed.

Lewis W. Hibben, of Los Angeles, for appellant Grabovich.

L. E. Dadmun, of Los Angeles, for appellants Fidelity & Deposit Co. and Smith.

Arthur M. Ellis and Robert H. Dunlap, both of Los Angeles, for respondent.

CONREY, P. J.

On the 6th day of June, 1929, pursuant to notice duly given, the attorneys for the respective parties in this action appeared before the superior court and two motions were presented, whereupon the court made the orders which are the subjects of the present appeals. The plaintiff moved for an order dismissing proceedings theretofore taken by the defendant for the purpose of procuring transcripts for use on the appeal of the case, on the ground that the defendant had failed to comply with the terms of section 953c of the Code of Civil Procedure, and had not taken the steps required by said section either within the time or in the manner prescribed, or at all. That motion having been presented, the defendants opposed the same and also moved the court for an order relieving said appellants from their default, if any, in perfecting their appeal and obtaining the reporter's transcript. This motion for relief was made upon ground of excusable neglect, of which the circumstances were set forth in an affidavit of the attorney Mr. Dadmun. Those matters having been submitted to the court, the motion of appellants to be relieved from their default was denied, and the motion of the plaintiff to dismiss the proceedings to obtain reporter's transcript was granted. Thereupon the defendants and intervener filed separate notices of appeal from said orders. Thereafter, in accordance with stipulations filed herein, the appeals were consolidated for hearing and determination. The record before us consists of a bill of exceptions, covering the said motions and affidavits and all matters introduced in support thereof, and considered by the court and the orders of the court denying and granting said motions respectively.

[1] It appears that on March 28, 1929, defendants filed a notice of appeal from a judgment entered against them on February 15, 1929, "and from the order of the court denying defendant's motion for a new trial, which said notice of motion for new trial was denied on the 18th day of March, 1929." At the same time appellants filed with the clerk a document entitled "notice demanding clerk's transcript and stenographic report of the trial pursuant to section 953a C. C. P." But the demand thus made was limited to a request that the reporter prepare a transcript "of the phonographic report of that portion of the trial only wherein motions were made by defendants; that an order of arrest be issued, directed to the witnesses subpœnaed for and on behalf of said defendants who failed to appear; also a motion of the defendants for continuance, based on the grounds of the absence of witnesses and the sickness of defendant, and all matters pertaining thereto, including objections, comments, and remarks by the court, rulings thereon, and all objections and exceptions of counsel, and the matters to which the same relate, and all orders and rulings of the court thereon, to be made up and prepared," etc. There is not in this record any direct statement of facts in relation to the motion for new trial, and the ruling thereon, and the notice of ruling thereon, except that, at the hearing of said motion in the superior court, Mr. Dadmun stated that his notice of appeal and notice demanding clerk's transcript and reporter's transcript have been filed "within the time allowed by law, to-wit, within the ten days from notice of denying motion for new trial." This statement should be construed as an admission by counsel for appellants that they were duly served with notice of an order denying their motion for a new trial. The reporter's transcript called for by the notice which appellant filed with the clerk on March 28, 1929, was not the transcript authorized by section 953a, Code of Civil Procedure. In the absence of the stipulation authorized by the last sentence of said section 953a, appellants were not entitled to the certificate of the judge upon a partial reporter's transcript such as was called for by the notice which they filed. If appellants desired to present their appeal upon a portion of the record selected by them, and could not obtain from the opposite party a stipulation, they should have exercised the diligence and industry required for the preparation of a proposed bill of exceptions. In Allen v. Conrey, 22 Cal. App. 409, 134 P. 730, 731, Mr. Justice James pointed out this distinction very clearly: "Where the official reporter prepares the transcript under the alternative method, no amendments are provided to be offered by the opposing party; but there is submitted to the trial judge a transcript made up by an officer of the court whose business it is, when so required at the trial, to make a record of all the evidence and proceedings. Because of the fact that the official reporter does furnish this transcript, no doubt is due the omission in the statute to provide for service of a copy of the statement upon the adverse party and the submission of proposed amendments by such adverse party, as is the requirement where a bill of exceptions or statement is prepared under the old method." See, also, In re Millsap, 92 Cal. App. 653, 268 P. 970.

[2] The delay of appellants in proceeding to obtain from the reporter the transcript called for by them resulted from their failure to give an undertaking for the reporter's costs, or promptly complete their arrangement with him for payment of those costs. These delays

in part were the natural outcome of their efforts to obtain from the reporter a different kind of transcript from that to which they were entitled. We are satisfied that the trial judge was not guilty of any abuse of discretion in making the two orders from which the defendants and intervener have appealed.

The orders are affirmed.

We concur: HOUSER, J.; YORK, J.

118 Cal.App. 318

WOODRUFF v. BENBOW.

Civ. 6818.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1931.

Rehearing Denied Dec. 12, 1931.

1. Limitation of actions ⚷167(1).

Chattel mortgagee could not take possession of property from one having lien for storage and repairs without satisfying debt, statute respecting extinguishment of lien by lapse of time not applying (Civ. Code, §§ 1856, 2911, 3051).

2. Chattel mortgages ⚷138(1).

Chattel mortgage *held* not to have priority over subsequent lien for storage and repairs arising under contract with mortgagor.

3. Replevin ⚷103(4).

In action for possession of personal property, judgment requiring plaintiff to return property to lien claimant or pay value thereof *held* warranted, where answer contained prayer for recovery of possession of property or for sum claimed by defendant (Code Civ. Proc. § 667).

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by Leonard J. Woodruff against W. Ray Benbow. From a judgment for defendant, plaintiff appeals.

Affirmed.

J. A. Coleman and Ed. Fitzpatrick, both of Los Angeles, for appellant.

A. B. Ritchey, of Pasadena, for respondent.

CONREY, P. J.

On December 27, 1927, plaintiff commenced this action against respondent Benbow and one Mary Ball Lewis to recover possession of certain described personal property, consisting of furniture, screens, pictures, etc. Plaintiff was the owner of a chattel mortgage on said personal property, which mortgage had been given to him in the year 1922 by Mrs. Lewis, owner of the property, and which property, at the time of commencement of this action, was in possession of respondent Benbow. By means of a claim and delivery proceeding the property was placed in possession of the sheriff, who then sold it at public sale held pursuant to the decree of foreclosure of the chattel mortgage, and plaintiff became the purchaser. At the time when the property was taken away from respondent under the claim and delivery proceeding, respondent Benbow was in possession of said personal property claiming the right to hold such possession for the protection and enforcement of a lien arising out of repairs and storage of the property by respondent for Mrs. Lewis. By his answer to the complaint in this action respondent asserted his right to said lien for storage and repairs, claiming that his rights in the premises were superior to those of the plaintiff. Judgment was rendered in favor of respondent, and the plaintiff appeals therefrom.

The property in question had come into possession of respondent in August, 1924, in accordance with a written contract between respondent and Mrs. Lewis. The storage and repair charges, referred to in the answer and findings herein, were provided for and authorized in said contract. The facts concerning the storage and repairs and the value thereof were found by the court, which findings are sustained by the evidence. It thus appears that the principal question in this case is a question of priority of right as between the owner of the chattel mortgage and the person holding possession of the personal property described in the mortgage, the possessor claiming to hold for the protection of a lien for storage and repairs, later in its date of origin than the said chattel mortgage.

Appellant's first point is that the court should have sustained his "demurrer to the affirmative matter set up" in the said respondent's answer. We think that the answer was sufficient to raise the issues which were tried by the court.

[1] Next it is contended that the statute of limitations has run as against respondent's claim of lien for alleged work and services; also that the claim for storage was barred as to each and every month within the first four years of the original lease providing for monthly payments for the storage. The repair work was commenced in September, 1924, and completed in March, 1925. The lease in which the contract for storage was contained was a five-year lease beginning August 1, 1924. The liens for repairs and for storage, respectively, are statutory liens. Civ. Code, §§ 3051 and 1856. Respondent never brought

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

any action on the storage contract or to enforce the liens claimed by him. His answer to the complaint in this action was filed on January 6, 1928. In support of appellant's contention that the lien of respondent was extinguished by lapse of time, appellant refers to section 2911 of the Civil Code, which reads as follows: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Apparently, however, this section 2911 was not intended to prevent the operation of the equitable rule that a debtor may not quiet title against an outlawed mortgage or pledge without paying his debt. Thus in Puckhaber v. Henry, 152 Cal. 419, 424, 93 P. 114, 116, 125 Am. St. Rep. 75, 14 Ann. Cas. 844, the Supreme Court said: "It is the general rule enunciated by courts of last resort that a pledgor cannot recover possession of the pledged property without paying his debt, although the debt be barred by the statute of limitations, and this rule is based on the equitable doctrine already stated. This court has announced the same rule in regard to a pledge, although perhaps never in a case where it was necessary to the decision. [Citing cases.] We have no doubt that it is the correct rule in the absence of express provision to the contrary, and that section 2911 of the Civil Code should not be construed as providing to the contrary." And if the pledgor is not entitled to take possession of property from the pledgee without satisfying the debt, we see no reason why the holder of a chattel mortgage given by the pledgor against the same property should be held to be in any better situation in that respect than is the mortgagor in whose shoes the mortgagee stands, unless the pledge itself (aside from the statute of limitations) is for some reason subordinate to the mortgage.

[2] Appellant in support of his contention that his chattel mortgage should be given priority over the Benbow liens relies upon Wilson v. Donaldson, 121 Cal. 8, 53 P. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17; but he admits that the Supreme Court has not followed the cited case, and that the decision in First National Bank v. Silva, 200 Cal. 494, 254 P. 262, runs to the contrary. In this later decision (pages 501, 502 of 200 Cal., 254 P. 262, 265), approving and quoting another decision, the court said: "The principle seems to be that where the mortgagee does not take possession, but leaves it with the mortgagor, he thereby assents to the creation of a statutory lien for any expenditure reasonably necessary for the preservation or ordinary repair of the thing mortgaged." And in Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 P. 1033, L. R. A. 1918D, 118, the Supreme Court said: "Here it may be said that this consideration is not complicated, as respondent urges, by the fact that the Chatts were in default under their chattel mortgage at the time they delivered the automobile to the defendant for repairs. They were still the legal possessors of the automobile, and their possession continued to be legal until the plaintiff exercised its rights under its mortgage and took unto itself that possession." Further on (page 113 of 177 Cal., 169 P. 1033, 1035) the court said: "Did the Legislature mean that every artisan and mechanic to whom might be delivered a chattel for improvement and repair must search the records to discover whether that article had been mortgaged, and, failing so to do, be at the peril of the impairment or total destruction of his lien, or did it mean that the money lender who took for security a chattel mortgage should take it with the understanding as part of his contract that improvements and repairs placed upon the article should be subject to a preferential possessory lien? Without hesitation we answer that the second alternative is sustainable as a just interpretation of the legislative enactments."

[3] Appellant contends that the judgment entered in favor of respondent, requiring that the plaintiff return to respondent the said personal property, or repay to respondent the stated value thereof, is against law, for the reason that it is not supported by any allegation in respondent's answer of the fact that the sheriff had taken the property. As hereinabove noted, the fact is that at the time when defendant's answer was filed, the property had been taken from respondent by means of plaintiff's claim and delivery proceeding in this action, and the property had been sold pursuant to the decree of foreclosure of the chattel mortgage. At the trial these facts were stated to the court by counsel for appellant, and there was no dispute about it. While respondent's answer did not, in direct terms, state that the property had been seized and taken from him by means of the claim and delivery proceeding, his answer did contain a prayer for recovery of possession of the property, or for the sum claimed by him. Section 667 of the Code of Civil Procedure provides that in any action to recover the possession of personal property, "if the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same." In Banning v. Marleau, 101 Cal. 238, 35 P. 772, the Supreme Court held that it was error to enter judgment for return of the property by plaintiff to defendant, etc., where there was no prayer, claim, or demand of any kind in the answer for the return of the property or its value. That decision did not hold that the answer must contain an affirmative pleading of the seizure by which the property was taken from the defendant. Inferentially, the

court would have considered it enough if the answer had in any way claimed a return of the property. See, also, Skaggs v. Taylor, 77 Cal. App. 519, 247 P. 218, where the court said that in any event, the defendant having set forth a claim in unmistakable terms for the return of the property, he was clearly entitled to such relief; and also held, that if the plaintiff fails to prove his averments, the general denial determines that the property should be restored to the defendant; and that, consequently, if in his answer the defendant has made due claim for such return, he is entitled to judgment to that effect. We think, therefore, that the suggestion that the judgment is against law, by reason of the asserted defect in defendant's answer, is without merit.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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138 Cal.App. 1

FAGEOL & TATE et al. v. BAIRD-BAILHACHE CO. et al.

Civ. 7614.

District Court of Appeal, First District, Division 2, California.

Nov. 16, 1931.

Rehearing Denied Dec. 16, 1931. Hearing Granted by Supreme Court Jan. 14, 1932.

1. Patents ⚷218(3).

Where licensors terminated license for nonpayment of royalties, they were not entitled to stipulated royalties after date of termination.

2. Patents ⚷214, 218(3).

Provision for termination of license upon default of licensee was for benefit of licensors, and, upon licensee's default, licensors could terminate contract or continue it in force and collect royalties as they accrued.

3. Patents ⚷211(1).

Where licensee failed to offer to join in suit against infringers or pay half of cost as provided by license, *held* licensors were not bound to begin suit.

Appeal from Superior Court, City and County of San Francisco; W. A. Anderson, Judge.

Action by Fageol & Tate, a copartnership, and Frank R. Fageol and John C. Tate, copartners, doing business under the firm name and style of Fageol & Tate, against the Baird-Bailhache Company, T. J. Potter, and the Potter Radiator Corporation. From judgment for plaintiffs, Baird-Bailhache Company appeals.

Judgment on cross-complaint affirmed; judgment on complaint reversed, with directions.

Clarence E. Todd, of San Francisco, Elbert W. Davis, of San Francisco (James M. Oliver, of Los Angeles, of counsel), for appellant.

A. V. Dalrymple, Walter E. Hettman, and John Douglas Short, all of San Francisco, for respondent Fageol & Tate.

DOOLING, Justice pro tem.

On January 15, 1919, plaintiffs and respondents, Fageol and Tate, entered into a written agreement with C. S. Baird and John M. Bailhache, whereby Fageol and Tate granted a license to Baird and Bailhache to manufacture and sell heating devices under patents belonging to the licensors. Subsequently the licensees organized a corporation, Baird-Bailhache Company, which succeeded to their rights and obligations under the license agreement and is the defendant and appellant here. The agreement provided for the payment of royalties upon the articles manufactured and sold according to a certain schedule, and for the payment of certain minimum annual royalties in any event. The amount of these minimum royalties and the manner of their payment were subsequently modified from time to time by the agreement of the parties, the final modification providing, in so far as is material here:

"1st:—That for the balance of the life of the main contract there shall be paid on the 15th of each month promptly the sum of $200 at all events" and in the event that the royalties due for heaters sold during the preceding month exceed the sum of $200, the excess shall be remitted and paid in addition to the $200.

"2nd:—That the yearly minimums named in the principal agreement and supplement thereto shall remain in full force and effect and that on the 15th of January * * * a full accounting shall be made * * * and the difference between the amounts paid in cash * * * during said fiscal year and the yearly minimum royalties due under said accounting shall be paid on January 15th of each year as aforesaid."

The original contract contained the following provision which was never subsequently modified: "In case of a breach of any of the terms and conditions of this agreement by the parties of the second part (licensees), and the failure of said parties of the second part to comply therewith within thirty (30) days after receipt of written notice from said parties of the first part (licensors) of said breach, then, and in that event, this contract shall immediately terminate."

On August 15, 1925, the appellant Baird-Bailhache Company failed to make the $200 payment due under the agreement as modified, and on August 25, 1925, respondents Fageol and Tate sent a letter to appellant calling its attention to its default in payment, and concluding: "Unless you do pay all royalties due and owing as of the 15th day of August, 1925, * * * the undersigned will consider the said contract as being, and having been, violated and terminated by you."

Appellant continued in default, and pursuant to this notice the license agreement was terminated thirty days after August 25, 1925.

Thereupon respondents brought suit against appellant, and in the lower court recovered judgment for $4,008, with interest thereon from September 25, 1925. The total minimum payment required to be made by appellant for the year ending January 15, 1926, was $7,500, and the amount of the judgment was arrived at by pro rating the sum of $7,500 between the portion of the contract year prior to the termination of the contract and the balance of the contract year. The amount so apportioned to the portion of the contract year prior to September 25, 1925, less $1,200 already paid in six monthly installments of $200 each, represents the sum of $4,008 allowed by the judgment.

[1, 2] Appellant attacks the judgment on the ground that respondents, having elected to terminate the contract on September 25, 1925, are not entitled to recover any amount not due under the terms of the contract on the date of its termination. This attack must be sustained. The provision for the termination of the contract upon default of the licensee was for the benefit of the licensors. Upon default of the licensee, the licensors could either terminate the contract by giving the thirty-day notice therein provided for or they could elect to continue the contract in force and insist on the payment of the royalties as they accrued. They could not do both. Having elected to terminate the contract as of September 25, 1925, the contract came to an end on that date, and neither party thereafter could obtain any new or further rights under it. The license of appellant to manufacture and sell the patented articles ceased on that date, and their obligation to pay future royalties ceased as well. The rule is thus stated in 48 C. J., page 283: "When a license has been properly terminated, the licensee is no longer liable for royalties, although he must pay those royalties which accrued before the license terminated."

In Hamilton v. Park & McKay Co., 112 Mich. 138, 70 N. W. 436, the court said: "The true rule is this: The rescission of a contract as against the party in default does not, in the absence of an agreement, destroy the right to recover royalty or rent which has already been earned. The past due payments are separable from the future payments, and the rescission is neither ab initio nor in toto, but solely in futuro."

All the cases which we have found on the subject support the same rule. Perfection Socket Co. v. American Forging Co., 209 Mich. 497, 177 N. W. 194; Brusie v. Peck Bros. & Co., 135 N. Y. 622, 32 N. E. 76; Garver v. Bement, 69 Mich. 149, 37 N. W. 63; Hurst v. Trow Printing & Bookbinding Co., 2 Misc. Rep. 361, 22 N. Y. S. 371.

On September 25, 1925, when the contract was terminated, there was due and unpaid under its terms the sum of $400; $200 due August 15, 1925, and $200 due September 15, 1925. This should have been the limit of respondents' recovery.

Respondents say that appellant should not be permitted to terminate the contract by its own breach and escape all further liability. But appellant's breach did not ipso facto terminate the contract. It gave the right to respondents to terminate the contract, and it was respondents who elected to bring it to an end. Having elected to terminate the contract, respondents can only recover what was due under it at the date of its termination.

[3] The contract contained the following further provision: "In the event that either party to this agreement deems it necessary to bring actions at law against the infringement of the manufacturing, selling, or using of the said radiators or heaters as herein defined, or trade names, or copyrights or compounds within the territory named, both parties shall join in said actions at law when either is requested by the other so to do and each party shall be equally responsible in such actions, share and share alike."

Appellant filed a cross-complaint asking damages by reason of the claimed breach of this provision by respondents. The trial court found against appellant on the cross-complaint. The judgment of the trial court in this regard must be affirmed because, although appellant made several demands that respondents commence suit against alleged infringers, in none of them did it offer or suggest that it join in such suits or pay half the costs thereof, as required by the terms of the contract above quoted.

By reason of our conclusions herein expressed, other points urged need not be discussed.

The judgment on the cross-complaint is affirmed. The judgment on the complaint is reversed, with directions to the trial court to enter judgment for plaintiffs for $400, with interest on the sum of $200 from August 15, 1925, and on the sum of $200 from September 15, 1925; neither party to recover costs on appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 259

COURSAULT v. SCHWEBEL et al.

Civ. 7822.

District Court of Appeal, First District, Division 1, California.

Nov. 10, 1931.

Rehearing Denied Dec. 10, 1931. Hearing Denied by Supreme Court Jan. 7, 1932.

1. Automobiles 🔑245(72).

It is not contributory negligence as matter of law for pedestrian to proceed at place other than established crossing.

> This is so, since the presumption is, that while so doing he was exercising the requisite degree of care for his own safety, and the question whether he was negligent, under the circumstances, is one of fact for the jury.

2. Automobiles 🔑217(6).

Person is not guilty of contributory negligence merely because he attempts to cross street when automobile is approaching.

3. Automobiles 🔑160(1), 164(1).

Motorist must anticipate presence of pedestrians upon streets or highways, and must anticipate that passengers will alight at intersections (St. 1923, p. 560, § 134).

4. Automobiles 🔑245(76).

One alighting from street car and crossing in front of approaching automobile to curb, *held* not contributorily negligent as matter of law (St. 1923, p. 560, § 134).

> Such a person has the right to expect that those operating automobiles upon a public street will operate them in a manner and at a speed customary at the particular place, and the question of negligence in such case is for jury.

5. Automobiles 🔑243(1).

Ordinance regulating automobile operation, when overtaking street car stopping and discharging passengers, *held* admissible, although street car had gone few feet into intersection (St. 1923, p. 560, § 134).

> Such ordinance was admissible to show autoist's negligence in injuring street car passenger alighting and proceeding in front of approaching automobile to curb, since it made it the autoist's duty to stop still whenever the street car stopped to discharge passengers, and this duty was not restricted to regular stopping places.

6. Automobiles 🔑246(6).

In action for injuries sustained by passenger alighting from street car when struck by automobile, instructions relating to applicability of ordinance, *held* sufficiently favorable to defendant.

> Court instructed that ordinance regulating operation of automobiles, when overtaking street cars stopping to discharge passengers, had no application, where a street car stopped at a point other than approximately the usual point for receiving and discharging passengers, or where motorist had no reasonable warning that passenger was to be discharged, and that if motorist had no warning that passenger was to be discharged at point other than at intersection, ordinance was not to be considered by jury.

7. Appeal and error 🔑216(2).

Appellant cannot complain of instruction as too broad, absent request for qualifying instruction.

8. Trial 🔑260(1).

Erroneous refusal to give requested instructions *held* not prejudicial, where substantially same matter was covered by instructions given.

9. Trial 🔑108½.

In personal injury action, question on voir dire whether prospective juror was interested as agent or stockholder in company insuring against liability, *held* proper.

10. Appeal and error 🔑1060(1).

In personal injury action, questions getting before jury fact that defendant was insured against liability, *held* not shown to be prejudicial misconduct.

> No prejudicial misconduct was shown where record did not disclose bad faith on part of plaintiff's counsel, court charged jury that question of insurance was not to be considered by them, and in addition it did not appear that verdict awarded plaintiff was excessive.

11. Appeal and error 🔑978(2).

Conclusion that alleged misconduct, in getting question of liability insurance before jury, did not necessitate new trial will not be disturbed, where it was not clearly wrong.

12. Evidence ⚷558(7).

Cross-examination of physician, in personal injury action, as to who requested him to make examination of injured plaintiff, *held* proper in determining his credibility.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Bernard Coursault against E. Schwebel and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco, for appellants.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

PER CURIAM.

An appeal from a judgment entered upon the jury's verdict of $6,500 in favor of plaintiff and against defendants.

On June 26, 1928, at the intersection of Sacramento and Maple streets in San Francisco, the plaintiff received personal injuries when he was struck by an automobile owned by defendant Schwebel and operated by defendant Barrett.

As grounds for their appeal, defendants claim that plaintiff was guilty of contributory negligence as a matter of law; that the court erred in admitting in evidence a certain ordinance of the city and county of San Francisco and in its instructions to the jury; and that plaintiff's counsel was guilty of prejudicial misconduct at the trial.

Plaintiff immediately before the accident was a passenger on a street car traveling west on Sacramento street. According to some of the witnesses, the car stopped on Sacramento street, its front end, from which plaintiff alighted, being about six feet within the intersection. It was testified by another witness that the car passed into the intersection a distance of about the length of the front platform. There was a conflict as to whether the car stopped before plaintiff alighted, but the testimony was sufficient to support an affirmative conclusion in that respect.

Defendant Barrett, in the course of his employment, was driving an automobile in the same direction and some distance behind the street car, and, as the car stopped, he turned to his right in an attempt to pass, and struck the plaintiff. It was also testified that no warning signal was given by Barrett, and that when the brakes were applied the automobile skidded a distance which was variously estimated from forty to eighty-five feet, and, when he stopped, the front of the automobile was about eighteen feet past the place where plaintiff, who had been thrown or carried some distance to the west by the automobile, was lying. Barrett testified that before he attempted to pass the car he had been traveling from fifteen to twenty feet behind at a speed of about fifteen to twenty miles an hour. According to the plaintiff, as he alighted he looked to his right and saw the automobile approaching some distance behind the car. He also heard the brakes applied, and thought the driver intended to stop. In the meantime, he had taken several steps toward the curb, and before he could save himself the automobile was upon him.

[1-4] Although it is the general rule that a greater degree of care must be observed by a pedestrian at a place other than an established crossing (Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493; Patania v. Yellow, etc., Cab Co., 102 Cal. App. 600, 283 P. 295), it is not contributory negligence as a matter of law for a pedestrian to thus proceed. The presumption is, that while so doing, he was exercising the requisite degree of care for his own safety, and the question whether he was negligent under the circumstances is one of fact for the jury (Broedlow v. LeGros, 88 Cal. App. 671, 263 P. 1027). Nor, as held in Flach v. Fikes, 204 Cal. 329, 267 P. 1079, 1080, can it be said that a person is guilty of contributory negligence merely because he attempts to cross a street when an automobile is approaching. As the court said: "If that were so, he never could attempt to cross a street upon which automobiles are being operated. * * * He has a right to expect that those operating automobiles upon a public street will operate them in the manner and at the speed customary at the particular place. Whether such a person is guilty of contributory negligence in attempting to cross a street in front of an approaching automobile would depend upon all the circumstances under which he acted. This question is one for the determination of the jury or the trial court, and their finding thereon is binding upon an appellate court."

The driver of an automobile must anticipate the presence of pedestrians upon the streets or highways. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027. He must likewise anticipate that passengers will alight at intersections; and it is his duty to operate his vehicle with due care and caution so as to assure the safety of such passengers. Vehicle Act, § 134, Stats. 1923, pp. 517, 560.

[5-6] In view of all the circumstances, the question here was properly one for the jury,

and the evidence fairly supports their implied conclusion that plaintiff was not guilty of contributory negligence.

There was introduced in evidence over defendant's objection an ordinance of the city and county of San Francisco, regulating the operation of motor vehicles when overtaking street cars which had stopped or were about to stop for the purpose of receiving or discharging passengers. It is claimed by defendants that the ordinance had no application to the facts of the case for the reason that the street car had passed the usual stopping place, and that its admission in evidence was prejudicially erroneous.

The ordinance made it the duty of a driver overtaking a street car to bring his vehicle to a standstill whenever the car stopped for the purpose of receiving and discharging passengers, and this duty was not restricted to regular stopping places. As stated, some of the witnesses testified that the car had passed into the intersection; but, however this may be, it is well known that circumstances may make it necessary to discharge passengers at places other than the usual stopping points; and it clearly was not the intention to restrict the operation of the ordinance to the extent claimed by defendants. However, the court at their request charged that the ordinance had no applicability where a street car stopped at a point other than approximately the usual point for receiving and discharging passengers, or where the operator of the automobile has no reasonable warning that a passenger is to be discharged; further, that if the jury found that the street car had proceeded across Maple street before discharging plaintiff as a passenger, and no reasonable warning was given defendant Barrett that a passenger was to be discharged at that point, then the provision of the ordinance that the driver must stop in the rear of the street car was not to be considered by the jury. The ordinance was in view of all the evidence properly admitted, and the instructions as to its application fully presented defendant's theory of the case, and were as favorable as the defendants had the right to demand.

[7] The court also instructed that failure to comply with an ordinance regulating the operation of motor vehicles upon the highways of San Francisco constituted negligence in itself; further, that if they found from the evidence that defendant Barrett violated the ordinance in question, and such violation proximately caused the injuries complained of, if any, and plaintiff was himself free from contributory negligence, he was entitled to recover. It is objected that the court did not qualify this instruction by stating that the violation of an ordinance may be explained or excused, citing Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675, 677, where the court said: "The violation of such a law, left without explanation or excuse, is conclusive of negligence, but it may be excused. * * * If some good excuse appears which would be a sufficient defense to an action for the penalty imposed by the law * * * then the law is not really violated. * * * The defendant was entitled to an instruction embodying * * * the substance of the rule as herein stated." The instruction, however, as far as it went, was a correct statement of the law (Mann v. Scott, 180 Cal. 550, 560, 182 P. 281; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045); and if defendants wished a qualifying instruction it was their duty to request it (24 Cal. Jur., Trial, § 74, p. 976). No such request was made.

Objection is also made to an instruction that the ordinance made it the duty of drivers overtaking a street car, which had stopped to discharge passengers, to stop their vehicles. What we have said regarding the admissibility of the ordinance in evidence and the instructions construing it applies to the above instruction, and requires no further discussion.

[8] Two instructions offered by defendants stating, in substance, that Barrett was not bound to drive his automobile so as to protect passengers who might jump from a street car while in motion, unless he had warning of such intention, were refused. Barrett testified that plaintiff jumped from the car while it was in motion; and it was held in Brown v. Brashear, 22 Cal. App. 135, 133 P. 505, that such testimony made a similar instruction proper, and its refusal was error. The court did, however, charge the jury that if Barrett, after the street car started, proceeded to pass at a lawful speed, and, while so doing, plaintiff alighted and stepped in front of the automobile, and the jury found that Barrett had no warning of plaintiff's intention and could not stop in time to avoid striking the plaintiff, then defendants were not guilty of negligence; and also that there was no duty on the part of Barrett to anticipate that passengers would alight from the street car between regular stops. These instructions covered substantially the subject-matter of those refused, and consequently the error was not prejudicial. 24 Cal. Jur., Trial, § 79, p. 806.

[9-11] Plaintiff's counsel during his examination of several of the jurors on their voir dire asked whether they carried insurance or were interested in the Indemnity Insurance Company of North America, or acquainted with certain of its agents, naming them; also a physician, called as a witness for defendants and who made a physical examination of plaintiff, was asked on cross-examination as to who requested him to make the examination. The physician answered that he acted either at the request of defendants' attorneys

or "the insurance company,"—which, he did not remember.

While it has been held that evidence that the defendant is insured against loss is not admissible, and that it would be improper for counsel to endeavor to get such fact before the jury by questions designed for that purpose, and that any unfairness in that respect might be regarded as prejudicial misconduct (Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 P. 700), nevertheless, it is entirely proper to ask such questions as may be reasonably necessary to ascertain whether a prospective juror is free from bias or interest, and to this end to ask whether he is interested as an agent or stockholder in a specified insurance company, or the question whether he is interested in any company insuring against liability. Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171. And it has been held that such questions, conceding their impropriety, cannot be said to have resulted in a miscarriage of justice, unless the amount assessed by the jury as damage is disproportionate to that which the evidence reasonably shows, or defendant's liability therefor under the evidence is a close question. Arnold v. California Portland Cement Co., supra; Eldridge v. Clark & Henery Construction Co., 75 Cal. App. 516, 243 P. 43. There is nothing in the record to indicate bad faith on the part of plaintiff's counsel; and in connection with the subject of insurance, the court charged the jury as follows: "In the questions asked of you concerning your qualifications to sit as jurors in this case some mention was made of the matter of insurance. I instruct you that you cannot bring in a verdict against any insurance company; and I further instruct you that no insurance company is a party to this action. The question of insurance does not enter into this case, and the jury is instructed not to consider the same at all. * * *" Moreover, in denying defendants' motion for a new trial based upon the ground, among others, of misconduct of plaintiff's counsel, the court impliedly determined that defendants suffered no prejudice; and this conclusion cannot be disturbed unless under all the circumstances it was clearly wrong (La Fargue v. United Railroads, 183 Cal. 720, 192 P. 538), which cannot be said here.

[12] The cross-examination of the physician was not improper, as the jury had the right in determining his credibility to consider his interest in the case. 27 Cal. Jur., Witnesses, § 96, p. 122.

In view of the evidence as to plaintiff's injuries, his loss of time on that account, and the medical and hospital expense incurred by him, we cannot say that the verdict was excessive.

The implied findings that defendants were negligent, and against the defense that plaintiff was wanting in due care, are fairly supported, and no error is shown which would warrant the conclusion that the same resulted in a miscarriage of justice.

The judgment is affirmed.

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118 Cal.App. 267

CONSOLIDATED LUMBER CO. v. BASTIEN et al., and twelve other cases.

Civ. 7987.

District Court of Appeal, First District, Division 2, California.

Nov. 10, 1931.

Rehearing Denied Dec. 10, 1931. Hearing Denied by Supreme Court Jan. 7, 1932.

Mortgages 🔑**151(3).**

Lien for material *held* subordinate to trust deed recorded prior to time lien claimant commenced to furnish material, where no general contract for construction existed (Code Civ. Proc. § 1186).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by the Consolidated Lumber Company against Augustus L. Bastien and others. From judgment rendered in consolidated cases, Thomas Haverty Company and others, plaintiffs and defendant, appeal.

Affirmed.

Culver & Nourse, of Los Angeles, for appellants Thomas Haverty Co. and Blue Diamond Co.

Kennicott & Williams, of Los Angeles, for appellant Pacific Plaster Co.

Bert Campbell, of Los Angeles, for respondents Metropolitan Trust Co. of California and W. Ross Campbell Co.

J. M. McCroskey, of Los Angeles, for respondent Title Insurance & Trust Co.

NOURSE, P. J.

The controversy presented on this appeal arises out of the trial of the consolidated actions brought to foreclose several mechanics' liens for labor and materials furnished in the construction of a dwelling house and garage on the property of defendant Bastien. The appeal is taken on the judgment roll by Thomas Haverty Company, Pacific Plaster Company, and Blue Diamond Company, three of the lien claimants.

The facts may be stated briefly. There was no general contract. On April 17, 1926, a trust deed covering the property was filed for record. On the day previous Consolidated Lumber Company commenced the delivery of materials on the premises. Following April 17th the other lien claimants delivered the materials or performed the labor upon which their claims of lien were based. The trial court found that the claim of the Consolidated Lumber Company was prior to the lien of the trust deed and prior to the liens of all other claimants. It also found that these other liens were subsequent and subordinate to the lien of the trust deed.

The appeal rests entirely upon this finding of priority and involves an interpretation of section 1186 of the Code of Civil Procedure, which provides, in part, as follows: "The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished. * * *" Appellants contend that a proper construction of this section requires a finding that their liens date back to the time when the building was commenced and that, as so construed, their liens should be held prior and superior to the lien of the trust deed and should be given equal force with the lien of the Consolidated Lumber Company. The point is not a new one. In McClain v. Hutton, 131 Cal. 132, 144, 61 P. 273, 63 P. 182, 622, the Supreme Court held that, where the general contract was invalid, the individual claims of liens attached as of the time when the work was done or the materials were commenced to be furnished under each claim and did not relate back to the time when work was commenced on the building. In Simons Brick Co. v. Hetzel, 72 Cal. App. 1, 6, 7, 236 P. 357, 359, the Appellate Court approved the holding in the McClain Case, saying that the Code section divided liens into two classes: "Those arising under a valid contract between the owner and the contractor, and those where the labor done and materials furnished were deemed to have been done and furnished at the personal instance of the owner." As to the latter class of claimants the court said: "In such a case, each laborer and materialman would depend for his lien upon his individual agreement with the owner, and his right to a lien would only commence when he began labor upon, or commenced to furnish material for, the building." To the same effect is Powers v. Soule-Martin Lumber Co., 209 Cal. 557, 560, 289 P. 809. None of the courts of this state has taken a contrary view.

The precise question presented here was before the Appellate Court of the Third District in American Bldg. Material S. Co. v. Wallin, 2 P.(2d) 1007, and in K. & K. Brick Co. v. Brooke et al., 5 P.(2d) 49. In those cases the court reaffirmed the rule of the cases cited, placing the decisions on the ground that the matter is "stare decisis" as to all cases arising prior to the amendment of section 1186 in 1931 (St. 1931, p. 1639).

Upon the authorities cited the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

214 Cal. 341

KUNZ v. ANGLO & LONDON PARIS NAT. BANK OF SAN FRANCISCO (BLANDING, Intervener).

S. F. 13514.

Supreme Court of California.
Nov. 25, 1931.

1. Principal and agent 🔑**43(2).**

Bill of sale purportedly assigning escrow fund did not create "power coupled with interest," but naked agency revoked by "assignor's" death (Civ. Code, § 2356).

Although the first paragraph of the "bill of sale" upon which the agent's claim was based purported to assign the escrow fund to him, by its very terms the instrument appointed and designated the agent as agent or attorney in fact solely for the purpose of collecting and holding the escrow fund for the principal's "use and benefit," and the entire instrument clearly disclosed that the assignment was made solely for the purpose of facilitating the collection of the fund which the agent was to hold in trust for the "use and benefit" of his principal.

[Ed. Note.—For other definitions of "Power Coupled With an Interest," see Words and Phrases.]

2. Evidence 🔑**462.**

Parol evidence *held* inadmissible to prove that instrument apparently creating bare agency for collection of escrow fund was absolute assignment of fund.

3. Vendor and purchaser 🔑**228(2).**

Subsequent deed to escrow deed, taken with knowledge of escrow deed, was subordinate thereto.

4. Vendor and purchaser 🔑**228(2).**

Deed subsequent to escrow deed to same property, taken with knowledge thereof, became functus officio upon escrow grantee's full compliance with escrow instructions.

5. Principal and agent 🔑**43(1).**

Instrument giving naked agency to collect escrow fund, even if construed with subsequent deed of escrow land to agent, did not entitle agent to escrow fund after principal's death (Civ. Code, §§ 1641, 1642).

This was so, since, even if the deed were to be read and construed with the instrument appointing the agent, it would have to be construed to give effect to the terms of each instrument, so as to effectuate the expressed intention of the parties, in accordance with Civ. Code, § 1641, and such a construction would interpret the deed as simply a means adopted by the principal to facilitate the agent's discharge of his duties as attorney in fact for the collection of the escrow fund, which fund the agent was to receive and hold for the "use and benefit" of the principal.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Felix J. Kunz, as administrator of the estate of A. H. Lee, deceased, against the Anglo & London Paris National Bank of San Francisco, in which Harry Blanding intervened. Upon prayer of defendant, plaintiff and intervener were made to interplead. Judgment was entered for plaintiff, and intervener appeals.

Affirmed.

Francis C. Brown, of San Francisco (Richard Busteed, of Las Vegas, Nev., of counsel), for appellant.

Chas. L. James and C. K. Bonestell, both of San Francisco, and Horace V. Ley, of Yreka, for respondent.

WASTE, C. J.

Respondent's intestate deposited in escrow with the Anglo & London Paris National Bank of San Francisco a deed covering certain mining claims, with instructions to deliver the same to one H. W. Wernse, the grantee named therein, upon the payment by him of $2,500 within a specified period; otherwise the deed to be returned to the depositor. Within the time prescribed in the escrow instructions, but subsequent to Lee's death, Wernse paid $2,500 to the bank and received the deed. This action was thereupon brought by the respondent, as administrator of Lee's estate, to recover the money. In its answer, the defendant bank averred that the plaintiff and the intervener had made inconsistent claims upon it for the fund, that it was ignorant of the merits of these respective claims, and prayed that upon depositing the money in court it be dismissed from the action and the adverse claimants made to interplead, all of which was done. Judgment was entered awarding the fund to the respondent as administrator of Lee's estate, whereupon the intervener prosecuted this appeal.

[1] Appellant's claim to the money is founded upon the following instrument executed and delivered to him by Lee:

"Bill of Sale.

"Know All Men By These Presents: That I, A. H. Lee, of Las Vegas, Clark County, Nevada, the party of the first part, for and in consideration of the sum of ten dollars lawful money of the United States to me in hand paid by Harry Blanding, of Las Vegas, Clark County, Nevada, the party of the second part, the receipt and adequacy whereof is hereby acknowledged, do by these presents, grant, bargain, sell, convey, and set over unto the said party of the second part, and to his executors, administrators, heirs and assigns, all right, title, interest, and claim whatsoever, I am now possessed of or may hereafter acquire, in or to or under that certain escrow agreement made by and between A. H. Lee, and H. W. Wernse, and deposited with the Anglo and London Paris National Bank of San Francisco, California, with escrow instructions dated April 26, 1926.

"And I hereby nominate, constitute and appoint the said Harry Blanding, my attorney in fact, irrevocable, for me and in my name and place and for my use and benefit, to demand, sue for, collect, and receive all such sums of money or demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me, under or in anywise arising from or out of the above mentioned escrow, or the agreement or deed or papers deposited therewith, and with full authority to the said Harry Blanding to make any and all compromises or agreements connected therewith as he shall deem wise or necessary, and to, in my name execute any and all discharges therefor as may be wise or necessary.

"Giving unto my said attorney full power to perform every act and thing which he may deem wise or necessary to be done in or about the premises, in my name and stead, as fully to all intents and purposes as I might or could do if personally present, I hereby ratifying and confirming all that my said attorney in fact, the said Harry Blanding, shall lawfully do or cause to be done by virtue of these presents.

"In witness whereof, I have hereunto set my hand and seal the 24th day of May, 1926.

"[Seal and Acknowledgment.] A. H. Lee."

The appellant contends that this so-called "Bill of Sale" created an irrevocable agency or power coupled with an interest which survived Lee's death, thus entitling him to the escrow fund. The leading case on the subject is Hunt v. Rousmanier, 8 Wheat. 174, 204, 5 L. Ed. 589, wherein Mr. Chief Justice Marshall declared: "We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. * * * The words themselves would seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore, cannot, in accurate law language, be said to be 'coupled' with it. * * * The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name."

Even a most cursory reading of the above-quoted "Bill of Sale" discloses that the appellant is not thereby invested with any beneficial interest or estate in the escrow fund now claimed by him. By its very terms, the instrument appoints and designates the appellant as Lee's agent or attorney in fact solely for the purpose of collecting and holding the escrow fund for Lee's "use and benefit." The latter's demise revoked and canceled this unexecuted naked power or agency, and terminated any and all rights of the appellant thereunder. Section 2356, Civ. Code; 1 Cal. Jur. 703, § 12.

An instrument bearing a marked similarity to the one under which the appellant here makes claim was before this court for construction in the case of Todd v. Superior Court, 181 Cal. 406, 184 P. 684, 685, 7 A. L. R. 938. In that case the principal, for a named consideration, had purported to transfer and assign to an attorney in fact all of her right, title, and interest in and to certain legacies, the instrument expressly stating that it was to be "construed as a power of attorney, coupled with an interest in the subject-matter thereof." However, at the conclusion of the instrument, the following appeared: "After deducting the interest herein assigned, and his expenses and outlays in and about performing his duties, said attorney in fact shall remit the balance of the funds on hand to me thru his corresponding bank." After stating that this court was not bound by the parties' designation of the power as one "coupled with an interest," the court in that case construed the instrument as a whole, and declared that the chief and predominating purpose of the constituents was not " 'to create a power coupled with an interest and thus an irrevocable agency,' but rather to make an assignment in trust to the attorney in fact *in order to facilitate the collection of the legacies*, and to insure the reimbursement of the attorney in fact for his outlays, and for compensation for his services." Continuing, the court stated: "Nor can the creation of a trust, which has placed the bare legal title in the attorney in fact, *with a corresponding duty to account*, be considered upon any theory as conferring upon the attorney in fact such a beneficial interest as to render the power irrevocable. Fairly considered, the contract herein creates a trust with a corresponding duty to account. It has no meaning other than this." (Italics ours.)

This language fits the present case exactly, for while the first paragraph of the instrument under which the appellant makes claim purports to assign the escrow fund to him, a reading of the entire instrument clearly discloses that the assignment was made solely for the purpose of facilitating the collection of the fund which the appellant was to hold in trust for the "use and benefit" of respondent's intestate. Appellant's attempted distinction of the instrument involved in the Todd Case, supra, from that involved in the case at bar, upon the ground that the former expressly provided for the accounting or paying over of the fund by the attorney in fact to the principal, is clearly without merit. The instrument in the present case, as already indicated, expressly provides that the escrow fund is to be collected and received by the appellant for the "use and benefit" of the respondent's intestate. Language more definitely requiring the appellant to account for and pay over any funds coming to him under the instrument cannot be phrased.

[2] Upon several occasions during the trial, the appellant sought to prove by parol evidence that the so-called "Bill of Sale" running in his favor, rather than being a mere assignment for purposes of collection, as the instrument in so many words provides, was in fact intended by respondent's intestate to be absolute in form and effect, and to be in partial satisfaction and discharge of an indebtedness then asserted to be owing by respondent's intestate to the appellant. In other words, the appellant attempted to show by parol that it was the intention of respondent's intestate to convey to him the entire beneficial interest in the escrow fund. Objections to this line of examination were repeatedly sustained by the trial court, and we find no error in the rulings. If admitted, this evidence would have worked a material alteration in the terms of the written instrument, for it would have tended to establish the assignment to appellant as an absolute and beneficial one, when, in fact and by its terms, it constituted but a bare power of attorney for collection. This being so, the proffered testimony was properly excluded under the parol evidence rule. The very authorities cited by the appellant establish the fallacy of his argument in this regard. For instance, in support of his contention that evidence of a contemporaneous oral agreement is admissible, he refers us to 10 Cal. Jur. 927, wherein the following appears: "Evidence of a contemporaneous oral agreement *as to any matter upon which the instrument is silent, and which is not inconsistent with its terms,* cannot be said to contradict or vary the terms of the written instrument. But, of course, where the evidence of a contemporaneous oral agreement *conflicts with the plain terms of a written contract, it is inadmissible.*" (Italics added.) The evidence here sought to be adduced conflicts with the written instrument. There is ample authority to support the trial court's rulings on this evidence. In United Iron Works v. Outer H., etc., Co., 168 Cal. 81, 84, 141 P. 917, 920, it is held that it is never within the contemplation of the parol evidence rule that "a contract reduced to writing and executed by the parties shall have anything added to it or taken away from it by such evidence of 'surrounding circumstances.' This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said." Then, again, in Keifer v. Myers, 14 Cal. App. 338, 340, 111 P. 1038, it is declared that the rule in "the Pierce Case [Pierce v. Robinson, 13 Cal. 125], as in all cases which have come under our observation, wherein the right to prove by parol facts tending to establish a contract different from that expressed by the language of the instrument, is confined to those cases where an equity is sought to be shown superior to the terms of the instrument, which equity a court of chancery will enforce by annulling or reforming the instrument, or limiting its operation, or enjoining its use. Under this rule, deeds may be shown to be mortgages and other instruments purporting to grant absolute rights may be shown to have been intended to possess some limited character. But the right to defeat *an expressed equity* by destructive parol proof is not comprehended within the rule. In our opinion, the written agreement of pledge cannot be shown by parol to be an agreement of absolute sale, no more than a mortgage, which is but a lien, may by parol be shown to have been intended as a grant of the property described. That in cases of the nature here presented evidence is not admissible *dehors* the instrument to establish a character different from that expressed by the language employed." [Italics added.] To admit the parol proof offered by the appellant would be to destroy an "expressed equity" and make absolute what was intended to be merely tentative and qualified.

In line with the trial court's rulings, it is our conclusion, therefore, that the intention of the parties to the "Bill of Sale" is clearly disclosed by the writing, the instrument being susceptible of but one construction, viz., that it created a bare power of attorney or agency for collection of the escrow fund, which power or agency terminated with the death of the principal. It follows therefore that the evidence was properly excluded.

[3-5] At or about the time of the execution and delivery of the instrument by which appellant was appointed the attorney in fact of respondent's intestate to collect the escrow fund for the latter's benefit, there was also

executed and delivered by said intestate a deed, introduced in evidence by the appellant, purporting to convey to appellant the several mining claims covered by the deed theretofore placed in escrow and running in favor of Wernse. Appellant's deed being subsequent in point of time to the escrow deed, of which escrow deed the appellant had knowledge, was, of course, subject and subordinate to the Wernse deed. Though mentioned, this fact is not of particular moment here, in view of subsequent developments, for Wernse, the escrow grantee, fully complied with the escrow instructions, and took title to the mining claims. Appellant's deed, being subject thereto, thereupon became functus officio and of no effect as a medium of transfer. He now urges, however, that the trial court should have made a finding as to the effect, if any, said deed had upon his right to the escrow fund. That is to say, appellant contends that the delivery of the deed to him in some way strengthened his claim upon the escrow fund, and the trial court should have made a finding thereon. We cannot agree with this contention. We fail to see what different result would have followed had such a finding as is suggested been made. In the first place, we are not entirely satisfied that the trial court, as urged by the appellant, was obliged to read the power of attorney and the deed together as part and parcel of the same contract. Section 1642 of the Civil Code provides that "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Though executed at or about the same time and between the same parties, the instruments do not relate "to the same matters." The deed purports to convey certain mining claims, while the "Bill of Sale" or power of attorney merely provides for the collection of an escrow fund. Obviously, the former was not to take effect if the subject-matter of the latter should materialize, and it did materialize. In other words, the two instruments were not only independent of each other, but in a sense they were antagonistic, and could not operate together. The appellant apparently realized this, for in his complaint in intervention (paragraphs 2, 3, and 4 thereof) he pleads each as being a complete contract; the power of attorney as an absolute assignment to him of the $2,500 escrow fund, and the deed as conveying to him Lee's title to the mining claims, subject to the rights of Wernse, the escrow grantee. There is no allegation that the deed was delivered as part of a contract by which the respondent's intestate transferred to the appellant the beneficial interest in the escrow fund.

However, even if the deed were to be read and construed with the instrument appointing appellant as attorney in fact for the collection of the escrow fund, we would be required, so far as possible, to give effect to the terms of each instrument, so as to effectuate the expressed intention of the parties. Section 1641, Civ. Code. This being so, the deed would have to be construed, as we have already interpreted the purported assignment of the escrow fund, as simply a means adopted by the respondent's intestate to facilitate the appellant in the discharge of his duties as attorney in fact for the collection of the escrow fund, which fund, as we have already shown, the appellant was to receive and hold for the "use and benefit" of respondent's intestate. The deed could have no effect other than this, if we are to read the two instruments together and give effect to the predominating desire and purpose of the intestate to have the escrow fund collected and held for his "use and benefit."

What we have said sufficiently disposes of appellant's contentions. Examination of the entire record satisfies us that the findings, which are sufficiently full and complete, are amply supported by the evidence, and warrant the judgment entered.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

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214 Cal. 358

ASSOCIATED OIL CO. v. INDUSTRIAL ACCIDENT COMMISSION.

S. F. 14287.

Supreme Court of California.

Nov. 25, 1931.

Rehearing Denied Dec. 24, 1931.

Master and servant ⚷398.

Where injury immediately caused permanent physical impairment, subsequent discovery of permanency did not constitute "new and further disability" within provision extending limitation (St. 1917, p. 841, §§ 11(b), 11(c).

[Ed. Note.—For other definitions of "New And Further Disability," see Words and Phrases.]

In Bank.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by R. H. Tecklenberg, opposed by the Associated Oil Company. The Industrial Accident Commission awarded compensation, and the employer petitions for review of the award.

Award annulled.

Daniel W. Howe and W. F. Kiessig, of Berkeley, for appellant.

A. I. Townsend, of San Francisco, for respondent.

LANGDON, J.

This is a petition to review an award of the Industrial Accident Commission. On December 30, 1926, the employee, R. H. Tecklenberg, arranged and conducted a hunting party for one of the officers of his employer and certain customers, during which he was accidentally shot in the head. He was taken to a hospital for treatment, and twelve days later his right eye was removed. He was disabled for a period of about six weeks, after which he returned to work. He was paid full wages by petitioner, his employer, while under treatment, but no compensation or medical aid was furnished. On August 25, 1930, over three and one-half years after the injury, he filed an application with the commission, seeking compensation. Among other defenses, petitioner set up the bar of the statute of limitations.

The statute provides that with certain exceptions, proceedings must be commenced within six months from the date of injury. Workmen's Compensation Act, § 11(b), St. 1917, p. 841. Where compensation or medical treatment are furnished by the employer, the period is extended for six months. It is unnecessary to consider whether the payment of the employee's salary, or the furnishing of an artificial eye through a special hospital fund maintained for nonindustrial injuries, can be deemed to toll the statute. Assuming, with the commission, that it does, the fact still remains that the application was made long after the expiration of this additional six months' period. The commission contends, however, that the bar of the statute is further extended for 245 weeks from the date of the injury on the ground that "the original injury has caused *new and further disability*" under section 11(c) of the act (St. 1917, p. 841). The theory of the commission is somewhat obscure, but as nearly as we can determine, its position is that the original injury in this case, though it resulted at once in a *permanent physical impairment or injury*, gave rise at first to but a *temporary disability*, lasting throughout the healing period; that thereafter it appeared that the disability would be *permanent*, and consequently there was a change from one disability (temporary) to another (permanent); and that this permanent disability is a "new and further disability" within the meaning of the statute. It is difficult to comprehend the apparent contention that this change of opinion as to the permanency of disability is contemplated by the act as grounds for nullifying its statute of limitations. But the point is not made here for the first time. It was considered and disapproved by this court in Cowell Lime & Cement Co. v. Industrial Accident Commission, 211 Cal. 154, 294 P. 703, 706, 72 A. L. R. 1118. We there said: "If petitioner is correct in this statement that Cabral's injury was permanent at the date of its infliction, then the contention that his claim is barred by the statute of limitations must be sustained. For the right to file a claim within two hundred and forty-five weeks is given only in case the injured employee sustains a new and further disability, *and not necessarily for a permanent disability*. It is only when there is a *change in the condition of the original injury* from a temporary to a permanent disability that a 'new and further disability' is established. Therefore, *if the injury is permanent ab initio, no such changed condition can ever take place.*" (Italics ours.)

The loss of the sight of his eye, which is the injury for which compensation is sought by the employee, was the original injury, and was complete ab initio. The facts of this case come clearly within the language of the above quoted decision, and such is indeed the concession of the commission, for it is argued that the view therein expressed is dictum and should not be followed. We are, however, satisfied that the case correctly interprets the act.

The award is annulled.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

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214 Cal. 302

WOOLL (STATE COMPENSATION INSURANCE FUND, Intervener) v. J. S. SHEA CO. et al.

S. F. 13301.

Supreme Court of California.

Nov. 24, 1931.

Rehearing Denied Dec. 24, 1931.

1. Negligence ⚷134(4).

In action by salesman for injuries sustained while measuring pipe line on pile driver at defendant's request, evidence sustained verdict finding defendant negligent.

2. Negligence ⚷20.

Owner of pile driver owes invitee thereon duty of exercising ordinary and reasonable care in operation of driver.

3. Negligence ⚷20.

Moving pile driver by lurch of eight feet, without warning to salesman thereon, seeking refuge from danger, *held* not exercise of ordinary care owing invitee.

4. Trial ⚷260(8).

Instruction to find against plaintiff if defendants used ordinary care in moving pile driver *held* properly refused, where its substance was sufficiently covered by other instructions.

5. Negligence ⚷139(1).

Instruction that invitee injured on pile driver cannot recover unless he proved defendant omitted what reasonable man would do, or did something reasonable man would not do, sufficiently covered question of defendant's liability owed to invitee.

6. Negligence ⚷138(3).

In action for injuries to salesman on pile driver, instructions, defendants were lawfully entitled to move driver in ordinary way *held* properly refused under issues.

> Such instructions were properly refused, since there was no issue in the case as to defendant's right to move pile driver, or as to particular manner in which it might be moved, the issue being whether in moving it defendants exercised that degree of care commensurate with plaintiff's safety while on driver.

7. Negligence ⚷20.

Salesman's status as invitee while on pile driver *held* not forfeited while acting in prudent manner in going from one side of driver to other to avoid impending danger.

In Bank.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by C. L. Wooll and the State Compensation Insurance Fund, intervener, against the J. S. Shea Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, Tinning & Delap, of Martinez, and De Lancey Smith, of San Francisco, for appellants.

Ford, Johnson & Bourquin, of San Francisco (Fletcher A. Cutler, of San Francisco, of counsel), for respondent.

B. E. Pemberton and W. J. O'Connor, both of San Francisco, for intervener.

WASTE, C. J.

Defendants prosecute this appeal from a judgment entered in favor of the plaintiff for damages in the sum of $15,000 for personal injuries alleged to have been incurred by reason of defendant's negligence in the maintenance and operation of a pile driver. The State Compensation Insurance Fund intervened merely to insure its lien on any judgment recovered by plaintiff, the intervener having theretofore compensated the plaintiff under the provisions of the Workmen's Compensation Act for these injuries, which were received by the plaintiff while acting within the scope and course of his employment. The plaintiff and intervener have stipulated for such a lien, and there is no question raised on this appeal as to the propriety of such action.

The defendants were contractors engaged in driving piling to support the aqueduct line of the East Bay municipal utility district across the delta of the San Joaquin river. A heavy, sledlike platform weighing approximately fifty tons carried the pile driver and progressed with the construction work by being skidded over large cross-timbers laid on the ground surface before it. The driver was moved by its own power applied to cables, the latter being attached to posts or "deadmen" fixed in the earth and running through pulleys or "sheaves" fastened to the driver at appropriate places. The driver was some fifty-six feet long, with a derrick on the front end sixty feet high, and a hoist and stationary steam boiler on the after-end. Decks of planking were attached to the top of two longitudinal runners under the derrick at the front, and under and around the machinery at the rear. The center of the driver was open, save for structural cross-braces in the space intervening between the rear platform and the derrick.

The plaintiff, a machinery salesman, went upon the driver at the invitation of the defendants to take measurements for a pipe line to convey steam to a new steam piston pile hammer (that defendants later ordered from plaintiff's employer) to be used in place of a steel drop hammer then being employed. Shortly after he boarded the driver, it was moved by the engineer, and, during the course of its operation, the plaintiff was precipitated to the floor, when the driver gave a sudden and unexpected lurch. As a result of such fall, plaintiff incurred the injuries giving rise to this action. Defendants contend that the verdict and judgment are without support in the evidence because of a failure to show negligence on their part.

Plaintiff testified that he was a "sales-engineer"; that, while he was familiar with the workings and operation of pile driver machinery, he had very little field experience, and had never been upon a pile driver platform prior to the day of the accident; that he had gone there at the solicitation and invitation of defendants, in order to take certain measurements necessary to effectuate a contemplated change in the operation of the driver; that when he boarded the driver it was sta-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tionary, and he was without knowledge as to "what they were going to do"; that the engineer of the driver assisted in the taking of some of the measurements; that before he completed taking the measurements, he noticed a "slight movement of the pile driver"; that at first the movement, though rather "unsteady," "didn't seem much," and he therefore continued with his work; that he thereupon noticed a large timber off to one side which appeared to be changing position relative to his location on the driver; that he feared the rope holding said timber might give way, causing it to fall on him; that he expressed his fears in this regard to the man operating the driver, and requested that he "wait until I get on the other side, where I can be out of the way" and "safe"; that when he started around to the other side the driver was "absolutely stationary"; that before he reached his destination the driver lurched or lunged, and he was knocked down and rendered momentarily unconscious; that the fall broke his left leg; that he had not completed the measurements when he was hurt; and that the operator of the driver did not at any time tell him he was going to move the driver or tell him to get off.

P. S. Ricker, who had accompanied plaintiff to the job, corroborated much of plaintiff's testimony, and, in addition, testified that the driver had lurched or jerked with great force fully eight feet when plaintiff was knocked down, and that he (the witness) had never before seen such a lurch "on the movement of pile drivers."

[1-3] The foregoing outline of plaintiff's evidence sufficiently demonstrates the propriety of the verdict impliedly finding the defendants to have been negligent in the operation of their pile driver. Plaintiff was an invitee of the defendants, and, as such, the defendants owed him the duty of exercising ordinary and reasonable care in the operation of the driver. This principle is too well settled to require the citation of authority. To move the driver without warning and in such a manner as to cause it to lurch or lunge fully eight feet, at a time when the plaintiff was seeking refuge from a threatened danger, can hardly be said to constitute the exercise of ordinary and reasonable care. Particularly is this so when it is borne in mind that plaintiff had requested the engineer to wait until he got to a place where he would be out of the way from harm. Evidence adduced by the defendants is contradictory of plaintiff's showing. But it was for the jury to weigh the evidence, and we cannot say that its verdict is without support.

[4-5] The jury was fully and sufficiently charged as to the degree of care owing by the defendants to the plaintiff. In no fewer than seven instructions the jury was told, in effect, that "it is the duty of an owner of premises to an invitee to exercise ordinary care and prudence to render the premises reasonably safe for the invitee." Despite the giving of these several instructions as to the degree of care required of them, the defendants now urge that the court below erred in refusing to give the following requested instruction: "I instruct you that if defendants used ordinary care in moving their pile driver at the time and place in question, then your verdict must be in their favor and against plaintiff."

The requested instruction merely states in another and different form what the court very definitely and clearly explained to the jury in the several instructions referred to. If, as the court fully informed the jury, the defendants were only required to exercise ordinary and reasonable care for plaintiff's safety while on the driver, it seems to necessarily follow that the exercise of such a degree of care would discharge them from all liability to him. The substance of the refused instruction was sufficiently covered in the court's charge, though perhaps stated in different words. Aside from this, the trial court gave defendants' instruction number eighteen, wherein it is stated, among other things, that "Before the plaintiff is entitled to your verdict, he must prove by a preponderance of evidence that the defendants or their servants omitted to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or that the defendant [s] or [their] servants did something which a reasonable or prudent man would not do, which was the proximate cause of the accident and resulting injuries and damage." In our opinion, this instruction, in effect, informed the jury that, if the defendants had exercised ordinary and reasonable care in the operation of the driver, they were not answerable to the plaintiff.

[6] We do not find any error in the trial court's refusal to give the following instruction: "I instruct you that defendants were lawfully entitled to move the pile driver at the time and place in question and in doing so to move it in the ordinary way." There was and is no issue in the case as to the defendants' right to move the pile driver, or as to the particular manner in which it might be moved; the principal issue being whether or not in moving it, in the ordinary way or otherwise, the defendants exercised that degree of care commensurate with plaintiff's presence and safety while on the driver. On this issue, the jury's implied finding was adverse to the defendants.

[7] Contending that plaintiff forfeited and lost his status as an invitee and became a mere licensee (to whom a lesser degree of care is owing) when he went from one side of the driver to the other, in order to avoid what appeared to him to be a threatening and

impending danger, the defendants urge that the court below should have given an instruction to this effect which they had requested.

We regard as inapplicable to this case those authorities cited by the defendants to the effect that, when an invitee exceeds the scope of the invitation, he immediately becomes a mere licensee. When, as testified by the plaintiff, he found it necessary to change his position on the driver to avoid being struck by a large timber which was apparently moving toward him in a threatening manner, he did not thereby sacrifice and forfeit his status as an invitee. Under the peculiar circumstances of this case, the authorities do not require such a holding as is contended for by the defendants. That plaintiff apparently acted as a reasonable and prudent man would have acted under similar circumstances receives some support from the fact that Ricker, who had accompanied him to the job, found the danger from the timber sufficiently great to warrant his complete abandonment of the driver. Our examination of the entire record discloses nothing of a prejudicial nature.

The judgment is affirmed.

We concur: SEAWELL, J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

214 Cal. 288

CENTRAL MANUFACTURING DIST., Inc., et al. v. STATE BOARD OF EQUALIZATION OF CALIFORNIA et al.

S. F. 14390.

Supreme Court of California.

Nov. 18, 1931.

Rehearing Denied Dec. 18, 1931.

1. Taxation ⟹80.

Generally, there can be but one assessment of entire estate in realty, which assessment includes value of both estate for years and remainder or reversion.

2. Taxation ⟹80, 81.

As general rule, mortgagor or lessor of realty is liable for taxes thereon.

3. Taxation ⟹80.

Where reversion is exempt from taxation, as when owned by state, leasehold may be separately assessed.

4. Taxation ⟹80.

In oil leases, leasehold and reversion may be separately assessed, owing to peculiar nature of such leasehold interest as distinguished from usufructuary leasehold.

5. Taxation ⟹200.

Reversionary interest of lessor in property leased to and used exclusively as operative property by public utility corporation, which paid gross receipts tax to state, *held* not taxable locally (Const. art. 13, § 14).

In Bank.

Application for writ of mandate by the Central Manufacturing District, Inc., and another against the State Board of Equalization of the State of California and others, to compel cancellation of assessment upon reversionary interest in certain real property and improvements.

Writ granted.

Gibson, Dunn & Crutcher, of Los Angeles (Woodward M. Taylor, of Los Angeles, of counsel), for petitioners.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Dep. Co. Counsel, both of Los Angeles, for respondent Board of Supervisors of Los Angeles County.

U. S. Webb, Atty. Gen., and H. H. Linney, Dep. Atty. Gen., for respondent State Board of Equalization.

Pillsbury, Madison & Sutro, Alfred Sutro, and Eugene M. Prince, all of San Francisco, amici curiæ for petitioners.

Frank Karr and R. E. Wedekind, both of Los Angeles, for Pacific Electric Railway & Motor Transit Co.

H. C. Lucas and Orla St. Clair, both of San Francisco, for Pacific Greyhound Lines.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for Southern California Edison Co., Ltd.

SHENK, J.

This is an application for a writ of mandamus.

The petitioner, Central Manufacturing District, Inc., is a private nonpublic utility corporation. It is the owner in fee of certain real property and improvements situate in the city of Los Angeles. The improvements consist of railroad tracks, rights of way, buildings, structures, and appliances suitable to the operation of a railroad. The petitioner, Los Angeles Junction Railway Company, is a public utility railroad corporation having its principal office and carrying on a common carrier interstate and intrastate railroad business in Los Angeles county. On October 10, 1925, the petitioner Central Manufacturing District, Inc., leased to the petitioner Los Angeles Junction Railway Company said real property and improvements on a stipulated

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

annual rental, and said lessee is using, and, since the execution of said lease, has used, the real property and improvements exclusively in the conduct of its public utility business. The surface of said real property is entirely occupied by the railroad property and improvements so used, and the lessor has, during the existence of said lease, no possession or control, or right to exercise possession or control, of said real property and improvements. The lessee is required under said lease to pay all taxes lawfully assessed against the railroad tracks, rights of way, building, and structures placed upon said real property.

On April 10, 1931, the lessee public utility corporation duly filed with the respondent state board of equalization a report of all of its operative property for the year ending December 31, 1930. A copy of this report was served on the county assessor of Los Angeles county on April 9, 1931. This report contained a description of all of the real property and improvements covered by said lease, and set forth that all of said property was necessary to and was used exclusively in the operation of its said public utility railroad business. On April 28, 1931, the county assessor of Los Angeles county addressed a communication to the state board of equalization objecting and excepting to said report on the ground that the interests of the railway company were limited to the value of the leasehold on and in said property as of the first Monday in March, 1931; "that such value cannot and does not comprise the total worth of the aforesaid properties, as there is an interest in each property existing as of said first Monday in March, not embraced within the limited rights to the use thereof, as evidenced by the said lease, viz.: the reversionary interest therein; that said reversionary interests as of said first Monday in March, comprise taxable property, as defined by the Constitution and laws of this state, which, on said first Monday in March, was not, nor is it now, either owned or used by said railway company in the conduct of its business; that said reversionary interests were on said date and now are vested in the owners of the fee simple estate of said properties and are taxable as non-operative property under the laws of this state." The assessor requested the state board of equalization to order: "That the reversionary interests, as of the first Monday in March, 1931, in the aforesaid real estate, consisting of land and improvements, be returned to the non-operative roll of said county."

After hearings duly had, the state board of equalization sustained the objections of the county assessor and ordered that the reversionary interest of the lessor in and to said real property and improvements be placed on the nonoperative roll of said county. Thereafter, and within the time provided by law, the county assessor assessed against the lessor and entered upon the assessment roll of said county said reversionary interest in and to all of said real property and improvements. It is alleged and not denied that the assessment so made by the county assessor for local purposes is in approximately the same amount it would have been, had none of said real property and improvements been used as operative property. Thereafter, and on July 17, 1931, the petitioners herein filed with the respondent board of supervisors, pursuant to section 3804a of the Political Code, their joint petition for the cancellation of said assessments so levied and entered on the assessment roll of Los Angeles county, and requested the respondent county counsel to consent to such cancellation. The petition was denied and the consent was refused. Whereupon this proceeding was instituted to compel the state board of equalization to correct its said ruling and order placing said property on the nonoperative roll; to compel the county counsel to consent to the cancellation of said assessment for local purposes; and to compel the board of supervisors to cancel said assessment, on the ground that said local assessment is void under the Constitution and laws of this state and of the United States. It is conceded that mandamus is the proper remedy.

The question is presented whether the reversionary interest of the lessor in property leased to and used exclusively as operative property by a public utility corporation is assessable and taxable locally for county and municipal purposes when such property is exclusively so used and is properly reported. and the gross receipts taxes provided by law are paid to the state by said public utility corporation.

The position of the petitioners is stated substantially as follows: That under section 14 of article 13 of the Constitution of the state and laws enacted pursuant thereto, the gross receipts tax is not an income or earnings tax, but is a substituted property tax measured by gross receipts; that this substituted tax rests on all property, tangible and intangible, which is used in public utility service, because all property so used contributes directly or indirectly to the gross receipts by which the substituted tax is measured, and it contributes in exactly the same way whether it is owned or leased; that the rates of the gross receipts were purposely fixed so as to make the substituted tax on property used in public utility service the fair equivalent of the general ad valorem tax on like property not used in public utility service; that the gross receipts tax paid by the public utility includes a tax on all property used by the public utility in earning the gross receipts, and therefore under the Constitution and statutes of this state there can be no local taxation of such property, whether owned or leased by the public service corporation; that if the public utility, through its gross receipts tax, pays a substituted tax on the full value of the leased property used in the public service, and if at the same time the lessor is required to pay a local tax on the full value of the leased property so used, double taxation necessarily results; that since no other property in the state is subject to such double taxation, it follows that the same would be discriminatory, and therefore unconstitutional.

It is the position of the respondents that the entire value of the corpus of the property cannot be considered as vested in a lessee for purposes of taxation, leaving no taxable interest in the owner; that the right of the owner to receive the rents, to enforce his contract, and to receive back his property upon default in the lease or upon its expiration, and all other rights therein, viz., the reversionary interest, is property, and therefore is taxable to the owner no matter who holds the lease or who uses the physical property; in other words, that the gross receipts tax rests not on the property used in public service, but on the title or interest of the operating public utility in that property.

[1-4] It is the general rule that there can be but one assessment of the entire estate in real property, which assessment includes the value of both the estate for years and the remainder or reversion, and the mortgagor or lessor of the real estate is liable for the taxes thereon. Graciosa Oil Co. v. County of Santa Barbara, 155 Cal. 140, 143, 99 P. 483, 20 L. R. A. (N. S.) 211. There are certain exceptions to this general rule. Where the reversion is exempt from taxation, for example, when it is owned by the state, the leasehold may be separately assessed. San Pedro, etc., R. Co. v. Los Angeles, 180 Cal. 18, 179 P. 393. In oil leases, the leasehold and the reversion may be separately assessed, owing to the peculiar nature of such leasehold interest as distinguished from a usufructuary leasehold. Graciosa Oil Co. v. County of Santa Barbara, supra. These exceptions have no application to the present case. Here we are considering a change in the method of taxation, a substituted tax, and no exemptions are involved. San Bernardino v. State Board of Equalization, 172 Cal. 76, 155 P. 458. Here we have a gross receipts tax on operative property. As to such property, there is no occasion for its valuation or assessment as such. The equivalent of such valuation and assessment is inherent in the gross receipts tax. When, as here, such substituted tax is not only permissible but mandatory, what is the status of the reversion when the operative property embraces all possessory and usufructuary rights in the property and has been taxed substantially to the full value of both estates in the property? The petitioners contend that this question is answered conclusively by the case of Hopkins v. Southern Cal. Tel. Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329, and by the later and recent decision of this court in Morgan Adams, Inc., v. Los Angeles County, 209 Cal. 696, 289 P. 811. The respondents concede that those cases "are to some extent opposed" to their contentions, but they attempt to distinguish them on the facts. In the Hopkins Case, a futile effort was made to tax locally certain personal property used by the telephone company in its public utility business but held by it under lease from the owner. In the Morgan Adams, Inc., Case it was ineffectually sought to tax locally a ten-story building leased by the telephone company and used in its public service. In the present case, the effort is made to tax to the owner of the fee the reversionary interest in the leased property. But in arriving at the value of the reversionary interest for the purpose of the assessment and levy of taxes for local purposes, the assessment is made practically the same as it would have been had the property not been leased or used for public utility purposes. In other words, the respondents must be deemed to contend that it is lawful to require the public utility to pay a substituted tax to the state on the whole value of the property, and at the same time to require the owner of the reversionary interest to pay a local tax on the practical equivalent of that value. It seems obvious that this would result in double taxation and on principle be contrary to the holdings in the Hopkins and Morgan Adams, Inc., Cases.

[5] Theoretically it may be said that the reversionary interest now sought to be taxed is property; but when, as here, the entire possessory and usufructuary rights and interests in and to said property are necessarily taxed for state purposes, there is nothing left beneficially for local taxation. If it be conceded that under the admitted facts the reversionary interest is subject to taxation at a nominal valuation, the answer is that there is here no attempt to fix and impose a nominal valuation and assessment, but an endeavor in support of the local tax which would have the effect, if approved, of subjecting the same property to a burden of double taxation.

Under the authorities, the petitioners' contentions must be sustained, and the local tax sought to be imposed be declared unlawful.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; RICHARDS, J.

214 Cal. 295

SMITH v. FRANS NELSON & SONS, Inc.

L. A. 13178.

Supreme Court of California.

Nov. 19, 1931.

1. Brokers ⊂⊃43(3).

Statute of Frauds may be satisfied as to employment of realty broker by resort to escrow instructions (Civ. Code, § 1624, subd. 6).

2. Escrows ⊂⊃5.

Escrow instructions *held* to provide for payment of broker's commission only on completion of escrow contract.

Escrow instructions of party employing broker provided that escrow holder should pay broker certain commission and deliver to him as balance of commission a deed. Instructions of both parties provided for completion within 30 days from date, and each contained provision that if conditions had not been complied with at expiration of such time they should be completed at earliest possible date thereafter unless written demand had been made for return of money or instrument deposited by either signer.

3. Brokers ⊂⊃60.

Where only written evidence of broker's employment was escrow document providing for commission only on consummation of transaction, broker could not recover commission where transaction failed through no fault of party employing him (Civ. Code, § 1624, subd. 6).

In Bank.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Charles R. Smith against Frans Nelson & Sons, Incorporated. From a judgment for plaintiff, defendant appeals.

Reversed.

Superseding opinion of the District Court of Appeal in 1 P.(2d) 509.

Hughes & Miller and Harold Aubry Miller, all of Los Angeles (Randall & Bartlett, of Los Angeles, of counsel), for appellant.

Edgar G. Wenzlaff, of Los Angeles, and John H. Miller, of San Francisco, for respondent.

PRESTON, J.

The judgment of the court below is reversed.

[1-3] The case of Coulter v. Howard, 203 Cal. 17, 262 P. 751, is authority for the proposition that the Statute of Frauds (section 1624, subd. 6, Civ. Code) may be satisfied as to the employment of a real estate broker by resort to appropriate language in escrow instructions, if signed by the party sought to be charged. But it is likewise evident that, unless overcome by some direct attack in equity, the broker must accept the apposite burdens and conditions contained in the letter of authority which thus confirms his employment. And where, as here, the legal effect of the contract is to provide for the payment of a commission only upon completion of the escrow transaction, so as to invest the defendant with a clear title to the property it is to receive in exchange for its own, the commission does not become due where, through no fault of the defendant, the transaction is never completed.

In Coulter v. Howard, supra, the defendant was held liable because her own act prevented consummation of the escrow transaction. Here we have the reverse situation. The party sought to be charged was willing to complete the exchange and, but for the other party thereto, would have done so. Said other party, however, failed or refused to carry out his covenants. The broker's claim in this case must therefore fall with the collapse of the other negotiations. It is not permissible for the broker to resort to the escrow document for a ratification of his employment and then, in contradiction of the other provisions thereof, establish by parol a different contract as to the conditions under which the commission is to become due. To permit such a course would be to defeat the very object the Statute of Frauds was designed to accomplish.

The facts out of which this controversy arose are well set up in the majority opinion of the District Court of Appeal, with whose conclusion we agree. From said opinion we quote the following:

"Defendant has appealed from a judgment awarding a commission to plaintiff as a realtor. Plaintiff testified that he was a real estate broker on and prior to December 1, 1927, that about said date he was employed by defendant under an oral contract 'to get an acceptance' of the latter's proposition to exchange certain real properties for property owned by one Fred W. Siegel, at a stipulated commission or compensation, and that on that date he succeeded in bringing the parties together. Escrow instructions to the title company describing the respective properties were prepared and signed, the parties agreeing to deposit deeds to their properties which could be delivered by the escrow holder when the latter could issue certificates of title showing the properties each was to receive to be vested in him or it 'free of incumbrance except 2nd ½ taxes for fiscal year 1927–1928,' etc. In defendant's escrow instructions appeared the following: 'Pay Charles R. Smith * * *

$5,250.00 commission and deliver to him as balance of commission a deed covering Lots 6 and 7 in Block 23 of Tract No. 7264, in the County of Los Angeles * * * with certificate of title. * * *' The instructions of both parties provided for completion within thirty days from date and each contained a provision that, if the conditions thereof had not been complied with at the expiration of such time, they should be completed at the earliest possible date thereafter, unless written demand had been made for the return of the money or instruments deposited by either signer. * * *

"The conditions of defendant's escrow instructions were changed in various particulars not material here, and extensions were either permitted or expressly granted by it until February 21, 1928. It is admitted that plaintiff understood that defendant would require clear title in the contemplated exchange and Siegel testified that there were many liens against his property, and that he had not been able to 'clear' his property up to February 21, 1928, at which time defendant withdrew from the escrow, although he says he was still 'proceeding to arrange to clear it.' * * *"

As above noted, the only conclusion reasonably deduced from this escrow document is that the commissions were to be due and payable to plaintiff only upon the consummation of the transaction according to its tenor. By this contract, in the absence of other written agreement, plaintiff must be bound. Jennings v. Jordan, 31 Cal. App. 335, 160 P. 576; Brion v. Cahill, 34 Cal. App. 258, 165 P. 704; Coulter v. Howard, supra. Hence the conclusion above announced.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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214 Cal. 298

In re ENGLAND'S ESTATE.

ELKINS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

S. F. 14179.

Supreme Court of California.

Nov. 20, 1931.

Rehearing Denied Dec. 18, 1931.

1. Jury ⚷11(2).

Jury trials in probate proceedings were unknown to common law; hence require express statutory authority.

2. Jury ⚷19(7).

Heir at law may contest generally items of administrator's account, but jury trial is permitted only in contest of allowed claim (Code Civ. Proc., §§ 1490–1514, 1636, 1714).

3. Jury ⚷19(7).

Claim for attorneys' fees is not "allowed claim" within statute authorizing jury trial of heir's contest of allowed claim in administrator's account (Code Civ. Proc. § 1636).

[Ed. Note.—For other definitions of "Allowed Claim," see Words and Phrases.]

4. Executors and administrators ⚷507(2).

Where, on heir's contest, court disallowed item for attorneys' fees in administrator's account, and settled account, purported orders granting new trial and allowing previously rejected items *held* beyond court's jurisdiction (Code Civ. Proc. §§ 657, 1490–1514, 1636, 1714).

In Bank.

In the matter of the estate of Anna England, deceased. Petition for certiorari by James N. Elkins, heir at law of said deceased, to review orders of the Superior Court in and for Los Angeles County, and the Honorable Albert Lee Stephens, judge, presiding in Department No. 2 thereof, granting a motion for new trial and settling final account and directing distribution.

Orders annulled.

Ford, Johnson & Bourquin, Ford & Johnson, Fletcher A. Cutler, and John J. McMahon, all of San Francisco, for petitioner.

Loyd Wright, Hugh A. McNary, Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, all of Los Angeles, for respondent.

PRESTON, J.

Petition for writ of review.

The sole question is whether or not the procedure allowed on motion for new trial in civil actions may properly be applied to a judgment or order for the settlement of the final account of an administrator where an heir at law has presented an issue, by written objections solely to certain items of attorneys' fees claimed by the administrator for ordinary and extraordinary services of his attorney.

This question is answered by a consideration of what were formerly sections 1714 and 1636 of the Code of Civil Procedure in force at the time in question. The former section provided as follows:

"The provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided, that hereafter a motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings under section one thousand six hundred and sixty-four of this code and in those cases where the issues of fact, of which a new trial is sought, were tried by a jury or were of such character as to entitle the parties to have them tried by a jury whether or not they were so tried."

The latter section provided in part as follows: "* * * Whenever an allowed claim is contested by any heir, or other person entitled to contest it, unless such jury be waived as provided in section 631 of this code either the contestant or the claimant is entitled to a trial by jury of the issues of fact presented by the contest; and, it is the duty of the court, to call a jury and submit to them such issues, and, after receiving their verdict, to enter an order disposing of such contest in accordance therewith."

[1] Jury trials in probate proceedings were unknown to the common law, and hence must have express statutory authority to be allowed. Estate of Dolbeer, 153 Cal. 657, 96 P. 266, 15 Ann. Cas. 207; Estate of Baird, 173 Cal. 622, 160 P. 1078; Carter v. Waste, 159 Cal. 25, 112 P. 727. It has several times been expressly held that, in the absence of a statute so providing, trials by jury in the settlement of accounts in probate are not allowed. Estate of Moore, 72 Cal. 335, 13 P. 880; In re Sanderson, 74 Cal. 208, 15 P. 753; Estate of Franklin, 133 Cal. 587, 65 P. 1081.

[2-4] It will be noted that under said latter provision of the statute, where the parties were entitled to a jury trial, the claim in question must be an allowed claim. An heir at law may contest generally the items of the account, but a jury trial is permitted only in a contest aimed at an allowed claim. Allowed claims were treated in what was then part 3, tit. 11, c. 6, §§ 1490–1514, of said Code of Civil Procedure. Among other things, the law requires that an allowed claim be approved by both the administrator and the judge of the Superior Court. Section 1496. We are not permitted to extend this right further than the plain provisions of the statute. A claim for attorneys' fees, however, is not an allowed claim within the meaning of the statute. Liability for attorneys' fees is an expense of administration. Many of the items involved here too are allowable only in the discretion of the court. It is true that under sections 1616 and 1619 of said Code, as they formerly read, and as the Probate Code (St. 1931, p. 587) now reads, an attorney himself may apply to the probate court directly for an allowance upon his compensation, but this does not constitute his demand an allowed claim within the meaning of the chapter above referred to.

This case arises from the following facts: In the above-entitled estate, the administrator, as public administrator, on January 23, 1923, presented to the court his second and final account and supplement thereto and his petition for distribution containing a number of items, including an item for regular attorneys' fees of $739 and several items for extraordinary services aggregating $3,500, and he prayed for allowance of these items. Thereafter one James N. Elkins, an heir at law of said decedent, contested said items of said account largely upon the ground that, under the charter of Los Angeles county, the county counsel should act as attorney for the public administrator and collect the fees allowed by law for such services and turn them into the county treasury. The court on the hearing disallowed all said items of attorneys' fees, settled the account, and ordered the estate distributed accordingly. No appeal was taken from this order. On January 27, 1930, the public administrator filed what was termed a notice of intention to move for a new trial on all the ordinary grounds mentioned in section 657 of the Code of Civil Procedure. Motion for a new trial followed, which on the 4th day of March, 1930, the court purported to grant upon the ground that the evidence did not support the judgment. This was followed by another final settlement of the account and distribution, which order allowed the items of attorneys' fees above referred to, whereupon said heir at law filed in this court this petition for writ of review. The writ issued. A return thereto was made, setting out substantially the facts above disclosed.

Manifestly, if the procedure in civil cases on motion for new trial is inapplicable, both the purported order granting the new trial and the additional order allowing the items theretofore rejected are beyond the jurisdiction of the court. Diamond v. Superior Court, 189 Cal. 732, 740, 210 P. 36; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001.

It follows that said orders granting the motion for new trial and the order which followed it are annulled.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

118 Cal.App. 426

LEVELL v. METROPOLITAN LIFE INS. CO.

Civ. 7595.

District Court of Appeal, First District,
Division 2, California.
Nov. 20, 1931.

1. Husband and wife ⚷247.

Amendments to Civil Code increasing wife's interest in community property could not give her vested interest in community property theretofore acquired (Civ. Code, § 161a, as added by St. 1927, p. 484).

This is so since amendments increasing wife's rights in community property are inapplicable to community property acquired before their adoption.

2. Husband and wife ⚷265.

Absent finding that premiums on husband's life policy were paid from community funds acquired after amendment increasing wife's rights, prior law governs, precluding widow's recovery from insurer paying beneficiary without knowledge that premiums were paid from community funds (Civ. Code, § 161a, as added by St. 1927, p. 484).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Mattie Fern Levell against the Metropolitan Life Insurance Company. From an adverse judgment, plaintiff appeals.

Affirmed.

Eloise B. Cushing, of Oakland, for appellant.

F. Eldred Boland and Knight, Boland & Christin, all of San Francisco, for respondent.

Francis V. Keesling, of San Francisco, amicus curiæ.

DOOLING, Justice pro tem.

This is an appeal on the judgment roll from a judgment in favor of defendant and respondent, the Metropolitan Life Insurance Company. From the findings it appears that on or about December 1, 1925, respondent insurance company issued to one James Levell a policy of insurance upon his life for $1,000 payable to his mother as beneficiary; that on or about December 31, 1925, James Levell married the plaintiff and appellant, Mattie Fern Levell, and they continued to be husband and wife until December 20, 1927, upon which date James Levell died; that all premiums upon this policy of insurance were paid from the community funds of appellant and James Levell; and that on December 21, 1927, respondent insurance company paid the sum of $1,000 due under the policy to the mother of James Levell as beneficiary, without any notice or knowledge that appellant was the wife of James Levell or claimed any interest in the proceeds of the policy.

It is appellant's contention that, by the adoption of section 161a of the Civil Code in 1927 (St. 1927, p. 484), she acquired a vested interest in the community property, including this policy of insurance, and that the payment of the principal sum of the policy to the beneficiary amounted to a conversion of that interest by respondent insurance company entitling her to a recovery from the respondent.

[1] Upon the record before us, we are not called upon to consider this ingenious argument. Prior to the adoption of section 161a, Civil Code, in 1927, the Supreme Court held in Blethen v. Pacific Mutual Life Insurance Co., 198 Cal. 91, 243 P. 431, that a widow could not recover from an insurance company which had paid the beneficiary under a policy of insurance upon the life of a deceased husband, even though the premiums had been paid with community funds, where at the time of payment the insurance company had no knowledge or notice of the widow's claim.

[2] It is well settled that amendments increasing the rights of the wife in community property have no application to community property acquired prior to their adoption (article on Community Property, 1930 Supplement to Cal. Jur., § 80, p. 117; McKay v. Lauriston, 204 Cal. 557, 566, 269 P. 519, and cases therein cited), and section 161a could not therefore give the wife a vested interest in community property acquired prior to its effective date. It was neither pleaded in the complaint nor found by the court that any of the community funds used in payment of any premium upon the policy here in question were acquired subsequent to July 29, 1927, the date upon which Civil Code, § 161a, became effective. In the absence of such finding, appellant is in no position to urge any rights under that section. It follows that this case is governed by the rule laid down in Blethen v. Pacific Mutual Life Insurance Co., supra.

Judgment affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

118 Cal.App. 439

JOHNSTON v. WHEELER et al.

WHEELER v. JOHNSTON et al.

Civ. 4449.

District Court of Appeal, Third District, California.

Nov. 20, 1931.

Pleading ⟹150.

Where alleged cross-complaint is mere repetition of defenses set up in answer, no formal denial of allegations therein contained is necessary (Code Civ. Proc. § 462).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by W. J. Johnston against Charles M. Wheeler and others, and cross-action by Charles M. Wheeler against W. J. Johnston and others. From judgment on cross-complaint, W. J. Johnston appeals.

Reversed.

C. Ibeson Sweet, of Los Angeles, for appellant.

Henry St. Rayner, of Los Angeles, and Clyde Woodworth and J. Gordon Mills, both of Inglewood, for respondents.

JAMISON, Justice pro tem.

Plaintiff brought this action for declaratory relief. He sets forth in his complaint that on or about July 13, 1927, defendant Marion R. Paddock made and executed his note for $1,600 to the order of the Bank of Italy National Trust & Savings Association, and secured same by a deed of trust; said bank being then the guardian of defendant Charles M. Wheeler. That on June 15, 1928, the said Wheeler having been restored to capacity by decree of court, the said note and deed of trust were assigned to him by said bank. That on September 26, 1928, the said Wheeler sold said note and deed of trust to plaintiff for $1,000, and thereupon indorsed said note and assigned said deed of trust to plaintiff, and delivered same to defendant bank, with instructions to deliver said instruments to plaintiff on payment of $1,000 for the use of said Wheeler. That the said $1,000 has been deposited with said bank from September 26, 1928, to the present time. That plaintiff has continually demanded of said bank the said note and deed of trust, but the same are still held by said bank. That on October 9, 1928, the said Wheeler notified said bank not to deliver said note and deed of trust to plaintiff. He therefore asked judgment that the said note and deed of trust be ordered delivered to him by said bank. Defendant Wheeler answered, admitting the ownership of the said note and deed of trust, his restoration to capacity, and that he notified said bank on October 9, 1928, not to deliver said note and deed of trust to plaintiff, but denied the other allegations of the complaint. And for a second further, separate, and distinct defense to the complaint he alleged that on September 26, 1928, he was the owner of the said note and deed of trust referred to in the complaint, and that he agreed to sell same to plaintiff for $1,000, upon the express condition that plaintiff would deliver said sum to said bank, and upon the delivery by said Wheeler of said note and deed of trust to said bank on the 26th of September, 1928, the said $1,000 would be paid over to him. That in conformity with said agreement on September 26, 1928, the said Wheeler delivered said note and deed of trust to said bank, with instructions to deliver same to plaintiff upon his compliance with said agreement. That on September 26, 1928, and on various dates up to October 9, 1928, said Wheeler demanded of plaintiff that he pay, or cause to be paid to him, the said $1,000, but that plaintiff refused, and still refuses so to do. That on September 26, 1928, and at various other times, said Wheeler demanded of said bank that it pay to him the said sum of $1,000, or redeliver to him the said note and deed of trust, but that said bank failed and refused, and still fails and refuses so to do. That on October 9, 1928, said Wheeler notified plaintiff and said bank that inasmuch as they had each of them violated the terms of said agreement, he demanded of them a return to him of said note and deed of trust, but that they, and each of them, have refused to comply with said demand.

Wheeler also filed, in conjunction with his answer, a cross-complaint, in which he set out, word for word, the exact facts contained in his second defense. Service of said cross-complaint was duly had upon plaintiff on December 20, 1928, but no service was had upon the bank.

On January 8, 1929, plaintiff having failed to answer the cross-complaint, default was entered against him, and thereafter, on January 9, 1929, upon a hearing duly had, judgment was rendered in favor of the said Wheeler, and against plaintiff and said bank canceling the said agreement, and ordering the said bank to redeliver to said Wheeler the said note and deed of trust. On January 21, 1929, the judgment was set aside as to the said bank.

Appellant contends that the cross-complaint is merely a repetition of the defenses set up in respondent's answer, and therefore does not require an answer on his part. We are of the opinion that this conclusion is well taken. The cross-complaint is a verbatim copy of the second defense set up in respondent's answer.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

In the case of Turner v. East Side Canal, etc., Co., 169 Cal. 652, 147 P. 579, the Supreme Court declared that the cross-complaint merely restated the affirmative allegations of the answer. It presented no new issue, and its allegations were deemed controverted by operation of law, and an issue was thereby formed. Code Civ. Proc. § 462; Banning v. Banning, 80 Cal. 271, 22 P. 210, 13 Am. St. Rep. 156; Shain v. Belvin, 79 Cal. 262, 21 P. 747.

In the case of Baird v. Pacific Electric R. Co., 39 Cal. App. 512, 179 P. 449, 451, the court said: "The provision of section 462 of the Code of Civil Procedure that 'the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial be deemed controverted by the opposite party,' entitles the plaintiff to introduce, without further pleading, evidence to sustain any legitimate defense to the new matter in the answer." Every allegation contained in the so-called cross-complaint was therefore deemed in law to have been controverted by plaintiff, and no further answer denying the said allegations was required of him. The acceptance of service of the said cross-complaint did not bind him to answer a paper which was not in fact a cross-complaint. Harrison v. McCormick, 69 Cal. 616, 11 P. 456.

The plaintiff is entitled to a trial on the issues raised by the complaint and the answer.

The judgment is reversed.

We concur: PRESTON, P. J.; THOMPSON, J.

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118 Cal.App. 407

GOUDAL v. CECIL B. DE MILLE PICTURES CORPORATION.*

Civ. 6752.

District Court of Appeal, Second District, Division 2, California.

Nov. 19, 1931.

Rehearing Denied Dec. 19, 1931. Hearing Denied by Supreme Court Jan. 18, 1932.

1. Master and servant 🔑30(2).

In action by moving picture actress for breach of employment contract, objections and suggestions concerning production of scenes *held* not failure or refusal to perform duties.

Since the contract provided "that the services of the artist herein provided for are of a special, unique, unusual, extraordinary and intellectual character," such objections and suggestions were in the interest of her employer and contemplated by the contract.

2. Master and servant 🔑30(1).

In action by motion picture actress for breach of employment contract, tardiness *held* not to justify discharge where resulting from work.

Such tardiness was not a justifiable excuse for discharge under contract where it was shown that tardiness resulted from duties in connection with costumes which plaintiff assumed voluntarily with approval of defendant, though not required by terms of contract to do so.

3. Master and servant 🔑30(1).

In action by motion picture actress for breach of employment contract, exercise of option to renew contract *held* declaration by act that past conduct was not a justification for termination of contract.

4. Appeal and error 🔑1008(1).

In action by motion picture actress for breach of employment contract, questions of failure or refusal to perform, tardiness, and ratification of conduct by defendant, *held* for trial court.

5. Appeal and error 🔑1010(1).

Findings of trial court sustained by evidence are not reviewable.

6. Master and servant 🔑30(2).

To constitute failure or refusal to perform contract of employment, there must be a willful act, or willful misconduct, on part of employee.

7. Master and servant 🔑41(6).

In action for damages for breach of employment contract, defense of failure to seek employment must be sustained by showing that by exercise of diligence plaintiff could have secured employment.

8. Appeal and error 🔑659(6).

Order of diminution of record to show amendment of defendant's answer ordered by trial court *held* properly denied, where such amendment was inconsequential.

Amendment to conform answer to proof by inserting therein an allegation that, since January 1, 1928, the plaintiff, suing for wrongful discharge, did not diligently seek other employment which she might have obtained at the same salary became inconsequential, where the judgment of the trial court did not allow the plaintiff any amount for damages after January 1, 1928.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Jetta Goudal against the Cecil B. De Mille Pictures Corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied 7 P.(2d) 174.

Neil S. McCarthy, of Los Angeles, for appellant.

W. I. Gilbert and Howell Purdue, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

This is an appeal from a judgment for plaintiff in the sum of $34,531.23 in an action to recover damages for breach of a contract of employment entered into in April, 1925. Under this agreement respondent was employed by appellant as a motion picture actress for one year beginning May 19, 1925, with the option to appellant of four yearly extensions of the contract, each yearly extension to be at a specified substantial increase in compensation. Respondent entered upon her duies, and appellant twice exercised its option, extending the period of employment to May 18, 1928. On September 10, 1927, respondent was discharged by appellant. The basic question in this case is whether such termination of the employment of respondent was wrongful or whether it was justified by acts of the respondent violative of the terms of the contract. The trial court found that respondent had not violated the contract, and that her discharge was not justified.

Many of the alleged violations of the employment contract set forth in appellant's brief are either not supported by the references to the transcript due either to counsel drawing inferences not justified by the testimony or to the fact that the references are to the testimony of Cecil De Mille as to what he told respondent had been reported to him, testimony which, while perhaps admissible on another theory, is pure hearsay so far as its being proof of the conduct of respondent is concerned. As an example of the misinterpretation of the evidence may be cited appellant's statement that "Mr. Howard testified that in two specific instances she refused to follow the directions of the director." When we examine the reference to the transcript, we find the testimony of Mr. Howard to be that in one scene Miss Goudal appeared disturbed, and did not perform the scene as he thought her capable of performing it, and that, in another instance, "She played the scene in a manner well enough for me to accept it and put it in my picture as a part of the picture but not in a manner I think fully as good as she was capable of playing it." Even the viewing of the testimony through the rose-colored glasses of the advocate can hardly justify counsels' statement that this was a refusal to perform a part of the contract.

[1] The claim that respondent failed or refused to perform her parts as requested is based upon many incidents set forth in detail in the record. They relate to occasions when the respondent, instead of unquestioningly performing as directed by the director in charge, called attention to inconsistencies, inaccuracies, possible improvements, or lack of artistic quality in the performance called for as they appeared to her. In some instances this resulted in the suggested change being made by the director without argument; in other cases the change was made after some argument between them. In most instances where the director did not make the suggested change it appears that respondent took the question up with the president of the appellant corporation, and in a substantial number of instances he agreed with her and the changes were made. In other instances he did not agree. This presents the question, Was respondent compelled by the contract to go through her scenes as a mere puppet responding to the director's pull of the strings, regardless of whether or not he pulled the right or the wrong string, or was she called upon by the language and spirit of the contract to give an artistic interpretation of her scenes, using her intelligence, experience, artistry, and personality to the ultimate end of securing a production of dramatic merit? We believe that the latter is the correct interpretation. Suggestions and even objections as to the manner of enacting the various scenes, when made in good faith, were in the interest of the employer; in fact, it appears from the testimony that they were welcomed and encouraged in many instances, and, prior to commencing work, the president of appellant informed respondent that he did not want mannikins to work for him, that he wanted thinking people, and that, if she would explain to him why she wanted to do a thing in a particular way, he would appreciate it. By the very wording of the contract "it is agreed that the services of the artist herein provided for are of a special, unique, unusual, extraordinary and intellectual character." Even without the evidence contradicting that of appellant, the trial court was more than justified in finding that it was not true that respondent had refused or failed to perform her part of the contract.

Some of the incidents, stressed by appellant as instances of a failure of respondent to perform her contract, turn out, when reference is had to the transcript, to be dependent upon the opinion of the director as to whether respondent performed to the best of her ability; others were dependent upon the feeling of the particular director as to whether he was or was not satisfied. The declarations of several of the directors as to their dissatisfaction with the work of respondent is rather inconsistent with the testimony elsewhere of one of them that the picture "White Gold," in which respondent performed under his direction, was "the best picture I ever will make," and the testimony of the director of her last picture, that he considered it one of his best American pictures. When considering the testimony of the directors who expressed dissatisfaction with the performance of her parts by respondent, one may well wonder who was temperamental and out of step when we note in connection therewith that in the picture in which Cecil De Mille directed Miss Goudal there was no trouble whatever. There is, furthermore, a conflict in the evidence as to whether the performance given by respondent was to the best of her ability and of an artistic character. In this conflict the trial court was fully sustained in its findings against appellant.

[2] The remaining ground urged as justifying her discharge is that respondent on certain occasions was late in arriving on the sets at the time designated by her employer. The instances cited were explained by the testimony for respondent as being due, not to any neglect or intentional absence, but to duties relating to costumes which had been voluntarily assumed by respondent with the approval of appellant, though not required by the contract, delays in appearing on the set due to the necessary consumption of time in the donning of a special wig, and, in the last picture, the only one made after the exercise of the last option by appellant to re-employ respondent for another year, delays due to the large number of costumes used, in one instance, a failure of her maid who forgot an article of clothing, and the delay of appellant in delivering to respondent the script, which determined the costumes required. It should also be noted that as to this last picture the director in charge, when respondent expressed regret at being late, stated to her that he understood, and that never before had he had as little trouble as he had with her. The case of May v. New York Motion Picture Corporation, 45 Cal. App. 396, 187 P. 785, so strongly relied upon by appellant, is easily distinguishable from the case at bar. The fact that the maximum salary under the contract of the plaintiff there was $125 per week as compared to the maximum salary of respondent of $5,000 per week sufficiently discloses the comparative skill of the respective artists. In that case also the plaintiff repeatedly was from one and a half to two hours late in arriving at the place of employment, on at least one occasion failed to appear after she had been notified by telephone, and on the three days preceding her discharge failed to appear for work at all, her reason for not appearing on those days being that her contract did not require her presence, a reason not sustained by the court's interpretation of the contract. The May Case involved the willful disobedience of a reasonable order incident to the employment justifying the plaintiff's discharge. There is in the case at bar no willful tardiness nor invalid excuse for absences, the instances of tardiness here being covered by the general description that those delays were occasioned by the requirements of the scenes to be enacted on those particular days, delays while respondent was actually engaged in performing her employer's business.

[3-5] It may also be noted that the references to alleged breaches of the contract consist largely of incidents prior to May, 1927, when appellant, for the second time, had exercised its option to continue and extend the contract for another year, and by which time respondent had completed seven of the eight pictures in which she performed for appellant. It is rather difficult to reconcile as sincere the appellant's criticism and faultfinding as to respondent's services in the pictures made during the two years prior to May, 1927, with the fact that in that month appellant voluntarily availed itself of its option to secure the talents and services of respondent for another year. Particularly is this significant when we consider that the salary under the latter option would amount to $39,000 more than respondent's salary for the preceding year. This circumstance alone would fully justify the trial court in considering as of little or no weight the testimony as to alleged breaches of contract prior to May, 1927. The exercise of the option not only evinced a desire on the part of appellant to retain respondent's services, but expressed an approval of the manner in which she had performed her services in the past, and was an indication that a continuation of the former services was desired. Having thus placed the stamp of approval upon respondent's conduct and services as rendered prior to May, 1927, it is not reasonable that a continuance of such services and conduct was unsatisfactory, and, from appellant's viewpoint, constituted a breach of the contract warranting respondent's discharge. Furthermore, the exercise of the option may be considered as a declaration by act that the past conduct of the artist was not such conduct as was intended by the contracting parties as a justification for the termination of the contractual relations. This would be particularly true where, as here, the duties of the performing party are described in the contract by such general phraseology as that the artist shall render the services "conscientiously" and "artistically." It might well be said that an artist who performed her part as directed without remonstrance or suggestion, in spite of the fact that the action was inartistic, crude, and illogical, would not be rendering services either conscientious or artistic in character, while the artist who made an effort to secure a change in the action to produce an artistic result would be complying with the letter and spirit of the contract. These matters and the intent and good faith of the respondent were matters of fact to be passed upon by the trial court, and, since their decision adversely to appellant is sustained by the evidence, the findings of the trial court are not subject to review here.

[6] To constitute a refusal or failure to perform the conditions of a contract of employment such as we have here, there must be, on the part of the actress, a willful act or willful misconduct (May v. New York Motion Picture Corp., 45 Cal. App. 396, 187 P. 785; Ehlers v. Langley & Michaels Co., 72 Cal. App. 214, 221, 237 P. 55), a condition which is absent when the actress uses her best efforts to give an artistic performance and to serve the interests of her employer. The trial court was fully warranted by the evidence in finding that respondent neither failed nor refused to perform the services required of her under the contract.

Even in the most menial forms of employment there will exist circumstances justifying the servant in questioning the order of the master. Would the discharge of a ditch digger be justified if, instead of immediately driving his pick into the ground at the point indicated, he in good faith suggested to the employer that the pipes they were to uncover lay on the other side of the highway? And when the employment is of the services of "a special, unique, unusual, extraordinary and intellectual character," as is agreed by the contract here under consideration, to be rendered "conscientiously, artistically and to the utmost of her ability," sincere efforts of the artist to secure an artistic interpretation of play, even though they may involve the suggestion of changes and the presentation of argument in favor of such changes, even though insistently presented, do not amount to willful disobedience or failure to perform services under the contract, but rather a compliance with the contract which basically calls for services in the best interests of the employer. What may in the case of the extra girl be rank insubordination because of a refusal to do exactly what she is ordered to do by a director may be even praiseworthy co-operation in the interests of the employer when the refusal is that of an artist of the exceptional ability expressly stipulated in the contract here before us.

[7] Appellant's final point is that respondent is precluded from recovery because, after her discharge, she failed to seek other employment. The testimony of respondent is that, after her discharge, she held herself in readiness to perform her part of the contract, and did not try to secure employment elsewhere. We are referred to no evidence, and appellant's brief concedes that there is none, that respondent could, with reasonable diligence, have secured other suitable employment during the remaining period of the agreement other than, as found by the trial court, that, after the 1st day of January, following her discharge, it should have become evident to her that appellant would not accept her services and that the circumstances showed that she did not diligently seek other employment which she could have obtained. Under this finding the trial court limited the recovery to the period ending January 1, 1928, and, pursuant to a stipulation, deducted therefrom the sum of $3,000 received by respondent from other employment.

"The measure of recovery by a wrongfully discharged employee is generally and primarily * * * the agreed wage for the unexpired part of the term; and the burden is upon the employer to rebut this presumption by proof that the damages sustained were actually less." Gregg v. McDonald, 73 Cal. App. 748, 757, 239 P. 373, 376. "The measure of damages in such cases is the amount of the salary agreed upon for the entire period of service, less the amount which the servant has earned or with reasonable effort might have earned from other employment." Boardman Co. v. Petch, 186 Cal. 476, 484, 199 P. 1047, 1051; Seymour v. Oelrichs, 156 Cal. 782, 801, 106 P. 88, 97, 134 Am. St. Rep. 154. The case last cited calls attention to the fact that, where the action is brought before the expiration of the period of employment provided by the contract, the action is not to recover wages due, but for damages for breach of contract, and that: "The measure of damages is, therefore, prima facie, the contract price." The burden was on the defendant to show, not only that respondent remained unemployed, but also that she could by diligence have secured suitable employment elsewhere. Rosenberger v. Pacific Coast Ry. Co., 111 Cal. 313, 318, 43 P. 963. Conceding that the proof would warrant the inference that respondent did not seek other employment, such proof would not establish that respondent could have secured other employment. Appellant failed to sustain the burden placed upon it by the law, and there is no proof which would warrant a reduction in the amount of damages awarded by the judgment.

[8] Appellant has moved this court for an order of diminution of the record to bring before this court the order of the trial judge that: "The defendant's answer is ordered amended to conform to the proof by inserting therein an allegation that since January 1, 1928, the plaintiff did not diligently seek other employment which she might have obtained at the same salary." As the judgment of the trial court did not allow to the plaintiff any amount for damages after January 1, 1928, it becomes immaterial here whether such amendment was ordered or not, and the motion is denied.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

118 Cal.App. 449

STONEBURNER v. RICHFIELD OIL CO. OF CALIFORNIA et al.

Civ. 563.

District Court of Appeal, Fourth District, California.

Nov. 20, 1931.

1. Appeal and error 🔑933(4).

Absent statement in order that new trial was granted because of insufficiency of evidence to sustain verdict, courts may examine evidence to determine whether errors of law occurred resulting in miscarriage of justice (Const. art. 6, § 4½; Code Civ. Proc. § 657).

2. Appeal and error 🔑977(3).

Granting new trial is so largely discretionary that trial court's order will not be disturbed except upon manifest abuse.

3. Appeal and error 🔑933(1).

Appellate court must presume that trial court before granting new trial obeyed mandate of Constitution and examined entire cause and was of opinion that errors of law resulted in miscarriage of justice (Const. art. 6, § 4½).

4. New trial 🔑108(4).

As regards propriety of new trial, circumstantial evidence shown *held* sufficient to support finding that defendant's truck and trailer were ones crowding automobile carrying plaintiff off road.

5. Negligence 🔑119(1).

Contributory negligence is affirmative defense which should be affirmatively pleaded and proved.

6. Negligence 🔑93(1).

Automobile driver's negligence *held* not imputable to guest.

7. Automobiles 🔑246(58).

Where there is no evidence of contributory negligence of automobile guest suing, instruction regarding her contributory negligence *held* erroneous.

8. New trial 🔑39.

Giving of instruction inapplicable under pleadings and evidence constituted "error of law," as regards right to new trial.

[Ed. Note.—For other definitions of "Error of Law," see Words and Phrases.]

9. New trial 🔑39.

If instructions, correct as abstract propositions, may have misled jury, new trial may be granted.

10. New trial 🔑39.

In automobile accident case wherein plaintiff's contributory negligence was not raised by pleading nor presented by evidence but court gave instruction regarding contributory negligence, court properly granted new trial.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Belle Stoneburner against the Richfield Oil Company of California, and P. R. McCutchen, doing business as the McCutchen Transportation Company, and Frank Chappell. The jury rendered a verdict in favor of all the defendants, and from an order granting a new trial, defendants McCutchen and Chappell appeal.

Affirmed.

O'Melveny, Tuller & Myers and J. R. Girling, all of Los Angeles, for appellants.

H. W. Phipps and Fred A. Wilson, both of San Bernardino, for respondent.

FREEMAN, Justice pro tem.

On the 13th day of August, 1929, Belle Stoneburner was a passenger in an automobile driven by Mrs. Odessa Hendee westerly along the Valley boulevard, a public highway connecting the cities of Los Angeles and San Bernardino. At a point about eight miles westerly of the town of Bloomington, the Hendee car came into collision with a light automobile driven by an unknown person. Mrs. Stoneburner was seriously injured in the collision and brought this action against the defendants to recover damages.

It appears from the record before us that a truck and trailer equipped with large tanks used for the transportation of gasoline were proceeding westerly on the Valley boulevard in advance of the Hendee automobile which overtook them some distance easterly from the place of the accident. After following the truck and trailer for some distance, Mrs. Hendee saw an opportunity to pass. She sounded several blasts with her automobile horn and proceeded around the left-hand side of the trailer. When she reached a point about opposite to or slightly in front of the center of the truck, its driver swung to his left across the center of the highway so that Mrs. Hendee did not have sufficient room upon the pavement to pass. She applied her brakes, slowing her automobile until it dropped back nearly opposite the rear of the trailer, and again sounded her horn. The truck returned to its right-hand side of the pavement and Mrs. Hendee again tried to pass. When she reached the same relative position as before, opposite or a little in front of the center of the truck, it was again swung to the left across the center of the highway, forcing the Hendee automobile into deep sand on the left of the pavement where the car came into collision with a light coupe driven by the unknown party, causing injuries to Mrs. Stoneburner.

It is alleged in the complaint that the truck and trailer were owned by the Richfield Oil Company of California, a corporation, and P. R. McCutchen, doing business as McCutchen Transportation Company, and was being driven and operated upon their business by Frank Chappell, who was their agent and employee acting within the scope of his employment. The answers filed deny ownership of the truck and trailer by either of the above-named defendants, deny that they were operated by any of their servants, agents, or employees, or upon their business, and deny any negligence. The answer of P. R. McCutchen and Frank Chappell allege that the accident and consequent injury to Mrs. Stoneburner was occasioned solely by the negligence of Mrs. Hendee. No contributory negligence on the part of Mrs. Stoneburner was alleged.

After a lengthy trial the court below granted the motion of the Richfield Oil Company of California for an instructed verdict in its favor and denied a similar motion made by McCutchen and Chappell. The jury returned verdicts against Mrs. Stoneburner and in favor of all of the defendants.

Mrs. Stoneburner thereupon made a motion for a new trial upon all the grounds specified in the statute, which was granted as to McCutchen and Chappell, by the following order: "Motion for new trial, heretofore submitted, granted, except as to Richfield Oil Co. of Calif."

The defendants McCutchen and Chappell are before this court on their appeal from this order. As the sole ground for its reversal, they urge that as the order did not specify insufficiency of the evidence to support the verdict, the trial court and this court must presume that the verdict and judgment were supported by the evidence (section 657, Code Civ. Proc.), and that we are required by law to reach the conclusion that a new trial cannot be granted because of errors of law alone, as such errors of law could not have resulted in any miscarriage of justice; the evidence being sufficient to support the verdict and judgment. This ingenious theory is supported by able argument without the citation of any decision supporting it.

Appellants base their arguments solely upon the provisions of section 4½ of article 6 of the Constitution, which provides that: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[1] Section 657 of the Code of Civil Procedure contains the following: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground." We may therefore concede that we are required to presume that the order of the trial court granting a motion for new trial was based upon errors of law and not upon the ground of the insufficiency of the evidence to sustain the verdict. However, we do not conclude that in the absence of a statement in the order that the motion for new trial was granted because of the insufficiency of the evidence to sustain the verdict, either the trial court or this court is precluded from examining the evidence for the purpose of determining whether or not any errors of law occurring during the trial "resulted in a miscarriage of justice." The very language of section 4½ of article 6 of the Constitution seems clearly to place such a duty upon the trial court in considering and ruling upon a motion for new trial, and upon an appellate court in reviewing an order granting such a motion.

In Montgomery v. Globe Grain & Milling Co. (Cal. App.) 293 P. 856, 858, it was said: "It is a well-settled rule of law in California that an erroneous instruction given by the court to the jury is an error of law that is considered excepted to as a matter of law. Section 647, Code Civ. Proc. While an instruction gives the law of the case to the jury, its applicability, and oftentimes its correctness, depends upon the evidence in the case. An instruction should not be considered as merely an abstract statement of a principle of law, but it must relate to and be measured by the circumstances of the case in which it was given. To determine the question of whether there was any error in giving it frequently requires an examination of the evidence in the case. Hamlin v. Pacific Electric Ry. Co., 150 Cal. 776, 89 P. 1109; Shipley v. San Diego Electric Ry., 106 Cal. App. 659, 289 P. 662." There are numerous other authorities supporting the doctrine thus announced.

[2] In 2 California Jurisprudence, at page 905, it is said: "The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter. It has been said 'that it is only in rare instances and upon very strong grounds that the supreme court will set aside an or-

der granting a new trial.' " In Condon v. Ansaldi, 203 Cal. 180, 263 P. 198, 199, it was said: "As the order appealed from does not specify that it was granted upon the ground of the insufficiency of the evidence to sustain the verdict, it will be presumed that it was not based upon that ground. Section 657, Code Civ. Proc. The only ground urged by respondent, therefore, which can be considered by this court in determining the validity of said order, is the alleged error of the trial court in giving certain instructions numbered 20, 21, 28, and 29, which were given the jury at the request of the appellant. We can see no real objection to instructions numbered 20 and 21. * * * We cannot say but that the plaintiff was prejudiced by the giving of this instruction, as well as that part of instruction No. 28 first quoted above. It evidently was the opinion of the trial judge that by the giving of these two instructions the rights of the plaintiff had been seriously prejudiced, and for that reason he granted plaintiff's motion for a new trial. In doing so we think he acted properly."

[3] We are required to presume that the trial court, before granting the motion for new trial, obeyed the mandate of the Constitution and examined the entire cause, including the evidence, and was of the opinion that errors of law committed during the trial resulted in a miscarriage of justice. Likewise, conforming to the mandate of the Constitution, we have examined the voluminous record before us in order to determine whether or not this assumption by the trial court finds any support in the record before us.

The appellants urge that there is a total failure in the evidence to prove, either the ownership of the truck and trailer by McCutchen; or that they were operated by his agent, servant or employee at the time of the accident; or that the driver of the truck and trailer was operating them within the scope of his employment or upon the business of his employer at the time of the accident. Had the trial court resolved these questions in favor of appellants we could easily have concurred in such a conclusion as the evidence tending to their resolution in favor of respondent is at least meager and entirely circumstantial.

[4] The record discloses that in August, 1929, P. H. McCutchen was the only person, firm or corporation transporting gasoline by truck and trailer for the Richfield Oil Company of California, from its refineries and storage stations in and near the city of Los Angeles to its distributing station in the city of San Bernardino. McCutchen's trucks were painted a blue color somewhat similar to that used by the Richfield Oil Company in decorating its service stations. At about 11 o'clock on the morning of August 13, 1929, the date of the accident, Frank Chappell, who was at the time in the employ of McCutchen and acting within the scope of his employment, delivered at the distributing station of the Richfield Oil Company in San Bernardino, gasoline which he had transported there in a truck and trailer. There is some evidence indicating that these vehicles were painted blue. Chappell drove the truck from San Bernardino back to the place of business of McCutchen southeast of Los Angeles. If he had traveled at his accustomed speed and over the Valley boulevard, he would have reached the place of the accident at about the time it happened. By a process of eliminating it definitely appears from the evidence that no other truck and trailer belonging to McCutchen was anywhere near the place of the accident. It would also appear that no truck or trailer belonging to the Richfield Oil Company could have been involved in it. No person or corporation other than McCutchen was transporting gasoline for the Richfield Oil Company by truck and trailer into San Bernardino or elsewhere east of the city of Pomona, on August 13, 1929. The truck and trailer which Mrs. Hendee tried to pass were painted blue in color and the trailer had upon its rear the word "Richfield." This evidence, while far from conclusive and entirely circumstantial, is sufficient to support a finding that the McCutchen truck and trailer driven by Chappell were the ones which Mrs. Hendee tried to pass and which she testified crowded her off the road at the place of the accident. That the trial court was of the opinion that there was evidence in the record showing that the truck and trailer belonged to McCutchen and was being driven by Chappell in the course of his employment and upon his employer's business at the time of the accident must be implied from the order granting a new trial. We are of the opinion that this conclusion of the trial court finds some support in the record before us as we see no reason why these facts could not be proven by proper circumstantial evidence.

[5-7] At the request of appellants the trial court gave the following instruction to the jury: "You are instructed that no person has the right to blindly surrender his or her own safety to another. The law requires all persons at all times to exercise ordinary care for their own safety, and it was the duty of the plaintiff, Belle Stoneburner, at all times to exercise ordinary care for her own safety, and if she could have avoided the accident by the exercise of ordinary care and failed to do so, then she was guilty of negligence, and if her negligence contributed directly and proximately to the happening of the accident in any degree, no matter however slight, your verdict must be for the defendants McCutchen Transportation Co. and Frank Chappell, and against Belle Stoneburner, the plaintiff."

Contributory negligence is an affirmative defense and should be affirmatively pleaded and proved. Certain exceptions to this rule do not apply here. In the instant case, while the evidence would support a finding of the trial court, if made, that Mrs. Hendee was guilty of negligence, this negligence was not imputable to respondent who was simply a guest of the driver of the car. There is nothing in the record that would indicate contributory negligence on the part of Mrs. Stoneburner. The quoted instruction was therefore erroneously given as the question of respondent's contributory negligence was neither raised by the pleadings nor presented by the evidence.

[8, 9] From the fact of making the order granting the motion for a new trial, it would appear that the trial court was satisfied that there were errors of law occurring at the trial prejudicial to the respondent. The giving of the instruction which we have quoted constituted an error of law. As was said in the case of Briggs v. Hall, 20 Cal. App. 372, 129 P. 288, 289, "'The test of an instruction is not whether the instruction was erroneous but whether it was misleading.' Hayne, New Trial and Appeal, § 122; People v. Maughs, 149 Cal. 253, 86 P. 187. If instructions, correct as abstract propositions, may have misled the jury, a new trial may be granted. Hirschberg v. Strauss, 64 Cal. 272, 28 P. 235; In re Calkins, 112 Cal. 296, 44 P. 577." An instruction if not applicable to the facts proved and the issues raised by the pleadings may easily mislead the jury.

[10] It has been said that "it is only in rare instances and upon very strong grounds that an appellate court will set aside an order granting a new trial." Chambers v. Farnham, 39 Cal. App. 17, 179 P. 423, 426. We cannot conclude from the record before us that the trial court abused its discretion in granting respondent's motion and ordering a new trial as to appellants.

Order affirmed.

We concur: BARNARD, P. J.; MARKS, J.

118 Cal.App. 341

PEOPLE v. HAYES.

Cr. 2141.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1931.

1. Indictment and Information ⚷110(52).

Information in robbery following language of statute, without alleging degree of offense, or facts from which degree may be determined, *held* sufficient (Pen. Code, §§ 211, 211a).

2. Robbery ⚷11.

Proof of loading of weapon which was pointed at shooting distance with threats to victim, in prosecution of first degree robbery, *held* unnecessary (Pen. Code, §§ 211, 211a).

3. Criminal law ⚷1129(3).

Error predicated on jurors being permitted to separate before submission of case to jury, in prosecution for robbery, without specifying irregularities or prejudice, *held* without merit (Pen. Code, § 1121).

4. Criminal law ⚷1178.

Minor points merely stated, without argument or claim of prejudice from action taken, will not be reviewed by appellate court.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Neal G. Hayes was convicted for robbery in the first and second degrees, and he appeals.

Affirmed.

M. Herzig, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CRAIG, Acting P. J.

By an information consisting of two counts, filed in the Superior Court of Los Angeles county, the appellant was charged with having willfully, unlawfully, and feloniously taken from the person and possession and in the immediate presence of another certain specified amounts of money, by means of force and by putting said person in fear. Pursuant to a trial by jury, he was found guilty of robbery of the first degree upon the first count, and guilty of robbery of the second degree upon the second count. A motion for a new trial was made, which was denied, and the defendant appealed from the resultant judgments and from the ruling upon said motion.

According to the testimony of the prosecuting witness, and statements of the defendant to an officer, Hayes caused the prosecuting witness to refer to certain accounts in her place of business, then demanded: "Never mind, you won't find my name there, it is just a hold-up; give me the money you have in the register"; that upon a second occasion he made a like demand for money; that the amounts of money were extorted as alleged, on the first visit by aiming a revolver at the proprietress, and the next time with one hand in his coat pocket in a threatening manner, but without withdrawing a weapon. The defendant's victim testified that she was exceedingly frightened in each instance. She identified the pistol offered in evidence as one similar to that used in the robbery first mentioned, and an officer swore that Hayes admitted to him that it was the revolver with which he committed the crime first charged. When found by officers among the effects of the accused, the weapon was loaded.

[1, 2] It is first contended that the verdict of robbery of the first degree is unsupported by allegation, or evidence tending to show, that the first offense was committed by the appellant while armed with a loaded dangerous or deadly weapon. It is sufficient that an information follow the language of the statute, without alleging the degree of such an offense or the facts from which the degree may be determined. In re Colford, 68 Cal. App. 308, 229 P. 63. And one who feloniously takes personal property in possession of another, from his person or immediate presence, by means of force or fear, is guilty of robbery in the first degree, if the crime be committed while the perpetrator is armed with a dangerous or deadly weapon. Pen. Code, §§ 211, 211a. Under the circumstances of such a case, it was not required that proof of the actual loading of the weapon which was pointed at a shooting distance with threats should be exacted. People v. Seawright, 72 Cal. App. 414, 237 P. 796; People v. Wysong, 86 Cal. App. 329, 260 P. 825, 829; People v. Hall, 87 Cal. App. 634, 262 P. 50.

[3] Error is assigned without specifying any irregularity or prejudice from the fact that the jurors were permitted to separate before submission of the cause to the jury. There is no merit in the contention. Pen. Code, § 1121.

[4] A few minor points, merely stated, without argument or attempt to claim prejudice from the action taken, are obviously without merit. An appellate court will not review such matters. 8 Cal. Jur. p. 546, § 550, and Supplements.

The judgments and order denying a new trial are affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

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118 Cal.App. 538

PARKFORD et al. v. UNION DRILLING & PETROLEUM CO. et al.

Civ. 4312.

District Court of Appeal, Third District, California.

Nov. 24, 1931.

1. Mines and minerals ⚷109.

Contract for drilling oil well *held* not to require contractors to drill well below approximate depth of 4,700 feet without other than original compensation.

> The contract required contractors to drill well "to the oil sand from which the nearest wells were then producing which sand was located at an approximate depth of 4,700 feet," but the owners of oil lease agreed to furnish approximately 4,800 feet of water casing, thus indicating that parties did not originally contemplate the necessity of sinking the well deeper than 4,800 feet.

2. Evidence ⚷448.

Unambiguous contract for drilling of oil well *held* not susceptible of explanation by oral testimony.

3. Mines and minerals ⚷109.

Finding that, after oil well reached original anticipated depth, owners of oil lease agreed for drilling to greater depth, *held* supported.

4. Mines and minerals ⚷109.

Contractors' extension of oil well below original contracted depth with knowledge and acquiescence of owners of oil lease constituted extra services for which contractors were entitled to reasonable compensation.

5. Work and labor ⚷13.

Where additional work is performed pursuant to subsequent oral agreements or with knowledge and acquiescence of owner, contractor is entitled to reasonable compensation therefor.

6. Interest ⚷65.

Ordinarily, interest may be allowed only on proper pleading and proof thereof.

7. Interest ⚷19(1).

Oil lease owners could not recover, from contractors drilling oil well, interest on unliquidated claim for supplies furnished to contractors.

8. Chattel mortgages ⚷109.

Oil lease owners' claim, against contractors drilling well, for casing, *held* secured by chattel mortgage given by contractors.

> Subsequent to the execution of the contract for drilling the well, the contractors executed a chattel mortgage on the well-drilling equipment to secure each and every obligation, and the payments of all sums to be paid by them under and pursuant to the contract for the drilling of the well.

9. Mines and minerals ⚷109.

Well-drilling supplies, claim for which was allowed oil lease owners against contractors drilling well *held* incident to well-drilling contract; hence claim was properly ordered paid from proceeds of assigned interest in gross oil production.

> The contractors drilling oil well assigned to owners of oil lease 15 per cent. of gross products of oil and gas which should be produced from the well as security for the repayment to him of the full purchase price of the supplies.

10. Interest ⚷66.

Where complaint for declaratory relief asked that rights be declared under assignment showing plaintiff's right to interest, interest could be recovered on liquidated demand without specific prayer therefor (Code Civ. Proc. § 1060).

> Interest could be recovered on liquidated demand without specific demand therefor, since item of interest was included in general demand, in suit for declaratory relief under Code Civ. Proc. § 1060, to ascertain and declare rights of plaintiffs.

Appeal from Superior Court, Los Angeles County; W. D. McConnell, Judge.

Action for declaratory relief by E. A. Parkford and others against the Union Drilling & Petroleum Company and others. From the judgment, the plaintiffs appeal.

Judgment modified, and, as so modified, affirmed.

Abrahams & Sadicoff, Robert M. Pease, and Roy P. Dolley, all of Los Angeles, for appellants.

Newby & Newby, of Los Angeles (Dee Holder, of Los Angeles, of counsel), for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the Court.

This is an appeal from a judgment which was rendered in a suit for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure, involving the construction of an oil well contract, with which proceeding another action for materials furnished to the defendants for the drilling of the well was consolidated.

The plaintiffs are the owners of an oil lease on lots 25 and 26 of Manila avenue tract in the county of Los Angeles, according to the map thereof which is recorded in book 5, page 160, of the maps of said county. On April 27, 1927, the plaintiffs executed a written agreement with Hammond and Cragen to drill an oil well on that property. This contract was subsequently assigned by the last-mentioned parties to the defendants. Pursuant to the terms of this agreement, the oil well was drilled on the premises above described. When the well reached a depth of 4,800 feet, a controversy arose regarding the cost of sinking it to a lower point. An oral agreement was thereupon made between these parties to continue the sinking of the well to an approximate depth of 5,500 feet, the additional cost of which was to be equally divided between the contracting parties. The well was thereupon drilled to a depth of 5,517 feet, at the additional expense of $19,238.06. At this depth the well produced oil in commercial quantity. By the terms of the contract the defendants agreed to drill the well "to the oil sand from which the nearest wells are now producing, which sand is located at an approximate depth of * * * 4700 feet." In consideration for sinking this well to the approximate depth of 4,700 feet, the plaintiffs agreed to and did pay the defendants the sum of $20,000. The plaintiffs also agreed to, and did, furnish approximately 4,800 feet of water casing of the agreed value of $9,218.34, together with certain other necessary supplies of the additional value of $1,986.15.

The contract for drilling the well also operates as an assignment to Hammond and Cragen of an undivided 40 per cent. of the gross product of oil and gas to be secured from the well, subject to certain specified royalties, and also subject to a charge of one-half the cost of operating the well after it has been placed on production. The contract provides in that regard: "In addition to the aforesaid cash payment of $20000.00, and the furnishing of casing as aforesaid, first parties agree that they will, and they do hereby, assign to second parties forty per cent (40%) of the gross production of oil and gas from said well, subject, however, to the payment of one-half of the cost of operating said well after it is placed upon production. * * *" Hammond and Cragen subsequently sold and assigned 35 per cent. of their undivided interest in the gross production of the oil and gas of this well to the defendants Kenny and McCaslin. June 8, 1927, the defendants Kenny and McCaslin thus acquired by assignment 35 per cent. of the gross products of oil and gas which should be produced from the well. September 1, 1927, the defendants assigned to the plaintiff Parkford 15 per cent. of the gross products of oil and gas which should be produced from the well, as security for the repayment to him of "the full purchase price of a string of four inch drill pipe and tool joints amounting to * * * $9,218.34, within six months from the date hereof, together with interest thereon at the rate of seven per cent per annum from date until paid."

Subsequent to the execution of the original contract for drilling the well, the defendants executed a chattel mortgage on the well-drilling equipment to secure "each and every obligation and the payment * * * of all sums

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to be paid by them under and pursuant to a contract" for the drilling of the well.

The trial court adopted findings in accordance with the foregoing statement of facts, and entered judgment accordingly, except that the amount which was allowed to the plaintiffs for the casing and supplies furnished by them is to be satisfied only from the proceeds of the oil and gas which may be secured from the well, and that no interest upon that sum was allowed. From this judgment the plaintiffs have appealed.

[1] The appellants contend that the agreement of April 27, 1927, requires the defendants, in consideration of the payment of said sum of $20,000, to sink the well to the oil-producing sand, which proved to be 5,517 feet below the surface, regardless of the estimated depth specified in the contract; that the plaintiffs were therefore not required to participate in the additional expense of drilling below the 4,800 foot level; that the allowance which was made to the plaintiffs in payment for casing and supplies furnished by them should not have required its satisfaction from the proceeds of the oil and gas produced; and that 7 per cent. interest on this amount should have been allowed, as provided by the terms of the contract.

There is no merit in appellants' contention that the written agreement required the defendants to drill the well below the approximate depth of 4,700 feet, without compensation other than the original payment of $20,000 specified in the contract and the undivided share of the proceeds derived from the gross output of oil and gas, which was assigned by the terms thereof. The language of this agreement clearly indicates that the parties did not originally contemplate the necessity of sinking the well deeper than 4,800 feet. That document does provide that the defendant shall drill the well "to the oil sand from which the nearest wells are now producing." Oral evidence corroborates the fact that the parties did not assume it would be necessary to sink the well below a depth of 4,500 feet, or, at most, not to exceed 4,700 feet in depth. The plaintiff Parkford testified: "At the time the lease was executed the general understanding was that we had to go to a depth of about 4500 feet. We knew a long time previous that it was probable that oil might be produced at a lower depth than 4,700 feet." Earl Kenny, one of the defendants, testified: "In April, 1927, I did not know of any depth that oil had been produced below 4,700 feet."

[2] Moreover, the language of the contract is unambiguous regarding this subject of the anticipated maximum depth of the well. It is therefore not susceptible of explanation by means of oral testimony. The contract specifically provides that the defendants "shall drill said well to the oil sand, * * * which sand is located at an approximate depth of 4700 feet." The parties therefore definitely located the anticipated depth of the oil sand at 4,700 feet. The original intention of the parties regarding the proposed approximate depth of the well is clear and explicit. In view of this language, there is no room for controversy. There is no ambiguity which will admit of oral explanation. The only language contained in this document which may be construed indirectly to support a contention that the parties anticipated the necessity of drilling the well to a maximum depth below 4,700 feet is the provision that the plaintiffs "agree to furnish approximately 4,800 feet of new 8¼" heavy casing for use as the water string in said well."

The court found that the defendants were not required to sink the well below a depth of 4,800 feet. The terms of the contract are so explicit in this regard we are unable to perceive how the court could have reasonably construed it otherwise. Certainly there is ample evidence to support this construction of the document. It is in accordance with the evident intention of the parties. It would be unreasonable to hold that the drilling of an oil well to the designated depth of "approximately 4,700 feet," for a specified compensation of $20,000, would require one to continue for a further depth of 817 feet, or until oil sand should be discovered, regardless of the depth.

[3-5] It is affirmatively alleged by the defendants that, when the well reached a depth of 4,800 feet, it was agreed between the parties hereto that the defendants would continue operations and drill the well to an approximate depth of 5,500 feet, and that the respective parties would contribute equal amounts to the payment of the additional expense therefor. The court found this agreement was made as alleged. It was also found that the reasonable value of the services of the defendants in drilling this additional 817 feet is the sum of $19,238.06; that one-half of this amount, to wit, the sum of $9,619.03, is due and owing from plaintiffs as compensation therefor. This sum was subsequently reduced by consent of the parties to $8,050. The reasonableness of this sum is not disputed. The terms of this subsequent agreement find ample support in the evidence. Both Mr. Kenny and Mr. McCaslin testified that on August 20th, when they had reached a depth of 4,800 feet, they interviewed Mr. Parkford, who represented the plaintiffs, and that an agreement was finally reached authorizing the drilling of the well to a maximum depth of approximately 5,500 feet, and that the additional cost therefor would be equally divided between the respective parties to the contract. The ultimate depth of the well is 5,517 feet. This is within the contemplation of the parties pursuant to the terms of the oral agreement.

The extension of the oil well 817 feet below the original anticipated depth which was specified in the written agreement is in the nature of extra services which were performed by the contractors. These services, having been performed with the knowledge and acquiescence of the owners of the property, created an obligation which entitles the defendants to reasonable compensation therefor. Where the terms of the original agreement are entirely fulfilled, and additional work is performed pursuant to a subsequent oral agreement, or merely with the knowledge and acquiescence of the owner, the contractor is entitled to reasonable compensation therefor. 27 Cal. Jur. 209, § 15; 9 C. J. 840, § 180.

In rendering judgment in these consolidated cases, the following items were allowed in favor of the respective parties:

Amounts allowed to the plaintiffs:		
For 4″ drill pipe and tool joints	$9,218 34	
For well drilling supplies.......	1,986 15	
Balance for 8¼″ heavy casing supplied	514 63	
Total amount allowed plaintiffs		$11,719 12
Amount allowed to the defendants:		
For drilling well below the 4800 foot level	$8,050 00	8,050 00
Balance due plaintiffs.........		$ 3,669 12

The defendants assigned to plaintiffs an undivided 15 per cent. of the gross production of oil and gas obtained from the well, as security for the payment of the four-inch drill pipe, of the value of $9,218.34, together with 7 per cent. interest thereon from September 1, 1927.

The court rendered judgment for the plaintiffs in the sum of $3,669.12, and provided that this sum shall be paid from the 15 per cent. interest in the gross production of oil and gas derived from the well, pursuant to the terms of the assignment above mentioned. Interest upon no sums which were found to be due was included in the judgment.

[6, 7] The appellants contend that the payment of the item of $514.63 which was allowed to them as a balance due for 8¼-inch heavy casing supplied should have been declared to be secured by the chattel mortgage, and that interest upon that sum should have been allowed from September 1, 1927.

The issues which were raised by the pleadings include no demand for the payment of interest on this claim for compensation for a balance due plaintiffs for 8¼-inch casing. The complaint fails to allege that interest was due or payable. The prayer of the complaint merely asks for a decree "determining and declaring the respective rights and duties of the parties." Ordinarily, interest may be allowed only upon proper pleadings and proof thereof. Miller v. Murphy, 88 Cal. App. 601, 606, 263 P. 1031; American-Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, 121 P. 709; 14 Standard Ency. of Proc. 121, subd. c; 33 C. J. 257, §§ 188 and 196. The appellants, however, contend that, because their action was primarily a suit for declaratory relief, it was therefore unnecessary to plead or prove their claim to interest. A construction of the contract which is involved indicates this item for compensation for 8¼-inch casing supplied was an unliquidated claim, and that it bears no interest. Paragraph 12 of the contract, upon which the validity of this item depends, provides that the owners shall supply approximately 4,800 feet of 8¼-inch casing, at a cost of about $10,000, but, "if the cost of such casing is more than $10,000, then second parties shall pay the cost thereof in excess of $10,000." The contract does not provide for interest on the money paid for such casing. The court found that plaintiffs had exceeded the estimated cost of such casing, and were entitled to the further sum of $514.63 on that account. This was an unliquidated claim. It required an accounting to ascertain that plaintiffs were entitled to any further sum therefor. The amount of casing furnished and the cost thereof had to be determined before the liability accrued. An unbroken line of authorities in California holds that an unliquidated claim does not bear interest. In Cox v. McLaughlin, 76 Cal. 60, 67, 18 P. 100, 103, 9 Am. St. Rep. 164, it is said:

"It may be stated as a general principle that interest is not allowed on unliquidated damages or demands. This term 'unliquidated damages' applies equally to cases * * * upon a quantum meruit, for goods sold and delivered, or services rendered."

[8] It is true that the payment of said item of $514.63 should have been declared to be secured by the chattel mortgage which was included in plaintiffs' application for declaratory relief and pleaded as Exhibit D attached to the complaint. That mortgage was executed "as security for the performance * * * of each and every obligation and the payment * * * of all sums to be paid * * * under and pursuant to the contract." The judgment should be modified to so declare.

The appellants claim the court should have allowed them 7 per cent. interest on the sum of $1,986.15 in compensation for well-drilling supplies furnished. This claim is also unliquidated. What this court has said regarding the preceding demand for interest on the item of $514.63 is also applicable to this claim. The court properly disallowed interest on this sum.

[9] It is also asserted this last amount of $1,986.15, which was allowed plaintiffs for well-drilling supplies, was entirely independent of the original contract, and that the court therefore erred in declaring that it should be paid only from the receipts secured

from the 15 per cent. interest in the gross production of oil and gas, which was assigned to the plaintiffs as heretofore mentioned. It sufficiently appears, however, that these supplies were furnished incident to the well-drilling contract, and that the court properly directed that this sum should be paid from the proceeds derived from the assigned interest of 15 per cent. of the gross production of oil and gas.

[10] Finally, the appellants contend that the court should have allowed them 7 per cent. interest on the sum of $9,218.34, which was found to be due for 4-inch drill pipe and tool joints. The court found that this string of pipe and tool joints was furnished defendants at "the agreed and fixed value of * * * $9,218.34." This claim, therefore, was not unliquidated, but, upon the contrary, was fixed and determined. The complaint for declaratory relief asked that the assignment, which was attached thereto as Exhibit E, should be construed to ascertain and declare "the respective rights" thereunder. This assignment shows upon its face that plaintiffs were entitled to 7 per cent. interest on said specified sum of $9,218.34 from the date of the assignment, which is September 1, 1927. Under such circumstances, it was unnecessary to specifically plead the demand for interest. The item of interest is included in the general demand to ascertain and declare the rights of the plaintiffs. The interest on this sum to the date of the judgment, which is eight months and two days, amounts to $433.77. The judgment should be modified to credit the plaintiffs with this additional sum.

The judgment is accordingly modified by allowing the plaintiffs the additional sum of $433.77, and by declaring that the chattel mortgage, which is attached to the complaint as Exhibit D, is security for the payment of the various sums found to be due the plaintiffs. With these modifications, the judgment is affirmed, respective parties to pay their own costs.

We concur: PRESTON, P. J.; PLUMMER, J.

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118 Cal.App. 487

PLACENTIA CO-OPERATIVE ORANGE GROWERS' ASS'N v. HENNING.

Civ. 173.

District Court of Appeal, Fourth District, California.

Nov. 23, 1931.

1. Agriculture 🔑6.

Defense that, through fraud of co-operative orange growers' association's manager, written marketing contract did not express parties' real intention, *held* good (Civ. Code, § 1640).

2. Appeal and error 🔑1002.

Jury verdict on conflicting evidence cannot be disturbed on appeal.

3. Appeal and error 🔑994(2).

That jury accepted defendant's uncorroborated and contradicted testimony, constituted no ground for reversal.

4. Trial 🔑359(1).

That jury made special findings in plaintiff's favor on incidental matters *held* not to make general verdict for defendant invalid for inconsistency between general and special findings.

5. Damages 🔑30.

Loss of prestige suffered by co-operative orange growers' association is proper element of damage for member's unauthorized withdrawal.

6. Appeal and error 🔑218(2).

Jury's finding that it would be impracticable and extremely difficult to fix actual damages for breach of contract *held* conclusive, in absence of attack.

7. Appeal and error 🔑1050(1).

Jury having found it would be impracticable to fix damage to co-operative growers' association for member's unauthorized withdrawal, refusal to permit association to show loss of prestige *held* not prejudicial to it (Civ. Code, §§ 1670, 1671).

8. Agriculture 🔑6.

Admitting testimony respecting duration of alleged marketing contract to corroborate grower's testimony that contract was for 1928 season only *held* not error.

> Admitting such testimony was not error, as against contention that it tended to show manager's waiver of condition of contract requiring written notice of cancellation between specified dates, without showing manager's authority to waive contract provisions, because testimony was admitted, not for purpose of showing waiver, but to corroborate grower's testimony that contract he actually made was for 1928 season only.

9. Trial 🔑260(9).

In action by co-operative orange growers' association for damages against withdrawing member, refusal to instruct that association's manager had no power to waive by-laws without authority *held* not error.

> Refusal to give such instruction was not error, in view of instructions at as-

sociation's request that, in order to find waiver of contract provision requiring written notice of cancellation, jury must find that association had actual intention to waive provision with full knowledge of rights which it intended to waive, and that, in absence of express agreement, waiver might not be implied, unless association by its conduct was estopped from relying on provision requiring written notice, and that burden of proving waiver or estoppel was on defendant.

10. Appeal and error ⚷843(2).

In view of special finding that contract as sued on by orange growers' association was not contract actually made, question of waiver of contract provisions became immaterial.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by the Placentia Co-operative Orange Growers' Association, a nonprofit co-operative association, against Lewis Henning. From an adverse judgment and order, plaintiff appeals.

Affirmed.

Ivan McDaniel and James C. Hyne, both of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, James L. Davis, and S. M. Reinhaus, all of Santa Ana, for respondent.

JENNINGS, J.

In this action judgment was rendered in favor of defendant at the conclusion of a trial wherein the issues raised by the pleadings were submitted to a jury which returned a verdict for defendant. From the judgment thus rendered and from the court's order refusing a new trial, plaintiff has appealed.

The cause of action alleged in the complaint was for the recovery of a sum of money as liquidated damages arising from the breach of a contract made by respondent with appellant. From the record herein, it appears that at all times material to the controversy appellant was a nonprofit association organized for the purpose of enabling its members to conduct jointly the operation of harvesting and marketing citrus fruits grown upon land owned by such members. The grower's contract and the by-laws of appellant provide that, so long as a grower of citrus fruit remains a member of the association, he is obligated to pack and market all citrus fruit grown on land covered by the grower's contract through appellant association; that his membership in the association continues from year to year, unless terminated as provided in the by-laws, one method of termination being the right to withdraw by giving written notice to the secretary of the association between the 1st and 15th of December, in each year, in which event the termination of membership becomes effective on the 1st day of January next succeeding. It is further provided in the by-laws that any member who violates the provision requiring him to pack and market his fruit through the appellant association shall be liable to pay to appellant the sum of 50 cents per box for every field box of fruit packed or marketed outside of the association. It is undisputed that, during the year 1929, respondent marketed 22,229 field boxes of oranges through agencies other than appellant.

Respondent's answer alleges that he entered into an oral contract with the manager of appellant on August 8, 1928, to deliver all the fruit from his ranch to appellant for packing and marketing for the year 1928 only; that on August 16th he was induced by said manager to sign, and did sign, a grower's contract in blank; that in such contract the blank spaces provided for indicating the dates between which notice of cancellation might be given and the date when cancellation would become effective were not filled in; that respondent was not furnished with a copy of the contract or by-laws of the association, and was not given a membership certificate in the association; that the manager of appellant stated to respondent at the time the blank contract was signed by respondent that said manager would so fill in the blank spaces and would so change the agreement that it would be a contract for the 1928 season only, and would definitely terminate at the end of said season without notice; that the said manager thereafter, with intent to deceive and defraud respondent, filled in the various blank spaces so that it contained the provision requiring respondent to give written notice of cancellation between the 1st and 15th days of December in order to accomplish withdrawal from the association; that the contract thus completed was not the true agreement entered into between the parties but that the true agreement was for the handling of respondent's fruit for the 1928 season only.

[1-4] The defense thus raised by the answer is that, through the fraud of appellant's manager, the written contract for whose breach the action was instituted does not express the real intention of the parties, a defense recognized and permitted by the provisions of our substantive law (section 1640, Civil Code). The evidence produced by respondent in support of the allegations contained in his answer consists of the testimony of respondent alone. It was contradicted not only by the testimony of appellant's manager but in many material features by the testimony of other witnesses. The conflict in evidence thus produced was resolved in respond-

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ent's favor by the verdict of the jury, and under the familiar rule this determination may not be upset. Appellant, however, urges that respondent's testimony is so improbable and so thoroughly and successfully contradicted that the verdict is entirely lacking in evidentiary support and should be set aside. It is true, as above indicated, that respondent's case rests solely and entirely upon the testimony of respondent himself, and that this testimony was unequivocally contradicted by the testimony of witnesses produced by appellant. It may be conceded that a verdict in appellant's favor would have had ample evidentiary support. Nevertheless, the jury had an opportunity not afforded to an appellate court confined to an examination of the printed record. The jury had the opportunity to observe the various witnesses as they gave their testimony, their demeanor and the manner in which they testified. That the jury should accept the uncorroborated testimony of respondent, contradicted though it was as to many material features, does not constitute ground for reversal. Leffingwell v. Faubion, 89 Cal. App. 157, 264 P. 306. Upon the completion of the trial, the various issues presented were submitted to them under appropriate instructions. It is deserving of comment that the jury not only returned a general verdict in respondent's favor, but also answered fourteen special interrogatories prepared by appellant in such manner as to indicate that, with two exceptions, its members accepted as true in all particulars the testimony of respondent. The findings contrary to respondent's testimony related to the date on which respondent signed the contract and the time when the date, August 16, 1928, was placed in the contract. Respondent testified that he signed the contract on August 16, 1928, and that immediately prior to his signing the instrument appellant's manager wrote in the date, August 16, 1928. Appellant's manager testified that respondent signed the contract on August 9, 1928. This testimony was corroborated by the testimony of two other witnesses. The manager also testified that the date, August 16, 1928, was written in by him during the evening of August 16, 1928, at the time the contract was executed by appellant's president and secretary. This testimony was corroborated by the testimony of the secretary of appellant. The jury resolved the conflict in the evidence as to these matters in appellant's favor, and found that the written contract was signed by respondent on August 9, 1928, and that the date, August 16, 1928, did not appear on the instrument when respondent affixed his signature to it. Obviously the time when the date was actually written in is immaterial to the principal issue presented. Nor is the date on which respondent signed the written instrument of substantial importance. There is no dispute that he signed the contract. The important question was whether the contract sued upon was the contract which respondent made. The date on which respondent affixed his signature is purely incidental. The jury found that the contract sued upon was not the contract which respondent made, and the finding in this particular is in conformity with and supports the general verdict rendered in respondent's favor. It cannot be said that the jury's findings with respect to the incidental facts mentioned are so antagonistic to the general verdict as to be absolutely irreconcilable. Manifestly, neither of the special findings mentioned would authorize a judgment different from that permitted by the general verdict. Neither of such findings may therefore be said to be inconsistent with the general verdict. Law v. Northern Assurance Co., 165 Cal. 394, 132 P. 590.

[5-7] Appellant further urges as ground for reversal that it was not permitted to show that the prestige of appellant was injured by the alleged breach of the contract by respondent in withdrawing from the association. Loss of prestige occurring through unauthorized withdrawal from an association of the character of appellant would appear to be a proper element of damage. Anaheim C. F. Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959. But this element is important only in determining whether the present case is one which falls within the rule declared in sections 1670 and 1671 of the Civil Code which permits the enforcement of a condition fixing damages in advance: "When, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." The jury expressly found that it would be impracticable and extremely difficult to fix the actual damage sustained by appellant, and this finding is conclusive, in the absence of any attack upon it. Poultry Producers, etc., v. Murphy, 64 Cal. App. 450, 221 P. 962. The refusal by the court to admit the proffered evidence tending to prove loss of prestige becomes unimportant, therefore, in the face of the express finding mentioned.

[8] It is further contended that the court erred in admitting testimony of respondent which tended to show a waiver by the manager of appellant of the condition requiring written notice of cancellation between certain specified dates. This testimony related to two conversations between respondent and the manager, one of which, the testimony showed, occurred prior to December 15, 1928, and the second on December 19, 1928. It may be conceded that, in the absence of a showing that appellant's manager was authorized by the association to waive the provision requiring written notice of withdrawal at the time designated in the by-laws, such waiver would not bind appellant. The record, however, shows that the testimony of whose

admission appellant complains was admitted, not for the purpose of showing waiver, but for the express purpose of corroborating respondent's testimony that the contract which he actually made with appellant was for the 1928 season only. It was evidence competent for the purpose for which it was admitted, and at the time of its reception the court carefully instructed the jury that it was to be considered only as tending to corroborate respondent's testimony in the respect suggested.

[9, 10] Appellant complains that the court at the conclusion of the trial refused to instruct the jury, as requested by appellant, that the manager had no power to waive the by-laws of the association relating to the substance of the contract between the parties, unless he was authorized to do so by appellant's board of directors. It appears, however, that the court gave other instructions submitted by appellant in which the jury was told that, in order to find a waiver of the provision requiring the giving of written notice of cancellation, it was required that the jury find that appellant association had an actual intention to waive the provision with full knowledge of the right which it intended to waive; that, in the absence of express agreement, waiver might not be implied, unless appellant was by its conduct estopped from relying upon the provision requiring the giving of written notice; that the burden of proving waiver or estoppel was upon respondent. We are of the opinion that the jury was sufficiently advised by the court with respect to the feature of waiver, and that the court's refusal to give the instruction mentioned was not prejudicial to appellant. We are further of the opinion that the testimony of whose admission appellant complains was sufficiently and properly limited by the court's instruction at the time of its reception. Furthermore, it is apparent from the answers returned to the special interrogatories that the jury found in accordance with respondent's contention that the contract made by respondent was not the contract for whose breach appellant brought the action, but was a contract for the 1928 season only, that it terminated at the end of that season, and that it contained no provision requiring the giving of notice of cancellation at a designated time. With a finding of this character, the question of waiver becomes unimportant, and the only excuse for its appearance is found in the replies to two interrogatories included among the fourteen submitted by appellant wherein the jury found that appellant's manager prior to December 16, 1928, informed respondent that an oral notice of withdrawal was sufficient, and further informed respondent that a written notice of withdrawal received subsequent to December 15, 1928, would be accepted as sufficient. From this it is argued that the jury must have found a waiver of the provision requiring the giving of written notice of withdrawal between the dates designated in the by-laws contrary to the court's instruction on the matter of waiver. Appellant's reasoning is not persuasive. The evidence relating to the conversations between respondent and appellant's manager was in direct conflict. The evidence was admitted solely for the limited purpose stated. The jury resolved the conflict in evidence as to this feature in respondent's favor, as it manifestly had the right to do under the interrogatories submitted. This evidence, it is true, is the only evidence which appears in the case which could relate to the question of waiver. Nevertheless, the jury did not specifically find a waiver, and, from the jury's finding that the contract sued upon was not the contract which respondent made and that the contract actually entered into did not contain the provision requiring written notice of withdrawal to be given at a designated date, it is not to be presumed that the jury, in disobedience of the court's instruction, found that there was a waiver of a provision that was not included in the contract which respondent made.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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118 Cal.App. 403

DAVIS et al. v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE.

Civ. 6883.

District Court of Appeal, Second District, Division 1, California.

Nov. 19, 1931.

1. Insurance ⚷114.

Policy indemnifying persons injured by insured's negligence in operating automobile owned by insured's wife in "auto tours," *held* not void for want of insurable interest (Civ. Code, §§ 2551, 2558, 2772).

Such policy was not void for want of insurable interest of subscriber under Civ. Code, §§ 2551, 2558, since such a policy was indemnity contract against liability of subscriber on account of injuries from use of automobile and was governed by law of indemnity as stated in section 2772.

2. Insurance ⚷435.

Automobile used to return plaintiff from bus in sight-seeing trip abandoned because of weather *held* used in "auto tours" as contemplated by indemnity policy.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by George Davis and another against the California Highway Indemnity Exchange. From a judgment for plaintiffs, defendant appeals.

Affirmed.

B. P. Gibbs and Walter W. Little, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

CONREY, P. J.

On the 14th day of January, 1925, the plaintiff Nora Ellen Davis, while riding in an automobile operated and controlled by one E. B. Brown, doing business as "Brown Auto Tours," received certain physical injuries in an accident which resulted from negligent operation of said automobile. At that time there was existing and in force the indemnity policy on which judgment has been recovered in this action. The policy dated February 15, 1924, was issued to E. B. Brown, doing business as Brown Auto Tours of Los Angeles, Cal. Brown was referred to therein as "the subscriber." The policy covered liability of the subscriber for injuries resulting from the operation of a certain described Lincoln automobile while used in the business of "auto tours." It was provided that the policy should inure to and be for the benefit and protection of "anyone who shall sustain any damage or injury * * * by reason of negligence on the part of the driver or operator of the motor vehicle described herein, * * * when such motor vehicle and the driver or operator of same are duly licensed, have permit issued by the authority of the Board of Public Utilities, Los Angeles, California." In this case it is not questioned that at the time of the accident both the vehicle and the driver or operator were duly licensed and permitted by the authority of said board of public utilities, and in accordance with an ordinance of the city requiring such license and permit as a condition for the lawful operation of such automobile. It was provided in the policy that "in case execution against the subscriber is returned, unsatisfied in whole or in part in an action brought by the injured," because of insolvency or bankruptcy of the subscriber, "or because sufficient property of the judgment debtor cannot be found to satisfy such execution, then an action may be maintained by the injured person * * * against the Exchange, subject to and under the terms of this contract for the amount of the judgment recovered in such action not exceeding the amount herein limited or the amount that the subscriber might have recovered against the Exchange under this contract in event the judgment had been fully satisfied against him."

The plaintiff Mrs. Davis, together with her husband, in an action to recover damages for the injuries received by her, obtained judgment against Brown in a sum exceeding the amount limited by the indemnity bond, which judgment was affirmed on appeal and became final prior to the commencement of the present action. Execution was issued on the judgment, and the sheriff having been unable to find any property of the judgment debtor duly made return thereon "no property found." Thereafter the plaintiff brought this action to recover on the indemnity bond, and recovered the judgment from which the defendant California Highway Indemnity Exchange appeals.

Appellant's first point is that the policy is void for want of insurable interest of the subscriber in said Lincoln automobile. In support of this contention reference is made to section 2551 of the Civil Code, which reads thus: "The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void." Also section 2558 of the Civil Code, which in part reads thus: "Every stipulation in a policy of insurance for the payment of loss whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest * * * is void." Also we are referred to 14 California Jurisprudence, p. 463, where the rule is summarized thus: "The sole object of insurance is the indemnity of the insured: if the insured has no insurable interest in the subject of the contract it is void. Accordingly, it is the rule that the insured must have such an interest both at the time the contract is made and when the loss happens, otherwise there can be no recovery on the policy; and upon this point all the authorities agree."

As a witness in this action the said E. B. Brown stated that the said Lincoln automobile was not his property; that his wife had bought it with her own money and it was registered in her name. He said, however, that at the time of the accident he was using said automobile and that he did use it from time to time whenever he had any demand for it to be driven in his business; that he did not consult his wife about it or account to her for its use in the business, but whenever he wanted the automobile he used it. There being no evidence or finding to the contrary, we must assume that said automobile at the time of the accident was in fact the property of Mrs. Brown.

[1] For answer to appellant's contention it should be sufficient to say that this was not a policy of insurance against loss of the automobile or injury thereto. The so-called policy was an indemnity contract against liability of the subscriber for damages on account of injuries resulting directly from "the ownership, use or maintenance" of the described automo-

bile; limited, however, to casualties suffered during the use of the automobile in the subscriber's business of "auto tours." Such a contract is governed by the law of indemnity, and the rules thereof, as stated in the Civil Code. Section 2772 et seq., Civ. Code. It is our conclusion that the policy is not void for want of insurable interest in the automobile.

Counsel for appellant, after stating in his brief his assignment of errors, summarizes his principal grounds for appeal as follows: "In addition to the point that the policy was void for want of an insurable interest, the chief question presented under the above-assignments is whether the terms and conditions of said alleged bond or policy of insurance were fully complied with, viz., whether the automobile in question was being used for 'auto tours' at the time of the accident. If it was not, then said policy has no force or effect under its express terms at the time of the accident."

[2] A real estate firm, for the purpose of promoting sales, was using the well-known device of offering to the public free rides on a "sight seeing bus." For that purpose solicitors were sent out to make appointments with people for sight-seeing trips. The prospective passenger would be given a ticket for the trip. On the morning when the trip was to take place automobiles would be sent out to the homes of the ticket holders to bring them to the centrally located point from which the bus would start. The real estate firm in the instant case contracted with Brown to furnish such Lincoln car, with a driver, to bring certain passengers to the bus. The solicitor went along in order to direct the driver to the various locations where the passengers lived. In that way respondent Mrs. Davis became a passenger on the day when this accident occurred. When they arrived at the location from which the bus was to start, it was decided that on account of unfavorable weather the trip of the day would have to be abandoned. Thereupon the Lincoln car was started back to return the plaintiff to her home. It was on this return trip that the accident occurred. These being the principal evidentiary facts in relation to the stated issue, appellant now contends that the evidence conclusively shows that the car was not being used in "auto tours," but that plaintiff was merely a passenger in the ordinary sense of one who is a passenger in an automobile for hire. Wherefore it is argued that the court erred in finding that at the time of said accident said automobile was being used for auto tours and was covered by the indemnity policy. It may be conceded that at the time of the accident the automobile was being used under a contract hiring it for the stated purpose; but the evidence justified the court in finding further that said automobile under said contract of hiring was being used for touring purposes, and that under the arrangement made with the plaintiff her trip or tour of the day was to begin when she left her home and end when she was returned thereto.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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118 Cal.App. 423

WEBER & BECKETT, Inc., v. LE CLAIR.

Civ. 7871.

District Court of Appeal, First District, Division 1, California.

Nov. 20, 1931.

1. Estoppel ⚷75.

Conditional seller, delivering to buyer automobile and report of sale, whereby buyer procured certificate of legal ownership, *held* estopped to assert title against innocent purchaser from buyer (St. 1923, p. 517, § 45½, as added by St. 1927, p. 1424, § 10).

Report of sale, signed by seller and delivered to the buyer, was a "report of sale by registered dealer" in the form required by St. 1923, p. 517, § 45½, as added by St. 1927, p. 1424, § 10, and allowed on its face the legal and equitable ownership to pass to the buyer, who on the following day presented the report of sale to the motor vehicle department, and there procured a certificate of legal ownership, known as the pink slip, so that he was able to present the indicia of ownership to the purchaser.

2. Estoppel ⚷118.

That purchaser of automobile from conditional buyer had purchased 11 new cars from him within three weeks below list price did not show bad faith as respects estoppel; prior transactions being unquestioned.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Weber & Beckett, Inc., against Earl Le Clair. Judgment for defendant, and plaintiff appeals.

Affirmed.

Erwin C. Easton, of San Francisco (Isla V. Davies, of San Francisco, of counsel), for appellant.

Albert J. O'Brien, of San Francisco, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

TYLER, P. J.

Action for conversion.

Plaintiff is a dealer in new Chrysler automobiles in the city of Modesto. On October 1, 1929, one L. D. Moran visited plaintiff's place of business and purchased an automobile under a conditional sales contract. The price of the car was $1,640. Moran paid $100 on account, and in addition thereto gave to plaintiff as security two diamonds worth from $200 to $450. The balance of the purchase price was to be paid two days thereafter. The contract of sale and purchase reserved title in the seller. After inquiry concerning the financial standing of Moran, however, plaintiff signed a "Report of Sale by Registered Dealer" in the form required and in compliance with section 451½b, chapter 752, p. 1424, Statutes of 1927 of the laws of the state, and delivered it to Moran. This report of sale allowed on its face the legal and equitable ownership to pass to Moran. The following day Moran presented the report of sale to the motor vehicle department, and there was issued to him the certificate of legal ownership, known as the pink slip. Moran immediately thereafter, for a valuable consideration, sold and delivered the car to one Earl Le Clair, a dealer in used automobiles, who is the defendant and respondent herein. After trial, the court found defendant to be an innocent purchaser for value, and judgment went in his favor. Plaintiff appeals.

[1, 2] The question here presented is, Does the evidence sustain the findings of the trial court? It is appellant's claim that, as the automobile was a new one, and was sold at a substantial reduction, the defendant was put on notice, and was not a buyer in good faith and for value in the ordinary course of business. It is claimed that lack of good faith is further evidenced by the fact that defendant during a period of some three weeks had purchased eleven new cars from Moran below their list price. Other facts are relied on to support the claim that defendant was not an innocent purchaser. It is true that Moran had sold defendant numerous new cars prior to the one in controversy, but the record fails to show that Moran was not the legal owner of the same. In our opinion, there is no merit in the appeal. Appellant, by delivering to Moran the automobile and the report of sale which showed him as both registered and legal owner, and which allowed him to obtain the indicia of ownership and thus perpetrate a fraud upon an innocent third person, is estopped from asserting his title. Nor does the evidence show, as claimed, that defendant was not a purchaser in good faith. On the contrary, the numerous prior transactions had by defendant with Moran, as above stated, were unquestioned. The case comes squarely within the rule announced in Washington Lumber & Millwork Co. v. McGuire (Cal. Sup.) 1 P.(2d) 437, to the effect that, where the seller of an automobile under a contract of conditional sale mistakenly indorses and delivers the certificate of ownership to the buyer, he is estopped as against an innocent purchaser to deny that he intended to transfer title.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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118 Cal.App. 482

MOLEN v. BUSSI et al.

Civ. 7809.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1931.

Rehearing Denied Dec. 23, 1931.

1. Judgment ⚷713(2).

Matters which have, or could have, been judicially determined in action, cannot be again drawn in controversy between same parties.

2. Judgment ⚷739.

Findings in prior action that none of allegations in cross-complaint on note were true *held* not res judicata of subsequent action on note, where subject of cross-complaint was not germane to issues in prior action.

3. Set-off and counterclaim ⚷31.

Persons, having independent claims against each other, cannot settle them all in one action.

4. Judgment ⚷585(4).

Where matter not allowable is pleaded as set-off but is excluded and not taken into consideration in rendering judgment, action may be maintained thereon.

5. Judgment ⚷562.

Where former adjudication is pleaded, it must appear that adjudication was on merits.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Henry E. Molen against Stella Bussi and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Albert Picard, of San Francisco, for appellants.

Waldo F. Postel, of San Francisco, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

TYLER, P. J.

Action upon a promissory note.

Judgment went in favor of plaintiff and defendants appeal. At the trial defendants pleaded in effect that the consideration for the note had failed; they also urged the defense of res judicata. It is here claimed that the latter defense should have been sustained and judgment should have been rendered in favor of defendants.

The plea invoked is a bold attempt to defeat the payment of an honest obligation. The facts show that Henry E. Molen, plaintiff in the present action, and H. B. Kennedy were at one time partners in a garbage business. Kennedy sold out his interest to Molen and the latter then became the sole owner thereof. Subsequently Molen sold the same to Battista and Stella Bussi. The Bussis paid Molen $200 cash and executed a promissory note for the sum of $1,300, the balance of the purchase price. This is the promissory note which forms the basis of this action. Upon the sale the purchasers went into immediate possession of the business and ever since have continued to operate the same. Kennedy, who formerly owned the property with Molen, subsequently asserted a claim against the Bussis and brought an action based thereon. This action was entitled Kennedy v. Bussi. Molen was made a defendant in this action. As it proceeded, Molen filed a cross-complaint against his codefendants, the Bussis, upon the promissory note given by them as part payment for the business. The answer to the cross-complaint, filed on behalf of the Bussis, admitted the sale of the business and the execution and delivery of the note, but set up as a defense the fact that Kennedy was asserting a claim to the business to which Molen had warranted title. Upon the trial of that action the Bussis objected to a consideration of the cross-complaint filed by Molen upon the ground that the matters therein set forth did not constitute a proper subject for a cross-complaint and could not be determined in that case. The trial court sustained this contention and refused to receive any evidence on the cross-complaint based upon the promissory note. An action had also been filed by the Bussis against Kennedy to quiet their title to the business and to enjoin Kennedy from interfering therewith.

[1, 2] These two cases were tried together. The result of this litigation was that the title of the Bussis was in effect quieted and confirmed as against Kennedy and he was enjoined from interfering with the business or in any manner asserting a claim thereto. Among the findings in that action was one to the effect that none of the allegations set out in the cross-complaint filed by Molen were true. The Bussis, in the present action brought against them upon their promissory note given in payment for the business they acquired and now possess, but have not paid for, claim that this finding amounts to a judgment on plaintiff's claim; it being, so it is claimed, res judicata. There is no merit in the claim. It is of course generally true that matters which have, or could have, been judicially determined in an action cannot be again drawn in controversy between the same parties. Here, however, the subject of the cross-complaint was not germane to the issues in the Kennedy Case and could not have been rightfully adjudicated in that action, as the matter set forth therein was foreign to the issues involved and had no place in that litigation. It was an entirely different and separate transaction.

[3-5] It was never the intention of the reformed procedure to allow persons having independent claims against each other to settle them all in one action. Clark v. Kelley, 163 Cal. 207, 124 P. 846. From the record before us it appears that no evidence was received upon the cross-complaint of Molen or considered by the trial court. Where a matter is pleaded as a set-off or counterclaim, if it is for any reason not allowable as such in the action and is excluded and not taken into consideration in rendering judgment, an action may afterwards be maintained thereon. Where a former adjudication is pleaded it must appear that the adjudication was on the merits.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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118 Cal.App. 387

PETROLEUM EQUIPMENT CO. v. HORWITZ et al.

Civ. 8048.

District Court of Appeal, First District,
Division 2, California.

Nov. 18, 1931.

1. Appeal and error 🔑1011(1).

Finding based on conflicting evidence, could not be disturbed.

2. Witnesses 🔑276.

In action on trade acceptances executed for goods purchased, cross-examination of maker called as plaintiff's witness whether he had considerable bank balance between date of purchase and suit *held* improper, where pleadings presented no such issue (Code Civ. Proc. § 2055).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Petroleum Equipment Company against R. R. Horwitz, L. G. Clark, and others. From an adverse judgment, the last named defendant appeals.

Affirmed.

Bernard Potter, of Los Angeles, for appellant.

Hibbard & Kleindienst and H. P. Hibbard, all of Los Angeles, for respondents.

STURTEVANT, J.

[1] This is an appeal by the defendants from a judgment foreclosing a mechanic's lien. The evidence showed, and the trial court found, that the plaintiff sold to the defendants a quantity of metal casing which the defendants used in sinking an oil well; that at the time of the purchase the defendants paid down in cash about one-half of the purchase money, and that they also executed three several trade acceptances; that they paid one of them; that they have not paid the others; and that the defendants have not paid the balance due and owing on the purchase price. The defendants claim that the acceptances were given and accepted as payments. The plaintiff replies that the trial court made a finding that they were not. In the case of National Lumber Co. v. Whalley, 162 Cal. 224, at page 226, 121 P. 729, 730, the court said: "Whalley gave his note to secure the payment of the amount due to plaintiff. It is contended that this note was given and received in full satisfaction of the claims of plaintiff, and thus constitutes a payment releasing the defendant. Whether a note, or even a check, is received in absolute payment of a debt, or merely as a recognition of the debt with an understanding as to time and terms of payment, are questions which, as between the parties, are determined by their agreement, and in the absence of an agreement to this effect, the acceptance is not a payment of the debt." It is not claimed that the quotation is not an exact statement of the law applicable to the point. It is not claimed that any one of the acceptances had written thereon any statement in the nature of an express promise that it was or was not given as an absolute payment. As to whether there was any collateral agreement on that subject, or whether there was any implied agreement on that subject, the trial court received parol evidence. At least one witness testified flatly that there was no collateral agreement between the parties whether the acceptances were or were not given as absolute payment. At most, it can merely be claimed that there was a conflict in the evidence. But, even if that be true, the conflict was addressed to the trier of the facts, and the finding may not be disturbed by a court of review.

[2] The plaintiff called as a witness under Code of Civil Procedure, § 2055, R. R. Horwitz, one of the defendants. As between the date of the purchase and the date of the commencement of the action, he testified that he had several accounts with the Seaside National Bank. On cross-examination, he was asked by his own counsel, "During this period of time you had considerable balance in this bank?" The trial court sustained an objection to the question. The ruling was correct. The pleadings presented no such issue.

At another place in his cross-examination, his counsel asked Mr. Horwitz: "Is that the reason you did not pay them, because they were not presented to you?" The trial court also sustained an objection to that question. For the same reason that the other ruling was correct, the last-mentioned ruling was also correct. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

118 Cal.App. 522

PACIFIC STATES AUXILIARY CORPORATION v. FARRIS.

Civ. 7974.

District Court of Appeal, First District, Division 2, California.

Nov. 24, 1931.

1. Forcible entry and detainer ⚷34.

Whether there was forcible entry into apartment building and unlawful detainer within statute *held* for jury under evidence (Code Civ. Proc. §§ 1159, 1160, 1172).

2. Forcible entry and detainer ⚷7.

No flat breach of peace is necessary to show forcible entry and unlawful detainer (Code Civ. Proc. §§ 1159, 1160, 1172).

3. Forcible entry and detainer ⚷30(1).

In absence of evidence showing rental value of apartment occupied by one taking possession of apartment building for about two weeks or expenses incurred, nominal damages only could be awarded (Code Civ. Proc. §§ 1159, 1160, 1172).

4. Appeal and error ⚷1004(1).

Power to fix damages, compensatory or nominal, rests with trier of facts, but that body may rest its determination on legal evidence only.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by the Pacific States Auxiliary Corporation against Fred Farris. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

Leon French, of San Francisco, for appellant.

John L. Mace, of San Francisco, for respondent.

STURTEVANT, J.

From a judgment in favor of the plaintiff in an action for forcible entry and unlawful detainer, the defendant has appealed.

[1, 2] In his first point the defendant claims the evidence was insufficient to sustain the findings, that the entering of the defendant and his holding were forcibly done. The property involved is a lot in Berkeley on which is located the Caledonia Apartments. The building contains many apartments. A former owner had obtained a loan on the property from Pacific States Savings & Loan Society, and had executed a deed of trust to secure that loan. The trust deed named the plaintiff as trustee. Payments on the loan were in default, and a notice of sale had been given. On September 12, 1930, B. N. Vernon was on the premises claiming to act as manager under and by virtue of a contract of employment at first for the former owner and later for the trustee named in the deed of trust. Mr. Vernon and his wife occupied one apartment and managed the house. On the date last mentioned the defendant took two other men, Mr. Diebert and Mr. Engleman, and all three went to the Caledonia at about 3:30 p. m. On arriving there the defendant exhibited a deed to the premises, and asked Mr. Vernon for possession. The latter asked for time, and left the house to call on his employer. When he returned, the defendant and his assistants had taken the most of Mr. Vernon's property out of his apartment and had set it out in the hallway. Mr. Vernon entered the house and told the defendant he could not have possession till the following morning. Continuing, he testified: "They were so insistent, however, that in lieu of any trouble * * * we called * * * the People's Express Company, and they took our belongings and personal things." On September 17, 1930, Mr. Green and Mr. Hilbeck, as representatives of the plaintiff, went to the Caledonia. There they entered the apartment occupied by the manager and held an acrimonious conversation with the defendant. Finally the defendant said to them: "Now there is the door; get out of this apartment. I am not going to tell you to get out again." At about the same time the agent of the defendant called a policeman. But before the officer arrived Mr. Green and Mr. Hilbeck left. Considering all of this evidence together, we think it cannot be said as a matter of law that it does not show a forcible entry and unlawful detainer within the meaning of the statute. Code Civ. Proc. §§ 1159, 1160 and 1172; Knowles v. Crocker Estate Co., 149 Cal. 278, 86 P. 715; San Francisco, etc., Soc. v. Leonard, 17 Cal. App. 257, 119 P. 405. No flat breach of the peace is necessary. It is exactly such incidents the statute was enacted to obviate.

[3, 4] The defendant entered September 12, 1930. The judgment was entered September 29, 1930. The defendant ousted no tenant. He collected no rents. He had actual use of one apartment during that period, and only constructive possession of the other apartments during that time. There was no evidence as to the rental value of the one apartment which he occupied and which had been occupied by Mr. Vernon. There was no evidence of expenses incurred. If evidence on any of these matters had been produced, the damages therefor could have been awarded. San Francisco, etc., Soc. v. Leonard, 17 Cal. App. 254, 267, 119 P. 405. In the absence of such evidence the most that could be done was to award nominal damages. Maher v. Wilson, 139 Cal. 514, 518, 521, 73 P. 418; 8 Cal. Jur. 735. The power to fix the damages, compensatory or nominal, rests with the trier of the facts, but that body may rest its determination on legal evidence only. 26 C. J. 862.

The judgment is reversed on the issue of damages, and the trial court is directed to again try that issue and then enter a judgment in accordance with this decision.

We concur: NOURSE, P. J.; SPENCE, J.

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118 Cal.App. 530

COURDWAY v. PEOPLE'S MUT. LIFE INS. CO. OF CALIFORNIA.

Civ. 6816.

District Court of Appeal, Second District, Division 1, California.

Nov. 24, 1931.

1. Insurance 🔑665(2).

Evidence *held* insufficient to establish beneficiary was guilty of fraud in receiving policy after insured's death.

2. Insurance 🔑349(1).

Where agent taking post-dated check, sent insurer entire sum it was entitled to before issuance of policy, insurer could not, after insured's death, raise question of non-payment of premium (Civ. Code, § 2598).

3. **Insurance** ⚷136(2).

Delivery of policy *held* accomplished by insurer's act of sending policy to agent for delivery to insured.

4. **Insurance** ⚷136(2).

That possession of policy, delivered by insurer to agent for delivery to insured, was transferred to beneficiary by unauthorized person, *held* immaterial, as regards insurer's liability.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Hazel Courdway against the People's Mutual Life Insurance Company of California. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, and Alfred B. Weiler, of San Francisco, for appellant.

Leonard G. Shelton, of Glendora, for respondent.

YORK, J.

On July 26, 1927, Dr. J. W. Courdway, of Pomona, Cal., made application to C. C. Likes, an agent of the defendant insurance company, for a policy of accident and health insurance, naming the plaintiff, Hazel Courdway, his wife, as beneficiary, and gave to the said agent his check dated August 1, 1927, for the sum of $36.50 in full payment of the initial quarterly premium on said policy. The agent thereupon delivered the application to the insurance company at its office in Los Angeles, paying to said company $9.13, which was the net amount of the initial payment due to appellant after the deduction of the agent's commission, and at the same time requested that the policy be mailed to him, the said agent, when executed. The policy was duly executed and countersigned by the appellant on July 28, 1927; the office record of the appellant showing that it was on that day mailed to the agent Likes. The insured was injured in an automobile accident on July 31, 1927, and as result died from injuries therein sustained, on the morning of August 1, 1927. On that morning, shortly after the death of insured, a young man, one L. E. Coffman, called upon the plaintiff and delivered to her the insurance policy here involved, after demanding of her the payment of $61.03, which sum of money she paid to him. The said L. E. Coffman is apparently unknown to any of the interested parties, and how he came into possession of the policy of insurance remains a mystery, so far as the evidence discloses.

Plaintiff made proof of loss and application for indemnity under the policy, but the appellant company refused to honor her claim, and she brought this action to enforce the same.

It was stipulated in the lower court, during course of trial, that the only issue was the question of delivery of the insurance policy. Appellant now claims that the plaintiff, by paying Coffman, in order to secure possession of the policy, is guilty of fraud as against the insurance company, that the policy was never effective, because the initial premium was not paid, and that the policy was never delivered.

[1] Appellant's first point, that of fraud on the part of plaintiff, is without merit. The evidence shows that the plaintiff told Mr. Coffman, when he appeared with the insurance policy, that her husband was dead, but that he replied it made no difference, and that he would deliver the policy to her if she would pay him $61.03, the premium due thereon. The evidence further shows that she knew none of the details of her husband's transaction with the insurance company or the agent Likes.

[2] As to payment of the premium, the deceased gave the agent a postdated check, but the agent, before the date when the check could be honored, paid to the appellant company the sum of $9.13, which was the net amount of the initial premium due upon the policy, after deduction of the agent's commission, so that, as between the appellant and the insured, the question of payment did not arise. The application for insurance, of which a photostatic copy was attached to the policy, contained the following statement: "25. The initial or down payment on this policy has been paid in amount of $36.50 on the 26 day of July, 1927." The insurance policy, which was issued by appellant company on the 28th day of July, 1927, contained the following: "This Policy is issued in consideration of the Application, copy of which is attached hereto and made a part hereof, payment of a policy fee of Ten and no/100 Dollars and payment of a premium of Twenty-six & 50/100 Dollars for a term of Three months beginning on the 28th day of July, 1927, and expiring on the 28th day of October, 1927, at 12 o'clock noon." "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." Section 2598, Civ. Code. It would seem, therefore, that appellant, having received from the agent the entire sum it was entitled to before issuance of the policy, is not now in position to raise the question of nonpayment.

[3, 4] The delivery of the policy was accomplished by the act of sending it to the agent for delivery to the assured. Harrigan v. Home Life Ins. Co., 128 Cal. 531, 543 to 546, 58 P. 180, 61 P. 99. The delivery by the unauthor-

ized person, Coffman, to Mrs. Courdway, really has no relation to this controversy. Upon the authority of Marderosian v. National Casualty Co., 96 Cal. App. 295, 303, 273 P. 1093, 1096, we hold that the policy of insurance was delivered and became effective upon the date of the application. The cited case holds: "Where a valid parol contract of insurance has been entered into, the policy to be issued thereon is simply the memorial of the prior parol contract, and, even though the policy be not delivered until after the loss occurs, the insurance is deemed effective from the time agreed upon in the parol agreement, irrespective of any delivery of the policy. Crawford v. Trans-Atlantic Fire Ins. Co., 125 Cal. 609, 58 P. 177. 'If an agent, authorized to accept risks, accepts a risk by parol, promising to deliver the policy, the insurance begins with the acceptance, and the contract in parol continues until the policy is delivered, when it is superseded by the policy.' Ferrar v. Western Assur. Co., 30 Cal. App. 491, 159 P. 609, 611."

The judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

TOPLEY v. ZEEMAN et al.*

Civ. 7602.

District Court of Appeal, First District, Division 1, California.

Nov. 23, 1931.

Rehearing Denied Dec. 23, 1931. Hearing Granted by Supreme Court Jan. 21, 1932.

1. **Innkeepers** 🔑10.

Innkeeper is not insurer of premises' safety, and cannot be held liable for patent defects in equipment.

2. **Innkeepers** 🔑10.

Innkeeper cannot be held liable for latent defects in equipment, absent showing of ordinary care to discover them.

3. **Innkeepers** 🔑10.

Hotel guest injured using bathtub partially supported by wooden blocks with knowledge of such condition assumed risk, precluding recovery against hotel.

4. **Innkeepers** 🔑10.

In action by hotel guest for injuries sustained while using allegedly defective bathtub, undisputed evidence that defects, if any, were latent and not detectable by exercise of ordinary care *held* insufficient for jury.

The undisputed evidence disclosed that the tub was carefully inspected daily by defendant; that defendant had not found the tub defective in any way; that plaintiff must necessarily have slipped as she stepped into the tub; and that in falling against the side of it her weight of 191 pounds caused the two metal legs to give way, and the tub to slip from the partially supporting wooden blocks.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Emma S. Topley against John Zeeman and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Reisner & Deming, of San Francisco, for appellant.

Charles W. Haswell, of San Francisco, for respondents.

KNIGHT, J.

This is an appeal by plaintiff from an adverse judgment entered pursuant to a directed verdict in an action for damages arising out of certain injuries plaintiff claims to have sustained as the result of a fall in a bathtub in a hotel in which she was living.

Plaintiff had been living at the hotel for some time and she had been occupying the apartment in which the accident happened for more than a week, during which time she used the bathtub every day. Between 11 and 12 o'clock on the night of the accident she prepared to take a bath, and, as she stepped into the tub, she fell upon the side of it, injuring her back. The next morning she went to work, but during the day informed her employer that she had been hurt and would be unable to continue. Upon returning to the hotel, she went to bed and remained there for approximately three weeks. Two days after the accident, she was examined by a doctor, and later another doctor was called in; but aside from a bruise on her back they were unable to find any bodily injuries, and her case was diagnosed as one of traumatic neurosis, purely a mental ailment.

The tub was installed against the wall, and about five or six inches above the level of the floor. Originally it was supported by four metal legs, but it seems that one of them, on the side next to the wall, had been broken off several years before the accident. Thereafter that corner of the tub rested on three wooden blocks placed there for such purpose, and, during the time plaintiff was using the tub, she had full knowledge of the manner in which it was supported. An examination of the tub immediately following the accident disclosed that the two metal legs on the front side were spread apart and broken off, the wooden blocks were displaced, and the tub

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 13 P.2d 666.

was resting on the floor, but it had not tilted sufficiently to spill any of the water. In view of these after-discovered conditions, plaintiff claims that it was either the wooden blocks slipping from place, or the giving way of the metal legs on the front of the tub that caused her to fall, and that on either theory, under the doctrine of res ipsa loquitur, the court should have allowed the case to go to the jury.

Evidence was introduced by defendants, however, which was neither disputed nor contradicted, showing that the blocks were placed in such manner that it was impossible for the tub to have slipped or to have been dislodged therefrom without the aid of some unusual force; moreover, that the bathroom and the tub were carefully inspected daily by Mrs. Zeeman, one of the lessees of the hotel; that she always looked under the tub to see if anything had been left there; that at no time during the inspection of this particular room did she ever find the tub to be in any way defective; that it was at all times firm, that the blocks were firmly in place, and that when she examined them they were in good condition; that they were solid, in no way water-logged, and bore no signs of cracking. Defendants contend, therefore, that the foregoing undisputed facts were sufficient as a matter of law to establish the fact that plaintiff's fall was not due to any defective condition of the tub; but that necessarily she must have slipped as she stepped into the tub, and that in falling against the side of it her weight (which was shown to be 191 pounds) caused the metal legs to give way and the tub to slip from the blocks.

[1-4] However, aside from the facts, the law appears to be well settled that, although an innkeeper is liable for his own willful acts and for his negligence, he is not an insurer of the safety of the premises nor of the hotel equipment, and therefore cannot be held liable for patent defects, because the guest assumes such risks; nor can he be held liable for latent defects unless it appears that there has been a failure on his part to exercise ordinary care to discover them. 14 Cal. Jur. 325; 32 C. J. 562; 14 R. C. L. 508. Assuming, therefore, that it may be inferred, as plaintiff contends, that the accident was caused by reason of the fact that one corner of the tub was supported by wooden blocks instead of a metal leg, plaintiff admits that she had full knowledge of such condition several days prior to the accident, and consequently, by using the tub in such condition, she assumed the risk thereof, and defendants are not liable. On the other hand, if it be assumed that the accident was caused by the giving way of the two metal legs on the front side of the tub, it is evident from the undisputed evidence hereinabove set forth that the defects in said legs were latent and not detectable by the exercise of ordinary care; and, under such circumstances, the defendants are not liable.

For the reasons stated, we are of the opinion that the trial court was justified in directing a verdict for the defendants. The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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118 Cal.App. 386

PEOPLE v. LATOURELL.

Cr. 1637.

District Court of Appeal, First District, Division 2, California.

Nov. 18, 1931.

Rehearing Denied Dec. 12, 1931. **Hearing** Denied by Supreme Court Dec. 18, 1931.

Criminal law ⚷1175.

If jury found degree of burglary to be second when it should have been first, defendant, not being prejudiced, could not complain.

Appeal from Superior Court, City and County of San Francisco; C. P. Vicini, Judge.

Lucien Latourell was convicted of second degree burglary, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J.

The district attorney filed an information against the defendant charging him with the commission of crime of burglary on August 10, 1930, in San Francisco. The defendant was arrested, he pleaded not guilty, and thereafter he was tried and convicted. By its verdict the jury fixed the degree as the second degree. From the judgment entered on the verdict the defendant has appealed.

He makes one point. He claims there was no evidence that the act was committed in the daytime and therefore there was a failure of proof on that element of the offense and that the defendant should have been acquitted. In this connection it is his contention that burglary of the first degree and burglary of the second degree are separate and distinct offenses, and that the latter is not included in the former. The manner of presentation may be new, but, in substance, the point has been made and ruled against the contention of the defendant. People v. Barnhart, 59 Cal. 381; People v. Maroney, 109 Cal. 277, 41 P. 1097; People v. Lowen, 109 Cal. 381, 42 P. 32; People v. Black, 80 Cal. App.

605, 251 P. 321. People v. Barnhart, 59 Cal. 381, is a full treatment of the subject. Among other things, it is there said: "But it is a sufficient answer to the objection taken on behalf of the defendant, to say that he is not prejudiced by the error complained of. * * * Section 1404 of the Penal Code." However, this defendant asserts that it is not "a sufficient answer." He says such a verdict rests on no evidence, that it stands on no better footing than if he were charged with burglarizing a house in San Francisco and convicted of burglarizing a house in San Mateo. He cites People v. Maroney, 109 Cal. 277, and quotes from page 279, 41 P. 1097. The degree of the offense was not being discussed by the court, but it was discussing whether the entry was shown to be by consent of the owner or was it felonious. It may be conceded for the purposes of this opinion that second degree burglary is not contained within the bounds of first degree burglary. But it must also be conceded that both were included within the information. Not until all the evidence was introduced could the jury determine whether the offense was of the first or of the second degree. When, as here, the defendant receives a verdict more favorable to himself than the facts warrant, he may not complain. 17 C. J. 362. In the instant case the evidence would have warranted a verdict finding the offense to be the first degree. Moreover, there was the evidence of two witnesses that on the date alleged the defendant feloniously entered the premises alleged. If the jury, under these circumstances, found the degree to be second when it should have found it to be first, this court may not reverse the judgment. That a crime was committed is clear. It follows that in no proper sense can it be said there was a "miscarriage of justice," and therefore the judgment may not be reversed.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

118 Cal.App. 442

KOEPPEL et ux. v. DALUISO.

Civ. 512.

District Court of Appeal, Fourth District, California.

Nov. 20, 1931.

Rehearing Denied Dec. 17, 1931. Hearing Denied by Supreme Court Jan. 18, 1932.

1. Appeal and error ⚷1039(5).

Defective pleading of contributory negligence *held* not sufficiently prejudicial to require reversal of judgment for defendant.

Reversal was not required, notwithstanding defendant's attempt to plead contributory negligence was artificial, since it was clear that such an attempt was made, and the case was tried on the theory that contributory negligence was an issue, and plaintiffs did not demur to the pleadings of defendant. In the opening statement of counsel for defendant it was clearly stated that he relied on the defense of contributory negligence, and much evidence was introduced on this issue, and instructions were proposed by both parties and given by the court on the question of contributory negligence.

2. Automobiles ⚷217(3).

Pedestrian struck by automobile *held* contributorily negligent as matter of law for violating ordinance prohibiting crossing street in congested district elsewhere than at crosswalk (St. 1923, pp. 554, 563, §§ 114, 145, as amended by St. 1929, pp. 537, 546, §§ 45, 65).

3. Appeal and error ⚷1064(1).

Instruction placing on pedestrian crossing street in congested district elsewhere than at crosswalk duty of continuous care in looking for approaching vehicles *held* not reversible error.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Carl Koeppel and wife against Salvatore Daluiso. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Swing & Wilson and Fred A. Wilson, all of San Bernardino, for appellants.

Harry D. Parker, of Los Angeles, for respondent.

MARKS, J.

Appellants are husband and wife. At about 1:30 o'clock on the afternoon of October 22, 1929, May Koeppel was injured by either running into or being struck by an automobile driven by respondent on Third street in the city of San Bernardino, at a point within what is designated as the central traffic district by ordinances of the city of San Bernardino. This action was brought to recover damages for the injuries suffered by appellants. A jury returned a verdict in favor of respondent, and, after the denial of their motion for new trial, this appeal was taken from the judgment.

Third street is a main business street of the city of San Bernardino extending east and west with a street car track in its center. Mrs. Koeppel, who, with her husband, lived in the westerly part of San Bernardino county, left a store on the southerly side of Third street and proceeded northwesterly across the street at a point between street intersections to catch a bus going westerly on the northerly side of the street. Several automobiles were parked at an angle to the southerly curb line of Third street on both sides of the place where Mrs. Koeppel left the sidewalk.

Respondent was driving his automobile easterly on the southerly half of Third street, and first saw Mrs. Koeppel when she came out from behind the rear of one of the parked cars, and was at a distance of about ten feet from him. He sounded his automobile horn, swerved his car to his left and applied his brakes, but did not avoid a collision with her. According to his version of the accident, it occurred south of the south street car rail and on the right-hand half of Third street from the direction in which he was traveling. He testified that Mrs. Koeppel walked into the right-hand side of his automobile at a point where her head came into contact with a glass wind wing attached to the outside of the right front door. Mrs. Koeppel testified that she looked in both directions before leaving the sidewalk, and, when she had proceeded into the street just beyond the rear of the parked automobiles, did not see respondent's approaching automobile. She further testified that the accident happened north of the center line of Third street, and that she was struck by the right front fender of respondent's automobile.

Appellants urge two grounds for a reversal of the judgment: First, that the court erred in admitting in evidence an ordinance regulating pedestrian traffic within the central traffic zone in the city of San Bernardino, and, second, that the court erred in giving an instruction to the jury requested by respondent.

[1] Appellants base their arguments in support of their claim of error on the admission of the ordinance in evidence, upon the ground that its sole purpose was to establish contributory negligence on the part of Mrs. Koeppel, and that contributory negligence was not properly pleaded by respondent.

It must be admitted that the attempt on the part of respondent to plead contributory negligence was most artificial; however, it is clear that such an attempt was made. The case was tried upon the theory that contributory negligence was an issue, and appellants did not demur to the pleadings of respondent. In the opening statement of counsel for respondent, it was clearly stated that he relied upon the defense of contributory negligence. Much evidence was introduced upon this issue. Instructions were proposed by both parties and given by the court on the question of contributory negligence. Under these circumstances, we cannot hold that the defective pleading of this defense was sufficiently prejudicial to appellants to require a reversal of the judgment under the authority of Schuh v. R. H. Herron Co., 177 Cal. 13, 69 P. 682, 684, where it was said: "The plaintiff contends that the ruling cannot be reviewed, because, as he claims, there was no issue on the subject of contributory negligence, pointing out that the only allegation thereof in the answer was that the injury to plaintiff 'was solely and proximately caused by the failure of plaintiff to exercise ordinary care on his own behalf for his own safety'; and, further, that 'the negligence of plaintiff and his failure to exercise ordinary care on his own behalf for his own safety contributed to any injury or damage suffered by plaintiff'; in support of which claim he refers to Crabbe v. Mammoth, etc., Co., 168 Cal. 505, 143 P. 714. In this case, however, the defense of contributory negligence was considered as properly pleaded throughout the trial. No objection was made at any time on the ground that it was not pleaded. A large part of the testimony on the trial was devoted to that subject, and the instructions of the court show that it was deemed a matter in issue to be submitted to the jury. Under these circumstances a defective plea cannot be made available in support of an erroneous ruling on the subject. Kelly v. Santa Barbara, etc., Co., 171 Cal. 415, 421, Ann. Cas. 1917C, 67, 153 P. 903; Perry v. Angelus Hospital Ass'n., 172 Cal. 311, 316, 156 P. 449."

[2] Appellants maintain that the trial court committed prejudicial error in giving to the jury, at the request of respondent, the following instruction:

"You are instructed that municipalities in this state have the right to declare by ordinance that the right of crossing streets by pedestrians shall be limited to established crosswalks. The city of San Bernardino has exercised its right to enact such an ordinance, and declared it to be unlawful within the Central Traffic District to cross a highway other than at an established crosswalk. Any violation of such ordinance which contributes to the injury complained of constitutes a bar to recovery.

"However, even in the absence of such ordinance, the law declares that in the exercise of due care for one's own protection, which the law exacts of everybody, a greater degree of care is necessary upon the part of the pedestrian who undertakes to cross a congested highway other than at an established crosswalk. Furthermore, the exercise of due care under such circumstances demands that the pedestrian shall look for the approach of vehicles lawfully traveling thereon. The observance of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as she steps upon the street. The observance of that care is imperative of her during all the time that she is crossing.

"In this case, if you believe that Mrs. Koeppel proceeded to cross Third street at a place where there was no crosswalk, or that she did not after stepping upon the street look to the right or left, or did not, as she attempted to cross the street, use ordinary care to determine the approach of vehicles thereon as herein defined, then I instruct you that she was herself guilty of negligence, and you shall find against her upon that issue."

Appellants maintain that the first paragraph of the instruction was defective, in that it informed the jury that Mrs. Koeppel was guilty of contributory negligence as a matter of law in crossing Third street between intersections in violation of an ordinance of the city of San Bernardino, and that the remaining paragraphs were defective in placing upon her the duty of continuous care in looking for approaching vehicles after entering between the intersections.

The California Vehicle Act (sections 114 and 145 [as amended by St. 1929, pp. 537, 546, §§ 45, 65]) gives to the governing bodies of counties and municipalities the right to provide certain regulations for foot and vehicular traffic on streets where traffic is heavy and continuous. This right has been recognized in the case of Lindenbaum v. Barbour (Cal. Sup.) 2 P.(2d) 161, and in the case of Sheldon v. James, 175 Cal. 474, 166 P. 8, 10, 2 A. L. R. 1493, where it was said: "Automobiles have ceased to be the mere playthings of the rich. They have become a part, and well-nigh an essential part, of the business life of a city. They make greatly for expedition in the transaction of business and in the accomplishment of this attain a speed far beyond that of horse-drawn vehicles. Business has adjusted itself to this new mode of transportation and would be as little inclined to abandon it as it would be to abandon the telephone. Municipal authorities have, and properly have, recognized the necessity of regulatory provisions controlling automobile traffic for the safety of pedestrians, upon the one hand, and at the same time, to the end that the traffic may not be unduly interfered with, have adopted regulatory provisions controlling the movements of pedestrians. The most familiar of these provisions is the one checking automobiles or bringing them to a full stop as they draw up to intersecting streets in the congested portions of the city, and here police officers are frequently stationed to regulate the traffic. It then becomes a necessity for the orderly and expeditious movement of this traffic in such congested districts that automobiles should be allowed to move at reasonable speed between intersecting streets. In many municipalities this is declared in terms without an express limitation upon that speed. In others, to the end that such movements may not be unduly impeded and interfered with, the right of crossing streets by pedestrians is limited to the established crosswalks."

From the provisions of Ordinance No. 1301 of the city of San Bernardino, it appears that, "when within the central traffic district, no pedestrian shall cross a roadway other than by a cross-walk." The accident happened within the central traffic district of the city of San Bernardino. The ordinance provides further that a crosswalk shall be "that portion of the roadway included within the prolongation of curb and property line at street intersections." By the same ordinance a pedestrian is defined as "any person afoot."

It is clear that Mrs. Koeppel was violating the provisions of this ordinance in crossing Third street at a place where there was no crosswalk. The violation of a law or city ordinance has been repeatedly held to be negligence per se. King v. San Diego Electric Ry. Co., 176 Cal. 266, 168 P. 131; Alechoff v. Los Angeles Gas & Electric Corp., 84 Cal. App. 33, 257 P. 569; Wynne v. Wright, 105 Cal. App. 17, 286 P. 1057. We are therefore of the opinion that the trial court was fully justified in giving the first portion of the instruction which we have quoted.

[3] While the balance of the quoted instruction should not be adopted as a recommended model to be followed in all similar cases, yet, under the authority of Sheldon v. James, supra, we do not think it sufficiently prejudicial to require a reversal of the judgment. In the Sheldon Case it was said: "It is palpably true that, in the exercise of the due care for one's own protection which the law exacts of everybody, a greater degree of care is necessary upon the part of the pedestrian who undertakes to cross a congested highway other than at the established crosswalk, and especially so if in the act he does not essay a direct crossing, but pursues a long diagonal route. It is true that in so crossing the care required of this pedestrian was especially directed to the observation of vehicles going north on the easterly side of Powell street and south on the westerly side, but upon neither side of the street was he relieved from the duty of exercising ordinary care to protect himself against automobiles which might, as they had a perfect right to do, be backing into a vacant parking stand. The observation of ordinary care by such a pedestrian is not fully performed by merely looking to the left or right as he steps upon the street. The observance of that care is imperative upon him during all of the time that he is crossing. Scott v. San Bernardino, etc., Co., 152 Cal. 604, 93 P. 677. Here it is in evidence from plaintiff's own witnesses that the automobile in backing up the grade made an extremely loud and raucous noise sufficient to attract the attention of people upon the opposite side of the street and such as should have

attracted the attention of the plaintiff before he put himself in a place of danger. If, then, under these circumstances, he did not look, the jury was justified in concluding that he was negligent in not having looked. We do not construe the instruction given as meaning that it is the duty of a pedestrian to look backward, nor yet as an effort to standardize the law by declaring that a pedestrian must constantly and continuously be looking from right to left. We construe it to be no more than a declaration that in the exercise of ordinary care it is the duty of such a pedestrian to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction, and in particular where he has received adequate warning of the likelihood of peril."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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118 Cal.App. 392

PEOPLE v. CORBIN.

Cr. 53.

District Court of Appeal, Fourth District, California.

Nov. 18, 1931.

As Modified Dec. 2, 1931.

1. Larceny ⚷62(1).

Evidence showing that defendant did not use stock as he represented to victim it would be used and that he converted proceeds thereof supported conviction of grand theft.

2. Larceny ⚷68(1).

Whether arrest of defendant prosecuted for grand theft of stock prevented return of stock to owner *held* for jury.

3. Witnesses ⚷199(2).

Attorney and client relationship did not exist between attorney and defendant being prosecuted for grand theft, precluding attorney's testifying, where attorney employed to investigate another's relations with defendant had investigated matters in which defendant was involved.

4. Criminal law ⚷1158(2).

Determination of existence of relationship of attorney and client is for trial court.

5. Criminal law ⚷1158(2).

Trial court's determination as to existence of attorney and client relationship is ordinarily conclusive.

6. Criminal law ⚷798½.

Forms submitted to jury for finding defendant guilty or not guilty on each count of information for grand theft *held* unobjectionable.

7. Criminal law ⚷798½.

Defendant convicted of grand theft could not complain of form for verdict submitted to jury, absent showing that jury desired verdict different from that expressed in form.

8. Criminal law ⚷798½.

It is not judge's duty to furnish forms of verdict to jury; jury presumably being able to formulate own conclusions.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Claude Corbin was convicted of grand theft, and he appeals.

Affirmed.

D. G. Wettlin and Drumm, Tucker & Drumm, all of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

FREEMAN, Justice pro tem.

The defendant was charged with grand theft in two counts. He was acquitted as to count 1 and convicted on count 2. Count 2 alleged: "That on or about the 13th day of January, 1931, at and within said County of Orange, State of California, the crime of felony, to-wit: grand theft was committed by Claude Corbin, who at the time and place last aforesaid, did then and there wilfully and feloniously steal, take and carry away 79 shares of Southern California Edison Company Common Stock of the value of $3,500.00 in gold coin of the United States, the personal property of Martin Hayes."

The defendant appeals from the judgment of conviction and from the order denying a new trial, and contends there were three errors committed in the trial court which would entitle him to a new trial.

[1] The first contention is that the evidence is not sufficient to sustain the verdict. There is ample evidence in the record of the following facts: That Martin Hayes was a man 89 years old and in a somewhat senile and childish condition of mind; that he was the owner of 79 shares of common stock in the Southern California Edison Company, worth at least $3,500, which stock he had previously purchased through appellant; that at some time in December, 1930, appellant sold to Hayes certain shares of Pickwick Airways stock, receiving therefor a check for $2,000; that subsequently Hayes expressed the desire to exchange his Pickwick Airways stock for addi-

tional shares of Edison common; and that on January 13, 1931, appellant told Hayes that he had found a company that would trade Edison stock for Pickwick stock, that he needed more Pickwick shares in order to put over the deal, and that he would also have to have the 79 shares of Edison common in order to make the exchange. Thereupon Hayes delivered both the 79 shares of Edison common and the Pickwick stock to appellant. Some three or four days later appellant handed a stock certificate to Hayes which Hayes thought was Edison common, and which he put into his safety deposit box. The evidence shows that Hayes was hardly able to read because of age. Appellant testified that he did not tell Hayes that this was a certificate of stock in "Big Bear Trust," which it was, but that he referred to it as "trust." Hayes did not discover that he did not have Edison stock until some time later. It is admitted by the defendant and testified to by Hayes that at no time did he want any stock except Edison common. The evidence also shows that on January 17, 1931, appellant sold the Edison stock which he had thus obtained from Hayes for $3,653.35; that he deposited this sum in a bank to his own credit; that he checked out practically the entire amount on his own personal account; and that on February 11, 1931, he had checked out all of the money except a balance of $6.36. The evidence shows that appellant never returned the Edison stock to Hayes nor paid back the money he had received from its sale. The evidence is ample to show that appellant did not use the stock for the purpose for which he had represented to Hayes it would be used, and that he converted the money to his own use and benefit. Under our statutes his acts constitute grand theft, and the evidence is sufficient to sustain the verdict.

[2] In defense of his conduct appellant contends that he had until April 1, 1931, in which to return this stock, but that by reason of his arrest on or about March 13, 1931, he was unable to return it. There is evidence in the record to support the testimony of Hayes that a conversation with Corbin about his having until April 1st in which to return the stock did take place, but that it was after Hayes discovered, on February 11, 1931, that the Edison stock which he supposed he had in his deposit box was not there, and found in its place some Big Bear Investment Trust certificates, which certificates had been handed to him by appellant and which he supposed was Edison common. The following appears in the record:

"Q. Did he later deliver to you any kind of stock, Claude Corbin? A. Yes, sir; Big Bear stock, I guess. I found that in my box. I didn't know I got it at all. I thought it was Edison.

"Q. And when you found that in your box, who was with you? A. My daughter, Mrs. Brinkman.

"Q. And was that the first time that you knew you didn't have Edison common stock? A. The first time I knew it."

The question raised by this defense was a question of fact which had been determined by the jury adversely to appellant upon sufficient evidence.

[3-5] The second contention of appellant is that the court erred in admitting the testimony of Deputy District Attorney Kaufman. As to the contention that the testimony of the witness Kaufman was not admissible on the ground that it was privileged as there existed the relationship of attorney and client between witness and appellant, there is nothing in the record which will substantiate it. From the testimony of Kaufman we find the following:

"Mr. and Mrs. Burns were having difficulty with some brokers in Los Angeles who insisted that they pay them a large sum of money, indirectly through the alleged activity of their son, Carl Burns. Mr. Burns employed me to make an investigation of all of the activities of Carl Burns that we could ascertain. He gave me a letter to that effect, advising me that I was representing no one else except Elmer Burns. * * *

"Q. By The Court: You were not employed at any time by Mr. Corbin? A. At no time, nor by Mr. Carl Burns, nor by any of the representatives of the American Investors. I was employed only by Elmer Burns, and he was so particular about our employment that he drafted a letter to us, saying he wanted to reduce the matter to writing so there wouldn't be any uncertainty as to the responsibility and whom we were working for."

From the above testimony it is clear that at no time was Mr. Kaufman employed by Mr. Corbin as an attorney for or by him. He was employed by one Elmer Burns, a father whose son had had business relations with appellant, and by reason of such employment he investigated some matters in which Mr. Corbin was involved. The relationship of attorney and client did not exist, nor did any confidence reposed by Corbin in Mr. Kaufman constitute the privilege which exists between attorney and client. This was the ruling of the trial court after considerable evidence voir dire on this point. "It is for the trial court to determine whether the relationship of attorney and client existed and such determination is ordinarily conclusive." 27 Cal. Jur. 52, and cases there cited.

[6-8] The third contention of appellant is that the forms of verdict submitted to the jury were not proper. There is no merit in this contention, as there were submitted to the jury forms for finding the defendant guilty or not guilty on each count of the information, and, if the jury desired to find the defendant guilty as a whole, it was at liberty to do so. Appellant, by reason of the verdict given, is

in no position to object, as a form of verdict was used which expressed the views of the jury and there is no showing that it desired a different verdict. The form of verdict given by the jury is not prejudicial to appellant. The law makes it no part of the duty of the trial judge to furnish forms of verdict to the jury; the latter is presumed to be able to formulate its own conclusions. People v. Hill, 116 Cal. 570, 48 P. 711.

It is therefore ordered that the judgment and order denying motion for new trial be and the same are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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118 Cal.App. 430

PEOPLE v. COLLINS.

Cr. 2080.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1931.

Rehearing Denied Dec. 5, 1931. Hearing Denied by Supreme Court Dec. 18, 1931.

1. Robbery 🔑24(3).

Finding of jury based on conflicting evidence, identifying defendant as one of parties committing robbery, *held* supported.

2. Criminal law 🔑1169(5).

Admission of evidence subsequently stricken from records, relating principally to first count of information on which defendant was acquitted, *held* not prejudicial.

3. Criminal law 🔑528.

In robbery prosecution against two defendants, officer's testimony that one defendant made voluntary statements showing guilt *held* properly admitted.

> This was especially so as it did not appear that the defendant complaining of the admission of the testimony was referred to in the confession or admission of facts made by the other defendant.

4. Criminal law 🔑829(1).

Striking portions of defendant's requested instruction *held* not error, where essential or important statements stricken were contained in other instructions.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Robert Collins was convicted of robbery, and he appeals.

Affirmed.

W. Frank Shelley, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

CONREY, P. J.

[1] By information filed, appellant and one Evans were accused of two robberies. At the trial they were acquitted on the first count and convicted on the second. Defendant Collins appeals from the judgment and from an order denying his motion for a new trial. The evidence leaves no doubt that, at the stated time and place, in the city of Los Angeles, two men forcibly took from the person of the prosecuting witness Allaire the sum of $55. The witness Allaire identified appellant Collins in the most positive manner. Collins denied his guilt, and denied that he was in the city of Los Angeles at the time when the robbery occurred. He testified that at that time, October 4, 1930, he was in the city of Oakland. Other witnesses testified to having seen Collins in the city of Oakland early in October; and at least one of them definitely fixed the date as October 4, when he saw appellant at Oakland. On this conflicting evidence, plus circumstantial evidence, the jury found against appellant, and the finding must stand approved.

[2] The first two assignments of error relate to the admission of evidence to which appellant objected. This evidence was later stricken from the record; and since it related principally to the first count of the information (on which the jury found appellant not guilty), it is clear that the jury was not prejudiced against appellant by reason of such evidence.

[3] Point 3 is that the court erred in admitting certain admissions or confessions purporting to have been made by the codefendant Evans, which appellant contends were obtained as the result of a beating administered by five Denver policemen. The witness Wessels, a Los Angeles police officer, testified that on October 23, 1930, certain statements were made in his presence by defendant Evans, in the police station at the city of Denver. Wessels testified that no threats, force, or violence were used upon Evans at that time nor was any promise of reward or hope of immunity extended to him, and that the statement made by Evans was free and voluntary. In response to this testimony Evans testified that on or about the 15th of October, certain police officers of the city of Denver had by violent means obtained from him statements which he made in order to avoid further punishment, but which statements he said were false. It is not claimed that Wessels was present at that time. The argument of appellant is that the influence of the violence used against Evans

on the 15th must be presumed to have continued so as to affect the statements made by him in the presence of Wessels eight days later. We think that the court did not err in receiving the testimony of Wessels, and submitting it to the jury, as it did, under proper instructions. Moreover, it does not appear that Collins was referred to in the confession, or admission of facts, made by Evans.

[4] In his brief appellant contends that the court "drew a line through" the following words in an instruction concerning the defense of alibi: "Such a defense is as proper and legitimate as any other and all evidence bearing on that point should be carefully considered by the jury." Turning to the record we find that the court did *not* erase from said requested instruction the words "such a defense is as proper and legitimate as any other." Appellant claims that in certain other stated instances the court erred in striking from the instructions certain clauses thereof by running a line through them. It does not appear, however, that the rights of defendant were prejudiced thereby, or even that the documents were delivered to the jury. It does appear that the statements thus stricken out, in so far as they were essential or important, were contained in other instructions. We find no error in the matter of instructions to the jury. After a fair trial defendant's guilt was established by competent and sufficient evidence.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

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118 Cal.App. 457

PEOPLE v. RODERICK et al.

Cr. 1606.

District Court of Appeal, First District,
Division 2, California.

Nov. 21, 1931.

Rehearing Denied Dec. 5, 1931.

1. Homicide ⚿253(1).

Evidence *held* sufficient to sustain conviction for first degree murder.

2. Criminal law ⚿1144(13).

Reviewing court must assume in favor of verdict every fact which jury could have reasonably deducted from evidence.

3. Homicide ⚿234(3).

Evidence aside from accomplice's testimony *held* sufficient in prosecution of deceased's wife and hired man for murder (Pen. Code, § 1111).

4. Criminal law ⚿1166½(5).

Conduct of sheriff in assembling prospective jurors in anticipation of order for special venire *held* not to warrant reversal, where there was no claim of bias and defendant received fair trial (Pen. Code, § 1064).

5. Criminal law ⚿622(2).

Denial of separate trials *held* not abuse of discretion, though state's testimony would include confessions or other extrajudicial statements admissible against one defendant only (Pen. Code, § 1098, as amended by St. 1921, p. 90).

6. Criminal law ⚿507½.

Evidence in murder prosecution *held* insufficient to show that deceased's wife and hired man, jointly accused of murder, were accomplices as matter of law.

7. Criminal law ⚿1137(3).

Failure of court of its own motion to submit question whether defendants were accomplices *held* not error in murder prosecution, where both defendants contended there was no concert of action.

8. Criminal law ⚿829(1).

Refusal of instruction on subject fully and correctly covered by court in other instructions is not error.

9. Homicide ⚿305.

In prosecution for murder, modification of instruction requested by eliminating portion which directed acquittal if defendant merely assisted in concealing dead body *held* not error.

Modification of the instruction by eliminating this portion was not erroneous, since the deceased's wife, who was the defendant in question, had admitted participation in concealing deceased's body and the instruction that she was not guilty if she only assisted in throwing the body into the well conveyed to jury the impression that such conduct could not be considered with other evidence in determining whether she participated in the homicide.

10. Criminal law ⚿761(9).

Statement of trial court that murder was committed *held* not erroneous, where commission of murder was admitted by defendants.

11. Criminal law ⚿1168(4).

In prosecution of wife and another for murder of husband, striking out testimony of son relating to family quarrels *held* not prejudicial error.

The boy's direct examination did not exculpate deceased's wife, and was at variance with her sworn statements, and boy's testimony was furthermore impeached by his own admissions on cross-examination.

12. Criminal law ⚷1166½(12).

Conduct of trial judge in advising witnesses in numerous instances to refrain from answering questions asked did not of itself constitute prejudicial misconduct.

Appeals from Superior Court, San Mateo County; George H. Buck, Judge.

Minnie Roderick and another were convicted of first degree murder, and they appeal.

Affirmed.

Joseph J. Bullock, of Redwood City, for appellant Roderick.

Gilbert D. Ferrell and Fred W. Comba, both of Redwood City, for appellant Woodring.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

SPENCE, J.

The defendants were jointly charged with having murdered one Frank Roderick. They were tried together before one jury and separate verdicts were returned finding each defendant guilty of the crime of murder in the first degree and fixing the punishment of each at imprisonment for life. Motions for new trials were made and denied and judgments were pronounced. Appeals have been taken by said defendants from the judgments and the orders denying their motions for new trial.

Frank Roderick, deceased, lived upon a ranch in San Mateo county with his wife, his children, and a hired man. He was last seen alive by others on May 14, 1930. Appellant Minnie Roderick, his wife, and appellant Woodring, the hired man, both admitted seeing him on the morning of May 15, 1930. On that date he disappeared and his body was not recovered until June 27, 1930, when it was found with a bullet wound through the skull buried about 26 feet under the ground in an abandoned well on the premises.

Prior to the trial each of the appellants denied any participation in the killing of the deceased, and after arrest each made statements showing or tending to show that the deceased had met his death at the hands of the other on the morning of May 15, 1930. The prosecution presented a vast amount of circumstantial evidence and proceeded upon the theory that the appellants had conspired together to kill the deceased, to dispose of his body and to conceal the fact that the crime had been committed.

Appellant Woodring contends that the evidence is insufficient to sustain the verdict against him, and the appellant Roderick contends that the evidence is insufficient to sustain the verdict against her. In our opinion both contentions are without merit. We will not attempt to set forth in detail all of the evidence upon which the prosecution relied. A summary of some of that evidence covers twenty-eight pages of respondent's brief, but we do not believe that such lengthy summary is required here.

Appellant Woodring had been living upon the Roderick ranch for some time prior to May 15, 1930, and continued to live there up to the time of his arrest on June 22, 1930. He was thirty-seven years of age and the appellant Roderick was thirty-two years of age. Although both appellants denied any intimacy between them, the evidence showed that the attitude of appellant Roderick toward appellant Woodring was not the attitude ordinarily assumed toward a hired man. They were frequently seen together at various places prior to the death of the deceased, sometimes in company with the deceased and sometimes not. They frequently kissed each other, which fact appellants attempt to minimize because on some of these occasions the deceased was present and for the further reason that appellant Roderick had kissed other men. The witness Mrs. Anderson, who was employed by appellant Roderick after the death of the deceased and lived at the ranch, testified that appellants were always together and that she had seen appellant Woodring kissing appellant Roderick about three or four times a week.

The story of the family life at the Roderick ranch prior to the death of the deceased is a sordid tale to relate. We shall not present it in detail. There was abundant evidence in addition to the testimony of appellants showing that each of the appellants had frequently quarreled with the deceased. The evidence showed that the parties had freely indulged in the use of alcoholic liquors, had freely used profane language, and that threats and drunken scuffles were not infrequent. In his reply brief, appellant Woodring speaks of these "parties, drunken scuffles and outbursts of profanity involving all parties on the Roderick ranch and neighboring localities" as "commonplace and perfectly natural events." In her reply brief, appellant Roderick speaks of her threats against her husband as mere idle threats "so commonly used as to be properly classified as slang." These consisted of various threats uttered during quarrels such as: "You go on, you God damn Portuguese or I will shoot you." "I will kill you." "I will cut your heart out," and "Get out of here you Portuguese s—— of a b—— or I will shoot your head off." In April, 1930, deceased and appellant Woodring had a fight in the home of the witness Hildebrand in which they broke down a door and scuffled on the floor until separated by the witness. The same witness was present on May 11, 1930, which was four days before the death of the deceased, when deceased and appellant Woodring again had a fight on the Roderick ranch in which foul words were used and blows were exchanged. Appellant Woodring testified that this altercation followed the failure of himself and appellant Roderick to wait on that day at a place called Carlson's Camp until the deceased had arrived; that when deceased returned to the Roderick ranch he quarreled with appellant, saying that he had been told that appellant Woodring had induced appellant Roderick to leave and not wait for the deceased at the camp; that appellant Woodring then said: "Whoever said that told a damn lie." That deceased thought appellant Woodring had called him "a damn liar" and the altercation ensued. Whatever attempt may be made by appellants to belittle the effect of evidence relating to the prior relations of the parties, the jury was warranted in attaching to such evidence a far greater significance than appellants would have accorded to it. Suffice it to say that the jury could very properly conclude from the evidence that the relationship of appellants toward each other had been more than friendly and that each had borne a feeling of hatred and malice toward the deceased.

On the morning of May 15, 1930, the Roderick children had gone to school and there were but three people on the ranch, the deceased and the two appellants. The only direct testimony purporting to show what occurred on the ranch that morning was the testimony of the two appellants. Their stories were irreconcilable, and it is apparent that the jury could and did properly attach little if any credit to either. Omitting for the present the testimony of both appellants relating to what happened on the morning that the deceased was killed, we will proceed to consider some further circumstances brought out by the prosecution. At about noon of that day appellants together visited a resort known as Peek-a-Boo Inn located at La Honda about six miles distant from the Roderick ranch. At that place they stated that "they had been driving cattle all morning and they were tired." It may be noted that at no time thereafter did either appellant testify or make any statement to this effect, but their statements and testimony showed that they were occupied with doing things other than driving cattle. Appellant Woodring in the presence of appellant Roderick further stated that Frank Roderick had "disappeared with some red-headed woman in a *Cadillac* car." About 2 o'clock of the same day appellants visited the store of Archie Woodhams at La Honda, and appellant Woodring in the presence of appellant Roderick "said that Frank Roderick was on a wild tear up at the ranch and they came down to get away from him a little while or something similar to that." On the following day, May 16th, appellants went to Palo Alto and in a conversation with Mrs. Anderson, who subsequently came to the ranch, appellant Roderick in the presence of appellant Woodring stated that on the previous day "her husband left with a red-headed woman in a big *Hudson* sedan and left her (appellant Roderick) lying unconscious on the kitchen floor." She further stated that her husband had taken $2,800 with him.

On May 17th, one Rapley, a neighbor, visited the Roderick ranch and saw appellant Woodring hauling manure in a truck, the truck being fifteen or twenty feet from the abandoned well at the time. When asked what he was doing, appellant Woodring said: "I am moving the manure from the barn—I had to do that or move the barn." On the same day appellant Roderick had a conversation with Dr. Clattenburg at his office in Redwood City at which she made a statement similar to those previously made about her husband leaving with some woman. On May 20th appellant Roderick appeared before a justice of the peace in Redwood City and swore to a complaint charging Frank Roderick with the crime of battery and advised the deputy sheriff that her husband had beaten her and then disappeared. She gave a description of her husband, including the fact that he was dressed in a "banker's gray suit" and stated that she assumed that he had gone to Australia as he had many times said he intended to do. On May 24th the sheriff visited the Roderick ranch and talked with the appellants. Appellant Roderick told him that at about 11 o'clock on the morning of May 15th Frank Roderick came into the house and told her he was going away "with this red-headed woman" and he thereupon "dressed in his banker's gray suit and left in this Hudson, brand new Hudson sedan." Appellant Woodring told the sheriff that "he saw the Hudson car leaving the place and thought there was a woman in there." He further said that he thought the woman who went away with Frank Roderick was the same woman he had met one evening while with Frank Roderick in La Honda and that on their return home on that occasion Frank Roderick had said to appellant Roderick "Well, Bill met my red-headed sweetie." Both appellants told of appellant Woodring coming into the house on the morning of May 15th and finding appellant Roderick in a semiconscious condition. Appellant Roderick further stated that Frank Roderick took $2,800 with him, showing the sheriff a bank book, which, however, showed no withdrawals.

On May 27th appellant Woodring told one Leslie Sampson that Frank Roderick was in Tia Juana on "one of his little annuals." On or about the same day he told one George Steinberg that "Roderick had come back and was a dreadfully sick man." On June 13th appellant Roderick verified a complaint for divorce against Frank Roderick, which complaint was subsequently filed on June 18th. The complaint alleged extreme cruelty on the part of Frank Roderick specifically stating that he had frequently beaten her with clenched fists and called her vile names; that frequently and without cause he had beaten their two children; that on May 15th he had violently struck her, causing her to fall to the floor unconscious and had left the premises; and that since that day she had not heard from him and did not know where he was. Upon the trial appellant Roderick testified that these allegations were false.

On June 14th, appellant Woodring delivered a note written by appellant Roderick to one James Allen reading: "Please leave Mr. Woodring have a scraper if you have one, and I will make it alright with you." Thereafter on June 16th, one James McGraney was hired by appellant Woodring to help him do some "road work" on the Roderick ranch. The work commenced on June 16th and continued for several days. This work was done in the vicinity of the well, but the well was covered by a scraper so that McGraney did not know there was a well there. On the second day, appellant Woodring sent McGraney to work in the hayfield cutting hay telling him to stay there until it was finished. The scraper was over the well when he left for the hayfield, but the following morning it was up against the fence. At one time during the plowing near the well, McGraney had told appellant Woodring that if the scraper was moved, the work would be facilitated and Woodring replied that he was driving the team. On the third day, appellant Roderick came to where the work was being done and ordered them to stop work, stating that "it did not benefit the road any."

On June 22d, appellant Woodring was arrested and subsequently testified that he did not know at that time what he was arrested for. He further testified, however, that he had previously heard conversations to the effect that possibly the body of Frank Roderick was in the well and appellant Roderick's folks and the lawyer were "building up a frame that I was the guilty guy that was the cause of the disappearance of Frank Roderick." The witness Mr. Anderson further testified that on the Sunday before his arrest, Woodring had quite a bit to drink and said: "If I get hung at San Quentin—come to see me and say 'there is an innocent man hung.'" Appellant Roderick was not arrested until June 27th, which was after the recovery of the body of the deceased. In the meantime, after appellant Woodring was arrested, appellant Roderick had endeavored to procure his release on bail.

On June 26th, a deputy sheriff and others started a search for the well. The vicinity had been recently plowed and scraped and all evidence of its location had been obliterated. They could not find it until given the approximate position by one familiar with its location. The digging of the well was started on that day. On the following day, the deputy sheriff told appellant Roderick that they were going to dig to the bottom of the well, whereupon she told them that she hoped they would, that "you will find a lot of old tin cans and stuff had been put in there when we first took the ranch, that is, when my husband and I took the ranch—you will find a lot of manure there that Frank put there before he left." Below the surface, the digging proceeded through gravel, rock, and manure, and then through a quantity of junk such as pieces of old stove, auto tires and rims, pieces of harness, and the like. Among the rubbish was found a copy of the San Francisco Examiner of May 22, 1930. Many feet of manure lay beneath, and when the digging had proceeded to a depth of about twenty-six feet the decomposed body of the deceased was found. On the evening of June 26th, and after the digging had started, appellant Roderick had said to Mr. Anderson: "I hope they do not go down there very far, because there is a calf down there. They will think Woodring is cattle stealing." Appellant Roderick was arrested following the discovery of the body of the deceased. The body was found dressed in working clothes and not in a "banker's gray suit" and was partially wrapped in a burlap sheet.

We may now briefly consider some of the conflicting testimony of appellants given on the trial. Appellant Roderick testified that on the morning of May 15th she was in the house and heard a shot; that she came out and saw appellant Woodring and when she asked him, "Who shot?" he commanded her to keep still; that he told her to get her car out and threatened to kill her if she did not do so; that when she backed the car out to the place indicated by appellant Woodring, she saw the body of her husband on the ground partially covered with canvas and rope; that she started to "holler," and again appellant Woodring threatened to kill her; that appellant Woodring placed the body of deceased on the running board of the car and commanded her to drive to the well; that she did so and then appellant Woodring lifted the body into the well; that she saw appellant Woodring haul two loads of manure from the manure pit and go in the direction of the well; that later he came into the house and told her to tell the story about her husband running away with a red-headed woman and taking $2,800 with him; that he threatened to kill her if she did not tell that story; that later appellant Woodring said he wanted a drink, pulled her through the door, and told her they were "going down the line to see people."

Appellant Woodring testified that on the morning of May 15th, the deceased sent him to do some work in the fields and that he did not return until about 11 o'clock; that as he came near the buildings, he saw appellant Roderick go into the house with a rifle in her hand; that some time later he went into the house and found appellant Roderick lying on the floor; that she told him that her husband had hit her and had gone away with a red-headed woman taking $2,800 with him; that later appellant Roderick asked him to drive her down to Peek-a-Boo Inn; that as he went to the garage to get the car, he noticed signs of some heavy object having been dragged along the ground; that he mentioned this to appellant Roderick, who stated that they had been cleaning up around the place and had dragged stuff from there over to the well.

Both appellants denied any intimacy between them. Each denied any trouble with or ill feeling toward the deceased, but each gave abundant testimony regarding the quarrels and bitter feeling of the other toward the deceased. Appellant Roderick denied that she had participated in the killing of the deceased, and appellant Woodring likewise denied that he had participated in such killing. Appellant Roderick endeavored to explain her actions following the killing of the deceased by her testimony to the effect that she had acted under the threats of appellant Woodring. Appellant Woodring, on the other hand, although admitting that he filled the well, maintained that he then knew nothing of the death of the deceased, and filled the well under orders from appellant Roderick. A reading of the testimony shows that the jury was warranted in giving no credence to the story of either appellant.

We shall not detail the conflicting statements made by appellants after arrest and prior to trial. We may observe, however, that in the statements made by appellant Roderick following the arrest of appellant Woodring and before her arrest, she made no statement implicating appellant Woodring nor did she refer to any threats on the part of appellant Woodring. After the discovery of the body of the deceased and the arrest of appellant Roderick, she was interviewed at length on June 28th and again on June 30th, but denied any knowledge of the killing and made no mention of any threats. In a second interview on June 30th, she admitted that many of her previous statements were false and stated that she knew the deceased's body was in the well but did not know who put it there. It was at this interview that she first made the statement that she feared appellant Woodring and that the previous stories she had told were made up by him and told by her because he had coerced and threatened her. We may further observe, with respect to the appellant Woodring, that prior to the time of trial he denied all knowledge of the killing except that when interviewed on July 2d he stated that he had heard a shot on the morning of May 15th as he came from the field and had seen appellant Roderick going into the house with a 30-30 rifle. This statement was not made until ten days after his arrest. Upon the trial, he related for the first time an alleged confession made to him by appellant Roderick some days before his arrest. He testified that up to the time that appellant Roderick made this confession to him, he had never told her that he saw her going into the house with a gun. He further testified that he had not told the authorities of so seeing appellant Roderick prior to July 2d as he relied on her promise to tell it herself. Upon cross-examination, it appeared that appellant Woodring had not divulged the alleged confession of appellant Roderick to any one, not even to his attorney, prior to the time that he related it on the witness stand. When asked the reason, his statement was: "Simply the reason why that I thought it would be best to tell it in court, I had waited so long to explain it."

[1] The foregoing evidence pointed unerringly to the fact that the deceased had met his death at the hands of one or the other or both of the appellants. The apparent affection existing between appellants up to the time of their arrest, their frequent quarrels and altercations with the deceased, their presence on the ranch when the crime was committed, their false statements made following the disappearance of the deceased, their concealment of known facts from the authorities, and other conduct tending to conceal the commission of the crime, all made it logical for the jury to conclude that the killing of the deceased and the disposition of his body was the result of a concert of action on the part of both appellants. It was but natural that after arrest and mature deliberation, each of the appellants should relate a story denying participation in the killing of the deceased, but in the light of the other evidence, it was but natural that the jury should decline to accept the story of either.

[2, 3] In passing upon this question of the sufficiency of the evidence, we must assume in favor of the verdict every fact which the jury could have reasonably deduced therefrom and then determine whether such facts are sufficient to support the verdict. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. In our opinion the foregoing evidence was ample to sustain the verdict against both of the appel-

lants. We are further of the opinion that there is no merit in the point made by appellant Woodring that the conviction of said appellant rests wholly upon the uncorroborated testimony of appellant Roderick, his accomplice. It does not appear that the conviction of either appellant rests upon the testimony of the other, but assuming that parts of the testimony of each appellant were accepted by the jury, there was ample other evidence tending "to connect the defendant with the commission of the offense" and that is all that is required. Pen. Code, § 1111; People v. Haughey, 79 Cal. App. 541, 250 P. 406; People v. Taylor, 70 Cal. App. 239, 232 P. 998.

Both appellants further contend that even assuming the evidence to be sufficient to warrant a conviction there was no evidence to sustain a conviction of murder in the first degree, citing People v. Kelley, 208 Cal. 387, 281 P. 609, and People v. Howard, 211 Cal. 322, 295 P. 333, 71 A. L. R. 1385. The authorities cited are not in point. Here there was evidence to show motive and there was ample evidence, circumstantial in nature, to support the implied finding of the jury that the killing followed a willful, deliberate and premeditated plan on the part of appellants to take the life of the deceased.

[4] Appellant Roderick contends that the trial court erred in not sustaining her challenge to the panel summoned pursuant to the special venire. When the regular panel was exhausted, the court ordered a special venire. Shortly after the order was made the sheriff made a return and twenty persons were brought into court. A challenge was interposed on the ground that said persons had not been summoned after the court had made its order. Evidence was introduced to show that on the preceding day members of the sheriff's office, acting on the suggestion of the clerk of the court, communicated with twenty persons and assembled them in the room of the board of supervisors in anticipation of the order for a special venire. The challenge was based solely upon the method by which these persons were produced. In the trial court counsel for appellant Roderick stated: "We have no objection to the character of the citizens and persons summoned, it is to the method and operandi by which they are produced in this court." Neither in the trial court nor on this appeal has any charge of bias been made against the officer who summoned the panel. Although a defendant's right to challenge such panel appears to be limited to the ground of bias on the part of such officer (Pen. Code, § 1064; People v. Manuel, 41 Cal. App. 153, 182 P. 306), we do not wish to be understood as expressing approval of the method adopted here. It was irregular and should not be followed, but it does not appear that appellants were thereby prejudiced in the present case. There being no claim of bias upon the part of the sheriff nor upon the part of the persons summoned, we cannot conclude that appellants were not accorded a fair trial at the hands of the jury selected. In fact, but one of the persons summoned on the challenged panel was ultimately selected and the jury was sworn at a time when each of the appellants had four peremptory challenges yet unexercised. Counsel for appellant Roderick, who now urges the objection, then said: "The defendant, Mrs. Roderick, is satisfied."

[5] Both appellants assert that the trial court erred in denying their motions for separate trials. We find no merit in this point. Since the amendment in 1921 of section 1098 of the Penal Code (St. 1921, p. 90), defendants jointly charged are not entitled to separate trials as a matter of right. That section now reads: "When two or more defendants are jointly charged with any public offense, * * * they must be tried jointly, unless the court order separate trials." It is well settled that the denial of separate trials will not warrant a reversal in the absence of a clear abuse of discretion and that such abuse of discretion may not be predicated merely upon the showing that testimony would be introduced at the trial of confessions or other extrajudicial statements, admissible against one defendant but not admissible against the other. People v. Erno, 195 Cal. 272, 232 P. 710; People v. Perry, 195 Cal. 623, 234 P. 890; People v. Burdg, 95 Cal. App. 259, 272 P. 816; People v. Remington, 74 Cal. App. 371, 240 P. 526; People v. Booth, 72 Cal. App. 160, 236 P. 987.

[6-8] Appellants contend that the trial court erred in the giving, refusing, and modifying various instructions. Appellant Woodring complains of the refusal to give his requested instruction which started with the statement: "You are instructed that the defendant Minnie Roderick is an accomplice in the crime of the murder of the deceased." This instruction was properly refused. The evidence was conflicting and it would have been reversible error so far as appellant Roderick was concerned for the court to instruct the jury that appellant Roderick was an accomplice as a matter of law. The question of whether appellants were accomplices might well have been submitted to the jury under proper instructions, but no such instructions were requested. As both appellants contended that there was no concert of action between them, it cannot be said that the trial court erred in not giving such instructions of its own volition. Appellant Woodring further complains of the refusal to give his proposed instruction relating to the subject of reasonable doubt and particularly with reference to the question of reasonable doubt concerning one's aiding and abetting in the commission of offense by another. The subjects were fully and correctly covered by the court in other instructions.

[9] Appellant Roderick complains of the refusal of the trial court to give various proposed instructions upon the subject of principals and accessories and of the modification of the following proposed instruction: "If you believe from the evidence that the defendant Minnie Roderick was not present when Frank Roderick was killed, and did not aid or abet in the killing, and the defendant, Minnie Roderick, at the time or prior to the killing had not conspired with any person to commit the act, and that she had not advised and encouraged any person or persons therein, and that the killing was not done in pursuance of any conspiracy between the defendant Minnie Roderick and the defendant William Woodring or any other person to kill Frank Roderick, *and that the defendant Minnie Roderick, only assisted in throwing the dead body of Frank Roderick, in the well*, then you are instructed that, under the indictment, you must find the defendant Minnie Roderick not guilty." The trial court gave this proposed instruction omitting the portion italicized. There was no error in this modification. The instructions as given covered the subject as fully as appellant was entitled to have it covered and the italicized portion, if included, could have served only to convey to the jury the impression that appellant Roderick's admitted participation in concealing the body could not be considered with other evidence in determining whether she had participated in the killing of the deceased.

[10] Much is said in the briefs of appellant Woodring regarding the following statement of the trial court in the early part of the instructions: "A murder was committed in this county on the 15th day of May of this year. Upon that point there is no dispute." It is claimed that the trial court thereby erred in instructing the jury upon a question of fact. This contention might require serious consideration under certain circumstances, but here it was assumed by all throughout the trial that a murder had been committed. Appellant Woodring did not defend upon the ground that no murder had been committed, but based his defense upon his testimony to the effect that he had no connection with the killing and no knowledge thereof until shortly before his arrest. The inconsistency of appellant Woodring's position is demonstrated when he complains about the giving of the foregoing instruction and in the same breath strenuously insists as hereinbefore stated that the trial court erred in refusing his proposed instruction reading: "You are instructed that the defendant Minnie Roderick was an accomplice in the crime of the murder of the deceased." We have read the entire charge to the jury and are satisfied that the jury was fully and fairly instructed and that there was no prejudicial error in the giving or refusing of any of the instructions.

Appellant Woodring further contends that the trial court erred in the admission and exclusion of evidence. In the numerous specifications of alleged error set forth in a few pages of the brief, said appellant contents himself with page references to over 100 different pages of the transcript without quoting in the brief the portions of the record wherein it is claimed that error was committed. We have been at pains, however, to read the entire record with special reference to the pages specified. Many of the said appellants' objections related to extrajudicial statements of the appellant Roderick made out of the presence of appellant Woodring. It was frequently stated in the trial that such statements were offered and admitted solely against the defendant making such statements and not as against the other defendant. Furthermore, the jury was clearly instructed to that effect during the trial and also in the main instructions given before the cause was submitted to them. Many of the rulings excluding evidence were made during the cross-examination of the witnesses by counsel for appellant Woodring. In practically every instance, the questions propounded covered irrelevant matter or new matter of a defensive nature which carried the scope of the inquiry beyond that of the direct examination. We are satisfied that there was no prejudicial error in the rulings of the trial court.

[11] Appellant Roderick makes the further contention that the trial court erred in striking out the testimony of Filbert Roderick, the twelve year old son of appellant Roderick and the deceased, who was called as a witness by said appellant. This testimony was stricken out on motion of appellant Woodring. Assuming, without deciding, that the trial court erroneously granted the motion, it does not appear that this action resulted in prejudice to the appellant Roderick. No objection was interposed by said appellant to the granting of the motion and a reading of the testimony leads us to the conclusion that said appellant may have been entirely willing to have the testimony stricken. Although the boy testified on direct examination that there were no family quarrels or beatings, he admitted on cross-examination that he previously told the district attorney that his mother and father had arguments because his father "wanted to kick Bill (appellant Woodring) out" and that his father "would accuse mother with Woodring." He thereafter testified that his previous statements to the district attorney were untrue, but further cross-examination by the district attorney and counsel for appellant Woodring was curtailed by the trial court owing to the age of the witness. The boy's direct examination did not exculpate appellant Roderick and was at variance with said appellant's sworn and unsworn statements made prior to the trial. If his direct testimony

could be said to have any value, he was effectively impeached by his own admission on cross-examination. We therefore conclude that the granting of appellant Woodring's motion to strike out his entire testimony could not have been harmful to appellant Roderick.

[12] A further contention made by the appellant Woodring is that the district attorney was guilty of prejudicial misconduct in that he did not more vigorously prosecute the appellant Roderick. This is a novel ground upon which to base a charge of misconduct. No authority is cited by said appellant to sustain his contention and we know of none. In passing, however, we may add that we find nothing in the manner in which the district attorney presented the case to justify a charge of misconduct. Appellant Woodring further claims that the trial judge was guilty of misconduct. The assignments under this heading relate to the action of the trial judge in ruling upon the admission of evidence and in advising the various witnesses on numerous instances to refrain from answering questions asked. Owing to the numerous times upon which the trial court of its own motion instructed the witnesses not to answer, we have as hereinbefore indicated read the entire record with particular reference to the pages enumerated by counsel. As stated above, we find no prejudicial error in the rulings nor do we find any prejudicial misconduct on the part of the trial judge.

Contending that the trial court erred in refusing to grant his motion for a new trial, appellant Woodring calls attention to the fact that practically all of the points urged on this appeal were urged upon the motion for new trial. The motion was not based upon any grounds other than those herein considered.

For the foregoing reasons the judgments and orders denying the motions for new trial are and each of them is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 534

PEOPLE v. ROUS et al.

Cr. 2110.

District Court of Appeal, Second District, Division 2, California.

Nov. 24, 1931.

Rehearing Denied Dec. 9, 1931. Hearing Denied by Supreme Court Dec. 24, 1931.

1. Criminal law ⚷511(1).

Evidence *held* sufficient to sustain conviction for owning and possessing distilling apparatus as against contention that accomplices were not corroborated.

2. Criminal law ⚷663.

In prosecution for possessing and operating distilling apparatus, physical production in evidence of cumbersome articles possessed *held* not requisite to conviction.

3. Criminal law ⚷663.

Rule that articles exhibited must be introduced in evidence *held* inapplicable where photographs of distilling apparatus were received for illustration and were not exhibited to jury.

4. Criminal law ⚷798½.

In prosecution for possessing distilling apparatus, forms of verdicts and instructions *held* not erroneous as confusing, in that jury might otherwise have convicted defendant of any other of offenses specified by statute.

> The instructions charged in substance that, if jury believed from all the evidence that defendant did possess, own, have an interest in, operate, or cause to be operated any apparatus described in the information, they should find him guilty of possession thereof; and one form of verdict admitted stated that the defendant was guilty of the "possession of a still, a felony, as charged in the information," and the other form was not guilty of "possession of a still, a felony, as charged in the information." The information alleged that defendant did, on or about certain day, at and in certain county, have unlawful possession of a still, a felony.

5. Intoxicating liquors ⚷137.

Each act of owning, transporting, operating, or causing still to be operated, if committed on or about date alleged in information charging unlawful possession of still, within jurisdiction, constituted "possession" as charged.

[Ed. Note.—For other definitions of "Possession," see Words and Phrases.]

6. Criminal law ⚷1144(15).

Appellate court must presume that jury observed trial court's instructions.

7. Criminal law ⚷1173(2).

Failure to instruct jury that certain witnesses were accomplices *held* not reversible error.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Charles Rous, John Sunsir, and others were charged with owning and operating distilling apparatus for the manufacture of intoxicating liquor, and on a separate trial John Sunsir was convicted, and he appeals.

Affirmed.

William T. Kendrick, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

CRAIG, Acting P. J.

The appellant and three others were charged by information with having owned and operated distilling apparatus and paraphernalia designed and intended for the manufacture of intoxicating liquor. Upon a separate trial by a jury, the appellant was found guilty, and appeals from the judgment and from an order denying a motion for a new trial.

The fact that he was a part owner of the property with the others, and that he financed its establishment and operation, was shown by his codefendants. Peace officers witnessed the removal of the still from Bell, Cal., to Azusa, in Los Angeles county. The wife of a codefendant swore that appellant visited the premises last mentioned on three occasions after the apparatus was set up, and that he brought sugar; that he instructed her to leave the premises at once if officers should appear. It further appeared that appellant stated that he had been informed of an intended raid of the premises at Bell, and that he was instrumental in borrowing a truck and in causing the plant to be moved to Azusa, where it was found by the officers, in operation.

[1] It is first insisted with much earnestness that the evidence was not sufficient to warrant a conviction or to support the verdict, for the reason that appellant's accomplices were not corroborated by independent evidence. The objection goes rather to the weight and truthfulness of conflicting evidence, since some of the facts outlined were established by witnesses other than accomplices, as already stated. It cannot successfully be contended that there was not some evidence tending to connect the defendant with the illegal ownership and possession of the prohibited articles, and, this being true, we are unable to say as a matter of law that the evidence was insufficient. People v. Clough, 73 Cal. 348, 15 P. 5; People v. Blunkall, 31 Cal. App. 778, 161 P. 997; People v. Wagner, 36 Cal. App. 41, 171 P. 699; People v. Mace, 71 Cal. App. 10, 234 P. 841.

[2, 3] It appeared that the articles confiscated, and with the possession of which the defendants were charged, were unduly large and cumbersome, but it is contended that their physical production in evidence against the appellant was requisite to a valid judgment of conviction. There was ample positive evidence as to the nature and description of the instruments used in committing the offense, and photographs thereof were received for illustration. But they were not available, nor were they exhibited to the jury, and the rule applied in People v. Cruz (Cal. App.) 298 P. 556, that articles exhibited must be introduced in evidence is not here applicable. Nor is it contended that the photographs were inaccurate representations of the inaccessible best evidence, or denied that the still and other paraphernalia were in fact on the premises and in operation. These elements of the res gestæ were established by uncontroverted evidence, and the appellant's sole defense consisted of a denial of ownership or knowledge of their ownership by others. It does not appear nor does he suggest how he was or could have been prejudiced by a failure to produce stronger evidence than that of coowners and numerous eyewitnesses whose testimony is unquestioned.

[4, 5] Instructions were given which in substance charged that, if the jury believed from all of the evidence beyond a reasonable doubt that the defendant did possess, own, have an interest in, operate or cause to be operated any of the apparatus described in the information, they should find him guilty of possession thereof. Two forms of verdict were submitted to the jury by which they were to find (1) that the defendant was guilty of "possession of a still, a felony, as charged in the information"; or (2) not guilty of "possession of a still, a felony, as charged in the information." It is objected that the forms of verdicts and instructions were confusing, in that the jury might otherwise have convicted the defendant of any other of the offenses specified by the statute. The information alleged that the defendant did on or about the 26th day of July, 1930, at and in the county of Los Angeles, have "unlawful possession of a still, a felony." Hence, if from all of the evidence adduced the jury were convinced that the defendant owned, transported, or operated or caused the still to be operated, they would have been justified in find him guilty of those offenses, had he been also charged with them. But each such act if committed on or about said date, within the jurisdiction, legally constituted possession as charged in the information. People v. Clemett, 208 Cal. 142, 280 P. 681. A conviction upon any such charge if made would not preclude a verdict of guilty in the instant case, and the failure to inform against the defendant upon additional offenses is not assigned as prejudicial error, nor is it contended that the jury were not entitled to consider them in arriving at the verdict rendered, though not so alleged.

[6, 7] Finally, it is insisted that a refusal to instruct the jury that certain witnesses who testified to facts and circumstances within their knowledge were accomplices was error. However, as held in numerous cases, we must presume that the jury observed all of the instructions of the trial court. They were charged that they should determine in each instance whether or not the witness was an accomplice of the accused, and that the testi-

mony of an accomplice must be corroborated by other evidence tending to connect the defendant with the offense, that the testimony of one accomplice cannot be accepted as corroboration of another, and that a conviction cannot be had upon the uncorroborated evidence of the accomplices. If it be said that appellant's contention that such instruction should have been given is tenable, the failure to so instruct the jury would not require or justify a reversal when the verdict cannot, as in this case, be said to have been founded entirely upon the evidence elicited from accomplices. People v. McDermott, 75 Cal. App. 718, 243 P. 485; People v. Ferlin, 203 Cal. 587, 265 P. 230; People v. Knoth (Cal. App.) 295 P. 577.

The judgment and order are affirmed.

We concur: IRA F. THOMPSON, J.; FRICKE, Justice pro tem.

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118 Cal.App. 332

In re FORTHMANN'S ESTATE.

FORTHMANN v. MEYER.

Civ. 8030.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1931.

1. Appeal and error 🔑417(1).

Notice of appeal may properly be part of request to clerk to prepare record.

2. Appeal and error 🔑417(1).

Notice of appeal containing phrase "desires or intends to appeal" *held* sufficient, since equivalent of "desires and intends to appeal."

3. Statutes 🔑231.

Black letter title of Code section is part of it, and limitations thereby placed on section must be given effect, even though section is unambiguous (Code Civ. Proc. § 1789).

4. Guardian and ward 🔑154.

Guardian on general accounting *held* not required to produce vouchers as condition to allowance for items of expenditure for ward's benefit in excess of $20 (Code Civ. Proc. §§ 1631, 1632, 1789).

> Guardian was not required to produce vouchers as condition to allowances on general accounting in view that Code Civ. Proc. § 1789, requiring settlement of guardian's account concerning sales of ward's property to be made in accordance with sections 1631 and 1632, requiring production of vouchers by executors and administrators for items in excess of $20, is limited in its application, in view of the language of the section itself and its title and headings, to cases involving the sale of property of a ward by his guardian, and does not apply to a general accounting of a guardian.

5. Guardian and ward 🔑161.

Objections to form of oath to guardian's account cannot be raised for first time on appeal.

6. Guardian and ward 🔑157.

Evidence *held* to justify trial court in holding that moneys expended by guardian and advanced to ward were properly chargeable against estate.

7. Guardian and ward 🔑154.

Taxicab fares, moneys advanced to ward, and small items of expense, *held* not advances for "maintenance, support or education" so as to necessitate filing of vouchers therefor (Code Civ. Proc. § 1771).

[Ed. Note.—For other definitions of "Maintenance" and "Support," see Words and Phrases.]

8. Guardian and ward 🔑161.

Trial court's findings of fact on conflicting evidence in guardian's final accounting are conclusive.

9. Guardian and ward 🔑157.

Allowance of $1,000 for attorney's fees in guardian's final accounting *held* authorized.

10. Guardian and ward 🔑58.

Fees of attorneys employed by guardian and expenses incurred by guardian in settlement of account *held* allowable as "reasonable expenses incurred in execution of his trust" (Code Civ. Proc. § 1776).

[Ed. Note.—For other definitions of "Reasonable Expenses," see Words and Phrases.]

11. Guardian and ward 🔑157.

Allowance of $5,000 for services as guardian of incompetent for 13 years *held* authorized.

12. Guardian and ward 🔑159.

In proceeding to settle general guardian's final account, allowances made ward *held* properly made lien against ward's estate consisting of undistributed interest in father's estate (Civ. Code, § 239; Code Civ. Proc. § 1765).

> Allowances were properly made lien against ward's estate, notwithstanding ward's estate consisted of an interest in his deceased father's estate which had not been distributed at time of the hear-

ing of the accounting of the guardian, since guardian had constructive possession of ward's interest in father's estate in that, under terms of his appointment as general guardian, guardian had management of all the property of the ward within the state under Code Civ. Proc. § 1765; Civ. Code, § 239.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Proceeding to settle first and final account of Charles A. Meyer, guardian, in the matter of the guardianship of the person and estate of John Albert Forthmann, Jr., an incompetent person. From order settling first and final account, John Albert Forthmann, Jr., former ward, appeals.

Affirmed.

Dockweiler & Dockweiler & Finch, of Los Angeles, for appellant.

Dunne, Dunne & Cook, of San Francisco, for respondent.

FRICKE, Justice pro tem.

This is an appeal from the order made September 24, 1930, settling the first and final account of the guardian of an incompetent person and discharging the guardian, Charles A. Meyer, and particularly from those portions of the order allowing certain items of expense and guardian's and attorney's fees, and from the provision in the order declaring the amounts allowed to be a charge and lien against the estate of the ward.

[1, 2] Respondent has moved the dismissal of the appeal upon the ground that the notice of appeal was not filed within the time required by law. Appellant contends that the document entitled "Notice and Request for Transcript" of October 10, 1930, filed sixteen days after the making and filing of the order appealed from is a sufficient compliance with the requirement of a notice of appeal, and, if this be true, the appeal was taken within the time allowed by law.

Did the notice and request for a transcript constitute also a notice of appeal? This notice declares that the ward "desires or intends to appeal" from the order, and concludes with a request for the reporter's transcript. It is no objection to a notice of appeal that it is a part of the request to the clerk to prepare the record, and, in recent decisions, construing the language similar to that quoted above, it has been held that "while it would be more satisfactory if the notice had been more explicit, * * * it must be held sufficient to give the appellate court jurisdiction." Purity Springs W. Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 P. 810, citing Anderson v. Standard Lumber Co., 60 Cal. App. 445, 213 P. 65, and Wright & Hogan, Inc., v. Heide, 72 Cal. App. 16, 236 P. 219. In the Purity Springs Case, the request for preparation of the record contained the notice that the plaintiff "desires and intends to appeal." In the Wright & Hogan and Anderson Cases, supra, the language "desires, intends to appeal and has appealed" and "desires and intends to appeal," contained in the respective notices of appeal, were held sufficient declarations of the taking of an appeal. The use of the disjunctive "or" in the notice here before us does not prevent the application of the rule laid down by the cases cited as a notice that a party "desires or intends" to appeal is the equivalent of "desires and intends" to appeal. The matter of real importance is whether the notice of the intent of appealing is clearly indicated by the language used, and in the light of the authorities cited the notice and request for a transcript sufficiently included a notice of appeal to give this court jurisdiction. The motion to dismiss is denied.

[3, 4] Appellant contends that the trial court erred in decreeing that four items of expense, in the sums of $600, $600, $500, and $500 for traveling to New York, Seattle, and St. Louis, and one item of $1,000 for personal advances to the ward were due the guardian; the basis of the objection being that these items were not supported by any voucher or receipt, and that no allowance could legally be made for any item in excess of $20 without the production of a receipt or voucher. Appellant relies upon sections 1789, 1631, and 1632 of the Code of Civil Procedure. Section 1789 provides that "all the proceedings by guardians concerning sales of property of their wards * * * accounting and settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter. * * *" Sections 1631 and 1632 relate to the production of vouchers by executors and administrators for items in excess of $20. The latter sections apply only if section 1789 can be construed as relating to a final account, or, as we have here, a first and final account. A reading of the entire section discloses that it relates to the sales of the property of wards by their guardians. The "black letter" title at the beginning of the section reads, "Sales of property * * * to conform to law governing executors," and the heading of article 4, chapter 14, title 11, part 3 of the Code of Civil Procedure, in which section 1789 is found, bears the title heading, "Sale of Property and Disposition of Proceeds." Therefore, not only the language of the section itself but also the titles and headings disclose that the section is applicable only to cases involving the sale of the property of the ward. The "black letter" heading or title of a section of one of our Codes when, as here, a part of the enactment, is a part of the section itself, and, in construing the section, any limitation, placed upon general language within the sec-

tion, expressed in such heading must be given effect. To refuse to do so "would be to make the law, not to administer it." Sharon v. Sharon, 75 Cal. 1, 16, 16 P. 345, 352. This limitation of the scope of a Code section exists, even though the language of the section is unambiguous. Thus, though section 549 of the Penal Code by its express language would seem to apply to "any contract or policy of insurance," the section is included in a chapter bearing the heading "Crimes Against Insured Property and Insurance Carriers," and it was held that this heading limited section 549 to contracts of insurance on property, and that it did not include a case involving an accident insurance policy. Matter of Wilson 30 Cal. App. 567, 158 P. 1050; see, also, People v. Richards, 86 Cal. App. 86, 90, 260 P. 582; Bettencourt v. Sheehy, 157 Cal. 698, 109 P. 89; Farraher v. Superior Court, 45 Cal. App. 4, 187 P. 72; Alden v. Mayfield, 33 Cal. App. 724, 725, 166 P. 382; Colthurst v. Justice's Court, 100 Cal. App. 146, 148, 279 P. 812. We hold, therefore, that section 1789, Code of Civil Procedure, is limited in its application to cases involving the sale of the property of a ward by his guardian, and does not apply to a general accounting of a guardian such as we have here, and the other sections of the Code of Civil Procedure relied upon by appellant and the decisions involving accounts of executors and administrators are not in point. We have been referred to no authority which would require the production of vouchers for the items above mentioned, and there appears to be no provision of law establishing such a requirement.

[5] The objections as to the form of oath to the account were not made in the court below and cannot be raised for the first time on appeal, and, furthermore, are met by the supplementary affidavit filed in this court.

[6, 7] This leaves for consideration the item of $1,000 of which, according to his testimony, the ward recalled receiving about $305, and which, according to the testimony of the guardian, represents items of taxicab fares, money advanced to the ward, and small items of expense, an average of about $5 a month during the period of the guardianship. It may be noted also that while but $1,000 was claimed, the guardian testified that this was a minimum figure, and that the true amount of such advances would possibly be two or three times as great. Section 1776, Code of Civil Procedure, provides that the guardian must be allowed his reasonable expenses incurred in the execution of his trust. The incompetency of the ward here was due to the excessive use of intoxicating liquor, and the trial court was warranted under all the circumstances in considering the various items making up the total of $1,000 claimed as proper expenses in controlling, directing, and supervising the ward, and in securing the necessary co-operation of the ward, and that the sums spent for the trips to New York, Seattle, and St. Louis were likewise necessary items of expense incurred on behalf of the ward and in securing the latter's return to Los Angeles. Section 1776 does not require the production of vouchers for expenses incurred, and the only requirement for vouchers seems to be that of section 1771, Code of Civil Procedure, which applies, however, only to advances for "maintenance, support or education," and the items included in the gross sum of $1,000 were for neither of these. The claim of appellant that the foregoing items must be substantiated by vouchers is untenable.

[8] Appellant contends, as to the various items in the account, that it is inherently improbable and untrue that the amounts claimed were expended, but is not sustained by the record. At best there was a conflict of evidence, and the findings of fact of the trial court, being supported by the record, are final. The same may be said as to the attack upon the amounts allowed by the court as guardian's and attorney's fees.

[9, 10] The fourth point is that the allowance of $1,000 for the services of attorneys is so excessive as to amount to an abuse of discretion. These attorneys performed services in preparing the account, the hearing of the accounting, and services incident thereto. Appellant does not point out, except in the most general way, of what these legal services consisted, and, in the absence of a clear showing to the contrary, this court cannot do other than hold that there was no abuse of discretion in fixing the amount of the attorneys' fee. Expenses incurred in the settlement of a guardian's account, including the fees of the attorney for the guardian, are "reasonable expenses incurred in the execution of his trust" (Code Civ. Proc. § 1776), and are properly allowed in the discretion of the court. Estate of Clanton, 171 Cal. 381, 387, 153 P. 459; In re Beisel's Estate, 110 Cal. 277, 40 P. 961, 42 P. 819.

[11] The fifth point is that the allowance of $5,000 as due the guardian for his services is excessive and constitutes an abuse of discretion. As stated by appellant, "The reasonableness or unreasonableness of any sum to be awarded the guardian for his services in this matter can only be determined in this case as in any other case which involves the reasonableness of a fee by the peculiar facts of the particular case itself." The guardianship extended over a period of about thirteen years, the court had before it the evidence as to the services rendered by the guardian, and, at best, there is a conflict in the evidence as to some of the services. The question is therefore one of fact only, and the conclusion of the trial court is final.

[12] The sixth point of appellant is that the court erred in finding and decreeing that

the allowances made by it were due out of the property of the ward which he had or was entitled to during the existence of the guardianship, and that such amounts are a charge and lien against said estate, because, appellant contends, none of the estate was ever actually or constructively in the possession of the guardian.

Prior to 1922, the ward had no estate, but in that year his father died, leaving an estate which at the time of the hearing herein was of the value of about $2,000,000, and in which the ward, under the will, was bequeathed a one-tenth interest. The guardian here was appointed and qualified as one of the executors of the estate of the father, and the evidence sustains the conclusion that certain advances were made from the estate to the ward, and that, after the filing of the account involved in these proceedings, the ward assigned his interest in the estate to a corporation, receiving stock in the corporation in payment therefor. The estate of the deceased had not been distributed at the time of the hearing of the accounting of the guardian.

As there is no basis for a contention that there was actual possession, we are concerned only with the question of constructive possession. Reduced to concrete form, the question is, Did the guardian, as such, have constructive possession of the interest of the award in the estate of his father, and had the court power to declare and order the lien?

Under the terms of his appointment, respondent was a general guardian, and, as such, was the guardian and had the management of "all" the property of the ward within this state. Civ. Code, § 239; Code Civ. Proc. § 1765.

In Estate of Schluter, 209 Cal. 286, 286 P. 1008, 1010, the guardian, appointed in Monterey county, had actual possession of no property of the ward other than a few minor articles of personal property not concerned in the question before the court. The ward died, and the guardian who was named as executrix under the will qualified and proceeded to settle the estate. In the meantime, the guardian filed her final account in Monterey county, and the superior court there made an order settling the account and allowing, as a charge and lien against the property and estate of the decedent a sum representing the expenditures, fees, and expenses incurred by the guardian. The superior court of Los Angeles county, where the will was probated, granted a motion and made an order subjecting the assets of the estate to a first lien in favor of the guardian for her claim allowed in Monterey, which order was affirmed on appeal. In considering the question of constructive possession, the Supreme Court quotes the provisions of section 239, Civil Code, "A general guardian is a guardian of the person or of all the property of the ward within this state, or of both," and then observes that the order appointing the guardian entitled the latter to recover the items claimed in the account, and subjecting "not only the Monterey property, which was in her actual possession * * * but also all the other property of said ward within the state, to a constructive trust in her favor for the amount due, * * *" and holds that the Monterey court had jurisdiction to make the order extending the guardian's lien to the Los Angeles property, and that the Los Angeles court acquired jurisdiction thereof subject to the liens imposed by the Monterey court. The rule would, of course, be the same where both proceedings were in the same county. The case directly involves the "question of whether the entire estate of said ward * * * was by reason of said guardianship placed in the constructive possession of said guardian," and answers the question in the affirmative. It therefore follows that, in the proceedings herein for final accounting, the res, the entire property of the ward in California, including the interest in the estate of his father, was subject to the jurisdiction of the court. This conclusion is further supported by the case of Estate of Clanton, 171 Cal. 381, 153 P. 459, cited and followed in the Schluter Case. There an order settling the final account of a guardian, and ordering that the amount due the guardian should be paid out of the estate of the deceased ward, was sustained. The estate there consisted of moneys realized from the sale by the administrator of the interest of the estate in certain real property. The court, declaring the proceedings for settlement of the guardian's account to be an equitable proceeding in rem, concludes that, "The court of equity, having the entire matter before it, could declare the existence of the lien upon the proceeds of the sale of the land, and could direct the payment of the amount due the guardian out of that sum."

Appellant contends that the moment the father died his personal representatives were entitled to both actual and constructive possession of his entire estate, and that such possession was exclusive. This is beside the point, and fails to recognize that the guardian does not claim constructive possession of any part of the estate of the father but does claim such possession of the estate and property of the ward; viz., his interest in the estate of the father, and that an interest in the estate of a deceased person is property. In re Dobbel's Estate, 104 Cal. 432, 436, 38 P. 87, 43 Am. St. Rep. 123.

Appellant's presentation of the question whether the probate court had jurisdiction to render a personal judgment against the ward is without support in the record. The order is not a personal judgment, but, on the contrary, declares that the amount in question "is due out of the property of the said ward."

The order of the trial court is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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118 Cal.App. 396

RAYL v. SYNDICATE BLDG. CO. et al.

Civ. 7977.

District Court of Appeal, First District, Division 2, California.

Nov. 18, 1931.

Rehearing Denied Dec. 18, 1931.

1. **Appeal and error** ⚿1002.

Verdict as to existence of negligence, where plaintiff rests solely on res ipsa loquitur doctrine and defendants present evidence contradicting such inference, is conclusive.

2. **Negligence** ⚿121(2).

Res ipsa loquitur applies when plaintiff has shown that instrument causing injury was in defendant's exclusive control, and that such accidents as one complained of do not usually occur without negligence.

3. **Negligence** ⚿121(2).

Plaintiff having shown applicability of res ipsa loquitur, burden is on defendant to negative negligence on his part.

4. **Appeal and error** ⚿1033(5).

Erroneous instruction relating to preponderance of evidence in case submitted under doctrine of res ipsa loquitur *held* not to require reversal, since favorable to defendant.

> Erroneous instruction relating to preponderance of evidence stating in effect that law does not require demonstration, but only moral certainty, or that degree of proof which produces conviction to an unprejudiced mind, did not require reversal in case submitted under doctrine of res ipsa loquitur, since under such doctrine there is a burden on defendant, without regard to the question of shifting, to prove by satisfactory evidence that the happening of the event causing injury was due to some other cause than want of proper care on his part.

5. **Trial** ⚿243.

No conflict exists between instruction that company must use utmost care of very cautious persons and instruction that it must guard against accident as reasonable and prudent person might have anticipated as necessary.

6. **Appeal and error** ⚿843(2).

Consideration of instruction as to amount of damages, if defendant should be found negligent, presented moot question, where no negligence was found.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Stanley G. Rayl against the Syndicate Building Company and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Donahue, Hynes & Hamlin, of Oakland, for appellant.

Myron Harris, of Oakland, for respondent Syndicate Bldg. Co.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent Joe Massetti.

NOURSE, P. J.

Plaintiff sued for personal injuries resulting from the fall of a passenger elevator operated by defendant Massetti under employment of his codefendant. The cause was tried with a jury, and both defendants had a verdict. The plaintiff appealed on typewritten transcripts.

[1-2] The plaintiff alleged negligence in general terms, and then pleaded seven special instances in which the defendants were alleged to have been negligent in their operation of the elevator. All charges of negligence were denied, and the defendants specially pleaded that the fall of the elevator which caused plaintiff's injuries was the result of unavoidable accident which they could not have foreseen or prevented. Plaintiff was his own witness, and called defendant Massetti under section 2055 of the Code of Civil Procedure. These were his only witnesses called on the issue of negligence. Plaintiff's testimony of the circumstances of the accident was vague and uncertain, and he was so effectively impeached that the jury must have rejected his testimony as incredible. Massetti's testimony as plaintiff's witness aided plaintiff not at all. Thus plaintiff's whole case rests upon the application of the doctrine of res ipsa loquitur in so far as any proof of negligence is concerned. On the part of the defendants, the evidence was that the elevator was apparently in good mechanical condition; that it was supplied with all necessary safety appliances; that it was subjected to periodical inspections, the last inspection having been made on the day before the accident; that the defendant Massetti was skilled in the operation of the elevator, and was operating it carefully and skillfully at the time of the accident; and that the fall was caused by the sudden breaking of one

of the cables because of a latent defect in the cable which could not have been discovered by any reasonable inspection. Thus, on the issue of negligence, the evidence was such that the jury might well find that neither of the defendants was guilty of any act of omission or commission which could have been held negligent. When the plaintiff must rest solely on the inference of negligence arising from the res ipsa loquitur doctrine and the defendant presents direct evidence contradicting that inference, the issue is one of fact upon which the evidence is conflicting and the finding of the jury is conclusive. Maryland Cas. Co. v. Matson Navig. Co., 177 Cal. 610, 613, 171 P. 427; Michener v. Hutton, 203 Cal. 604, 610, 265 P. 238, 59 A. L. R. 480. Hence the judgment here must be affirmed, unless the errors of law complained of are prejudicial.

[3-5] The appellant first complains of the instruction defining preponderance of evidence. This instruction, given by the court of its own motion, reads:

> "Preponderance of evidence means not the greater number of witnesses, but the greater weight, probability, quality and convincing effect of the evidence and proof offered by the party holding the affirmative, as compared with the opposing evidence.
>
> "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty is all that is required, or that degree of proof which produces conviction to an unprejudiced mind."

The criticism is directed to the last sentence of the instruction and People v. Miller, 171 Cal. 649, 653, 154 P. 468, 469; Estate of Ross, 179 Cal. 629, 633, 178 P. 510, 512; and Galloway v. United Railroads, 51 Cal. App. 575, 197 P. 663, are cited as holding that similar instructions were prejudicial.

The cases cited carry two important distinctions from the case at hand. In the first place, the wording of the instructions in those cases is essentially different from the instruction here given. In the Miller Case the only definition of preponderance of evidence given to the jury was in the instruction reading: "Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds." In Estate of Ross, supra, preponderance was defined as: "That amount of evidence which produces conviction in an unprejudiced mind, and only such evidence will justify a verdict that Isaac J. Ross was of unsound mind." In the Galloway Case the jury was instructed that it was necessary that the evidence satisfy their minds to a moral certainty and by a preponderance of the whole evidence. In no one of these cases was the jury given a correct definition of preponderance of evidence as was done here. In the second place, each of the instructions in the cited cases was specifically directed to the question of what proof was necessary to sustain a specific issue, the burden of which was upon the complaining party. Thus in the Miller Case the instruction was directed to the defense of insanity raised by the defendant. In the Ross Case it was directed to the issue of insanity of the testator raised by the contestants. In the Galloway Case it was directed to the issue of proximate cause and whether the fatal blow struck by an employee of the railroad was struck while such employee was in the course of his employment. In the case at hand the instruction is directed to all issues, and is equally applicable to the evidence of each party.

The case is therefore more closely alike to Gregoriev v. Northwestern Pac. Ry. Co., 95 Cal. App. 428, 440, 273 P. 76; Mella v. Hooper, 200 Cal. 628, 630, 254 P. 256; Richmond v. Moore, 103 Cal. App. 173, 180, 284 P. 681; and East Bay Mun. Utility Dist. v. Kieffer, 99 Cal. App. 240, 256, 278 P. 476, 483, 279 P. 178, where many cases are cited. As said in the Kieffer Case in reference to a similar instruction: "Academically, the instruction is inaccurate, and it should not have been given, but it is highly improbable that the jurors were misled thereby." The same rule was followed in Richmond v. Moore and the other cases last cited, but the Richmond Case is more closely analogous to the one at hand. There the instruction was held not to be prepudicial, first, because the court gave complete and proper instructions upon the burden of proof and the preponderance of evidence, and, second, because each party had a special issue to maintain, and therefore the instruction, though technically erroneous, was equally applicable to each.

The application of this rule to our case is apparent. As we have heretofore said, there was no substantial, credible, direct evidence of respondents' negligence offered by the appellant. On this issue his entire case rested upon the inference arising out of the doctrine of res ipsa loquitur. The jury was entitled to draw this inference of negligence when the appellant showed that he was hurt by the fall of the elevator which was caused by the breaking of the machinery. At this point appellant's proof of negligence was complete, and he was entitled to recover, unless the respondents satisfied the jury that they were free from negligence by proving that the hurt was caused by an inevitable casualty, or by establishing any other fact which would relieve them of responsibility. Treadwell v. Whittier, 80 Cal. 574, 582, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. We are not here concerned with the intricate question of the shifting of the burden of proof. Suffice it to say that, whenever the res ipsa loquitur doctrine is applicable, that is to say, when the plaintiff has shown that the instrument which caused the injury was in the exclusive control of the defendant, and that in the ordinary course of things an accident does not occur under such circumstances, when due care is used, these facts afford reasonable evidence "in the absence of explanation by the defendant" that the accident arose from want of proper care. Crooks v. White, 107 Cal. App. 304, 308, 290 P. 497, and cases cited. Thus there is a burden upon the defendant, without regard to the question of shifting, to prove by satisfactory evidence that the happening of the event was due to some other cause than the want of proper care on his part. Applying this principle to the instructions under consideration, it is evident that, because of the application of the res ipsa loquitur doctrine and because of the burden of explaining away the inference of negligence, the error of the instruction bore upon the respondents' case more severely than when the defendant raises the issue of contributory negligence, as was done in Richmond v. Moore, supra, and similar cases which have been cited. For these reasons we are satisfied that the instruction complained of, though erroneous, does not justify a reversal.

Criticism is made of instructions Nos. 24 and 30. The first advised the jury that the Syndicate Building Company was not liable if the accident was caused by a defect or flaw in the elevator apparatus which was not discoverable "on a reasonable and careful examination." No. 30 advised the jury that the company was not liable if the accident was caused by a fault which could not have been foreseen by "a reasonably careful person, or against an accident such as a reasonable and prudent person would not have anticipated the need of guarding against." The appellant concedes that the jury was properly instructed as to the measure of care and diligence required by the respondents in the operation of the elevator. This instruction (No. 26) follows the rule of Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175, and similar cases. The criticism of Nos. 24 and 30 is that they disregard this obligation of carriers to use the utmost care and diligence of very cautious persons. But instruction No. 24 also states the rule approved in the Treadwell Case, and has met with judicial approval over a long period of years. 9 R. C. L. p. 1239. As to instruction No. 30, if there be error here in the use of the words "a reasonable and prudent person," such error was invited by appellant's requested instruction No. 25, where the jury was advised that the Syndicate Building Company was required "to use all reasonable means and efforts" to furnish good and well constructed machinery. However, we are not satisfied that the instruction complained of is open to criticism, because it does not occur to us that there is any real conflict between the instruction advising that the company must use "the utmost care and diligence of very cautions persons" and the instruction advising in effect that the company must take such means to guard against an accident as a "reasonable and prudent person" might have anticipated to be necessary. It would seem to be self-evident that it is the "reasonable and prudent persons" to whom we would look to use the degree of care necessary under the circumstances.

[6] Finally, it is argued that the trial court erred in instructing the jury to disregard an ailment from which the appellant suffered prior to the date of the accident. This instruction was confined to the question of the amount of damages to which the appellant might be entitled if the jury found that the respondents were guilty of negligence. There is no dispute that the appellant suffered injuries at the time of the accident. If these injuries were aggravated by a prior ailment, the question whether the jury might take such ailment into consideration in assessing damages becomes a moot question when the jury by its verdict has determined that the respondents were not guilty of negligence, and hence that the appellant was not entitled to any damages as a result of the accident.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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118 Cal.App. 323

CALIFORNIA STANDARD FINANCE CORPORATION v. BESSOLO & GUALANO, Inc., et al.

Civ. 6867.

District Court of Appeal, Second District, Division 1, California.

Nov. 16, 1931.

Rehearing Denied Dec. 14, 1931. Hearing Denied by Supreme Court Jan. 14, 1932.

1. Appeal and error ⚷1170(7).

Alleged errors in admitting evidence regarding power of plaintiff's agent *held* harmless, where such agency and agent's power were satisfactorily established by other evidence (Const. art. 6, § 4½).

2. Principal and agent ⚷110(1).

Power of attorney under which agent acted *held* to confer power to execute bond guaranteeing payment of note (Civ. Code, § 13).

The power of attorney authorized agent to execute on behalf of principal any and all bonds and undertakings, recognizances, contracts of indemnity, and other writings obligatory in their nature.

3. **Insurance** ⊂⊃509.

Bonding company agreeing to pay note in accordance with terms in event others failed to pay *held* liable for interest as provided by note and for attorney's fees.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the California Standard Finance Corporation against Bessolo & Gualano, Fidelity Union Casualty Company, and others. From a judgment for plaintiff, defendant Fidelity Union Casualty Company appeals.

Affirmed.

See also 5 P.(2d) 480.

Hiram T. Kellogg, of Los Angeles, for appellant.

Rollinson, McGann, Becker & Nelson, of Los Angeles (Charles W. Rollinson and Don S. Irwin, both of Los Angeles, of counsel), for respondent.

HOUSER, J.

From the record herein it appears that Bessolo & Gualano, Inc., a corporation, executed its promissory note for the sum of $15,000 in favor of one Balfour; that later the payee of said note, together with Bessolo and Gualano, each as individuals, executed a guaranty of payment thereof, and thereupon delivered it to the plaintiff, together with a certain bond executed by the defendant Fidelity Union Casualty Company, which purportedly also guaranteed the payment of said note, and which latter instrument was as follows, to wit:

"Fidelity Union Casualty Company
"Dallas

"No. 79807 Bond
"...... No.

"Know All Men By These Presents:

"That we, Bessolo & Gualano, Inc., as Principals, and the Fidelity Union Casualty Company, a corporation, as Surety, are held and firmly bound unto California Standard Finance Corporation, its successors and assigns, in the sum of Fifteen Thousand & 00/100 ($15,000) Dollars, gold coin of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

"Signed, Sealed and Dated this 15th day of August, 1928.

"Whereas, Bessolo & Gualano, Inc., have executed a note in favor of F. C. Balfour, same being dated August 1st, 1928, in the amount of Fifteen Thousand & 00/100 ($15,000.00) Dollars, due October 30th, 1928, bearing interest at twelve per cent. (12%) per annum from date of note, and

"Whereas, F. C. Balfour, has sold said note to California Standard Finance Corporation, and the California Standard Finance Corporation have accepted to purchase said note,

"Now, Therefore, The Condition Of This Obligation Is Such, that if Bessolo & Gualano, Inc., shall pay or cause to be paid to California Standard Finance Corporation, said note for Fifteen Thousand & 00/100 ($15,000.00) Dollars, together with interest as aforesaid, within ninety days from the date thereof, then this obligation shall be null and void; otherwise to remain in full force and effect. It being expressly agreed that the Fidelity Union Casualty Company, does agree to pay said note in accordance with its terms on the due date thereof in the event Bessolo & Gualano, Inc., fails to pay or cause the same to be paid.

"Bessolo & Gualano, Inc.,
"By G. A. Gualano,
"President
"By M. Angelor Bessolo, Jr.
"Sec. & Treas.
"[Seal] Fidelity Union Casualty Company,
"By Jay G. Frederic,
"Attorney-in-Fact."

The promissory note was not paid when it became due and as a result thereof the plaintiff commenced an action against each of said corporations and Balfour, which action allegedly was upon the promissory note, the guaranty and the bond. From the ensuing judgment in favor of the plaintiff, the defendant Fidelity Union Casualty Company has appealed to this court.

It appears that the appellant corporation has its principal office at the city of Dallas, in the state of Texas, but that the bond which represents the obligation which is the subject of the action was executed by the agent of the appellant at the city of Los Angeles, Cal.

[1] Several of the points urged by the appellant on this appeal relate to alleged errors said to have been committed by the trial court in admitting in evidence certain testimony which tended to prove the agency of the person who acted in behalf of the appellant in executing the bond in question, also the receipt by the trial court of secondary evidence as to the contents of a certain power of attorney given by the appellant to the person whose agency in the premises was the subject of dispute between or among the several parties to the action; but since by other evidence both the agency of such person and his power

in the premises were satisfactorily established, the alleged errors to which the appellant has directed attention either become immaterial or are not of such consequence that because thereof this court would be justified in ordering a reversal of the judgment. Section 4½, art. 6, Constitution.

[2] The appellant also contends that, even conceding that the bond was properly executed, no power was conferred on the agent to execute it. On examination of the provisions of the power of attorney under which the agent acted in executing such bond, it is noted that, among other powers therein specified, the agent is thereby authorized to execute on behalf of the appellant corporation "any and all bonds and undertakings, recognizances, contracts of indemnity, and other writings obligatory in their nature."

By perhaps a severe straining of the technical meaning of the more pertinent words of such authorization, and considering them in connection with what may be the bulk of the business of corporations of the character of the appellant, it may be possible to arrive at a conclusion consistent with that for which the appellant contends; but considering the fact that the uncertainty (if any) as to the power of the agent was the result of the act of the appellant, and not that of the respondent, together with the rule that words are to be construed "according to the context and the approved usage of the language" (section 13, Civ. Code), and since it is manifest that by the ordinary and commonly understood meaning of the language to which attention has been directed powers were conferred upon the agent to execute an instrument of the character of that in question, it follows that the contention of the appellant in that regard cannot be upheld by this court.

[3] It is further urged by the appellant that since by its bond it only agreed "to pay said note in accordance with its terms on the due date thereof in the event Bessolo & Gualano, Inc., fails to pay or cause the same to be paid," the trial court erred in awarding judgment to the plaintiff for interest as provided by the terms of the note and for attorney's fees in procuring judgment, also as therein specified.

In principle, the point thus presented is ruled against the contention of the appellant in each of the following cases: San Francisco T. Seminary v. Monterey, etc., Co., 179 Cal. 166, 175 P. 693; Grace v. Croninger, 56 Cal. App. 659, 667, 206 P. 130; Murphy v. Luthy Battery Co., 74 Cal. App. 68, 239 P. 341.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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118 Cal.App. 327

CALIFORNIA STANDARD FINANCE CORPORATION v. BESSOLO & GUALANO, Inc., et al.

Civ. 7006.

District Court of Appeal, Second District, Division 1, California.

Nov. 16, 1931.

1. Guaranty ⚷36(9).

Principals in bond guaranteeing payment of note executed by principals *held* liable for attorney's fees.

2. Appeal and error ⚷694(1).

Where appeal was taken by alternative method and no report of transcript of evidence was filed, appellate court could not determine whether evidence supported trial court's conclusion objected to (Code Civ. Proc. §§ 953a–953c).

3. Appeal and error ⚷544(3).

On appeal based on judgment roll, merits are tested solely by what is disclosed by inspection of judgment roll.

4. Appeal and error ⚷714(4).

In absence of reporter's transcript, statements made by party to appeal regarding what evidence was adduced on trial cannot be considered by appellate court in determining merits (Code Civ. Proc. §§ 953a–953c).

5. Appeal and error ⚷595.

On appeal based on judgment roll, appellant could not, without respondent's leave, support its contentions by reference to reporter's transcript filed by codefendant.

6. Appeal and error ⚷900.

Every intendment is in favor of judgment rendered.

7. Guaranty ⚷94.

Judgment awarding plaintiff interest at 12 per cent. from and after date of note authorized interest at 12 per cent. in accordance with terms from date until rendition of judgment only and thereafter at 7 per cent.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by the California Standard Finance Corporation against Bessolo & Gualano, Incorporated, F. C. Balfour, and others. From a judgment for plaintiff, defendants named appeal.

Affirmed.

Lawrence M. Cahill, of Los Angeles, for appellants.

Rollinson, McGann, Becker & Nelson, of Los Angeles (Charles W. Rollinson and Don S. Irwin, both of Los Angeles, of counsel), for respondent.

HOUSER, J.

The pertinent facts upon which this appeal depends are set forth in the opinion in the case of California Standard Finance Corporation v. Fidelity Union Casualty Co., 5 P.(2d) 478, this day filed in this court, and to which opinion for said facts reference may be had.

It appears that the greater criticism by the appellant of the judgment rendered by the lower court is leveled, not only at the amount of fees allowed to the plaintiff for the attorneys who represented the plaintiff in the action, but as well at the conclusion that the appellant was at all liable for said attorney's fees.

[1] Because, according to the findings of fact which were signed by the judge of the trial court, it appears that the liability of the appellant herein to pay attorney's fees to the plaintiff in said action was identical with that of its codefendant Fidelity Union Casualty Company, and depended, not upon the original obligation of the appellant herein to do so, as expressed in the promissory note, but upon the separate and independent guaranty of each of such defendants, it is clear that even from such standpoint the contention of this appellant, to the effect that no liability was incurred by it, cannot be sustained. San Francisco T. Seminary v. Monterey, etc., Co., 179 Cal. 166, 175 P. 693; Grace v. Croninger, 56 Cal. App. 659, 206 P. 130; Murphy v. Luthy Battery Co., 74 Cal. App. 68, 239 P. 341; California Standard Finance Corp. v. Fidelity Union C. Co. (Cal. App.) 5 P.(2d) 478. However, in addition thereto, in the second cause of action of the complaint in the action upon which the judgment is founded, the material allegations of the first cause of action set forth in said complaint, by the terms of which the original and primary obligation of this appellant to pay said attorney's fees was clearly averred, were adopted and made a part of said second cause of action, and which allegations the trial court by its findings declared were true.

[2, 3] But the appellant contends that on the trial of the action no evidence was introduced by the plaintiff relative to the reasonableness of the fee which should be awarded to the plaintiff on account of the services which had been performed by its attorneys in connection with the action, and that without such evidence the trial court had no authority to include in the judgment rendered against the defendants any amount of money as and for such attorney's fees.

Without herein conceding that in the determination by the trial court of the question of what amount of money should be awarded to the plaintiff in the judgment against the defendants on account of attorney's fees, either expended by the plaintiff, or for which it had become liable, it was necessary that evidence be received by said court with reference to such question (since it appears by the files and records herein that the appeal by this appellant was taken by the so-called alternative method provided by sections 953a, 953b, and 953c of the Code of Civil Procedure, and that, in violation of such statutory provisions, no reporter's transcript of the evidence was filed in this court); as a legal consequence thereof this court is unable to determine what, if any, evidence was placed before the trial court upon which either it did rely, or was authorized to rely, in arriving at the conclusion to which appellant objects. Estate of Berry, 195 Cal. 354, 359, 233 P. 330; Jeffords v. Young, 197 Cal. 224, 227, 229, 239 P. 1054; Pearson v. Parsons, 173 Cal. 336, 340, 159 P. 1173. In addition thereto, considering the fact that the appeal is based entirely on the judgment roll (without any bill of exceptions), it is well-established law that in such situation the merits of the appeal must be tested solely on what is disclosed by an inspection of such judgment roll. Marr v. Southern, etc., Gas Co., 198 Cal. 278, 282, 245 P. 178; Miller v. Yule, 80 Cal. App. 618, 621, 252 P. 737; Ensele v. Jolley, 188 Cal. 297, 302, 204 P. 1085, 1087; and authorities there respectively cited.

As is stated in the last authority to which attention has been directed: "This appeal, being upon the judgment roll alone, no question can arise as to the sufficiency of the evidence to sustain the averments of the complaint and to justify the findings of the court."

In disregard of such rule, the appellant has incorporated in its brief various and sundry statements relating to the evidence or the lack thereof which it is asserted affect the point with reference to the allowance of attorney's fees. Nor does the record herein contain any stipulation or leave of any sort by any of the other parties connected either with this or any other appeal from the judgment in the action, by virtue of which permission is purportedly granted to the appellant either to use or to refer to the, or any, reporter's transcript of the evidence which may have been filed by its codefendant in its separate appeal from said judgment.

[4] As to the first situation, namely, in the absence of a reporter's transcript of the evidence, statements made by a party to the appeal as to what evidence was adduced on the trial of the action, the authorities are to the effect that in determining the merits of the appeal such statements may not be considered by the appellate court. Rich v. Moss Beach Realty Co., 43 Cal. App. 742, 745, 185 P. 859; Welch v. Alcott, 64 Cal. App. 781,

785, 222 P. 852; and authorities there respectively cited.

[5, 6] With reference to the second situation, to wit, on an appeal based solely on the judgment roll, the question of the right of the appellant (without leave of the respondent) to support its contentions by reference to a reporter's transcript filed by a codefendant on its separate and independent appeal from the judgment, it is stated in the case of Estate of Bell, 157 Cal. 528, 532, 108 P. 497, 498, that: "* * * There is no rule or statute authorizing an appellant to dispense with the filing of a transcript by making reference to a transcript on file in another appeal. Nor do we find any case in which it has been held that the appeals of separate independent appellants should be embodied in a single transcript. * * *" However, it is also there intimated that by order of court two separate appeals might "be heard on a single transcript."

The syllabus in the case of Edw. L. Soule Co. v. Severtson, 68 Cal. App. 46, 228 P. 351, is as follows: "Where a plaintiff has appealed from a judgment under the so-called alternative method and has prepared a transcript, a defendant, appealing from a different part of the same judgment has no right to rely on and use on his own appeal the transcript prepared by plaintiff, in the absence of a stipulation permitting the use of such transcript."

It therefore becomes manifest that in presenting its points on appeal the appellant herein must rely entirely upon what appears in the judgment roll. Since the appellant has failed to establish the fact that no evidence was received by the trial court relative to the amount of money which should be awarded to the plaintiff on account of attorney's fees, and since every intendment is in favor of the judgment rendered, it would seem to follow that, irrespective of the asserted merits of the appellant's claim in that regard, the judgment should be affirmed.

[7] The appellant also complains that by the judgment the plaintiff is awarded interest on the principal sum of the promissory note "at the rate of 12 per cent. per annum from and after August 1, 1928" (the date of the promissory note); which language (as suggested by the appellant) may be construed as authorizing the collection by the plaintiff from the defendant of interest on said judgment at the rate of 12 per cent. per annum, instead of at the statutory rate of 7 per cent. per annum.

Although such language to some extent may be uncertain, it is clear that the respondent is entitled to interest in accordance with the provisions of the promissory note from its date until the date of the rendition of the judgment only, and thereafter at the rate of 7 per cent. per annum until paid. The provision of the judgment to which appellant has thus taken exception should be and is so construed.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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118 Cal.App. 428

PEOPLE ex rel. CROWL v. CITY OF SOUTH GATE et al.

Civ. 6835.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1931.

As Amended on Denial of Rehearing Dec. 16, 1931. Hearing Denied by Supreme Court Jan. 18, 1932.

Municipal corporations ⚷33(9).

As regards legality of annexation of territory to city, evidence *held* to establish that territory annexed was inhabited.

> Evidence disclosed that, if there was anything that separated any part of territory annexed which was inhabited from any part of the annexed territory or from the city itself, it was merely a right of way for flood control, a line of railway, or public highway; that such right of way merely traversed the district annexed; that not one of the right of ways was in itself a separate or integral parcel of land; that not one of such ways was merely a connecting strip or link to connect widely separated parcels of inhabited lands; and that in each instance, so far as record showed, they were only incidental to lands annexed.

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Quo warranto by the People, on the relation of C. C. Crowl, against the City of South Gate and others. From a judgment denying application for writ of quo warranto, plaintiff appeals.

Affirmed.

U. S. Webb, Atty. Gen., Thomas V. Cassidy, of Huntington Park, T. P. Hogan, of Los Angeles, and Wallace F. Mills, of Huntington Park, for appellant.

B. A. Hayne, of Los Angeles, and A. P. Hayne, of Stockton, for respondents.

YORK, J.

This is an appeal by the plaintiff from a judgment denying plaintiff's application for a writ of quo warranto, and declaring the ter-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ritory described in plaintiff's complaint legally annexed to the city of South Gate.

The proceedings had were regular upon their face. It appears from the evidence and from the plat introduced that, if there was anything that separated any part of this territory annexed, which was inhabited, from any other part of the annexed territory or from the city itself, it was merely a right of way for the Los Angeles flood control, a water course, a line of railway, or a public highway. There is no contention, however, that the riverbeds, the right of way for the flood control, the public highway, or the line of railway was a separate parcel, but it affirmatively appears that such highway, such line of railway, such right of way for flood control purposes and the highway, in each instance, merely traversed the district annexed, and that not one of the rights of way was within itself a separate or an integral parcel of land, and that not one of such rights of way was merely a connecting strip or link to connect widely separated parcels of inhabited lands; that is, in each instance, so far as our record shows, they were only incidentally in the lands annexed by reason of the fact that they happened to be within the inhabited territory sought to be annexed.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

118 Cal.App. 283

MULLANE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7905.

District Court of Appeal, First District, Division 1, California.

Nov. 13, 1931.

1. Master and servant ⚷417(4).

That employer's petition for rehearing was not verified *held* waived by failure to raise point when petition was before commission (St. 1917, p. 873, § 64 (c).

2. Master and servant ⚷376(2).

Acceleration of pre-existing disease is compensable injury (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

3. Master and servant ⚷405(4).

Finding that death of salesman, subsequent to assault during course of employment, from tuberculosis destroying larynx, did not result from injury "arising out of or in course of employment," *held* contradictory to evidence showing assault aggravated pre-existing tubercular condition (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

[Ed. Note.—For other definitions of "Arising Out of Employment" and "Course of Employment," see Words and Phrases.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Emma G. Mullane to recover compensation for the death of her husband, Edward A. Mullane, opposed by the Pacific Gas & Electric Company, employer. To review an order of the Industrial Accident Commission denying compensation, petitioner brings certiorari.

Decision of commission annulled, and proceeding remanded, with directions.

Edmund J. Holl and M. L. Haun, both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

KNIGHT, J.

This is a proceeding in certiorari to review a decision of the Industrial Accident Commission.

On October 8, 1929, petitioner's husband, Edward A. Mullane, a salesman in the employ of the Pacific Gas & Electric Company in San Francisco, was violently and without provocation assaulted by a man conducting an apartment house when Mullane called at the house to demonstrate for a tenant therein a portable gas heater. He was seized about the throat, forced violently backward against the wall, and then shoved down a flight of stairs. As he spiraled down the stairway his back struck forcibly against the banister, jamming the heater which he was holding under his arm against his back; and he finally landed at the foot of the stairs in a crouched position with his back against the banister. Mullane's employer, being self-insured, placed him under the care of Dr. Haber, its doctor. At that time Mullane's condition was not considered serious, and after remaining home a short time he resumed his duties; but his condition immediately grew worse and in a few days he was compelled to quit. Dr. Haber then caused X-rays to be taken, which disclosed the development of a tubercular condition in the laryngeal and spinal regions; whereupon he was given a thorough examination by a specialist, Dr. Pierson, and placed under the care of Dr. Voorsanger at the latter's sanitarium near Los Gatos. Meanwhile, and on November 19, 1928, Mullane filed his application with the commission for compensation. At the hearing which followed on November 22, 1928, the medical reports of Drs. Voorsanger and Pierson were introduced in evidence, wherein they stated that the injuries Mullane received in the assault had activated a pre-existing quiescent tubercular

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condition which had developed in the laryngeal and spinal regions; that his disability was therefore brought about by the injury, and they recommended continued medical and hospital treatment. Their conclusions and recommendations were approved generally in a letter written by Dr. Harbaugh, the commission's assistant medical director. The commission made an award accordingly, it being found specifically that Mullane "sustained injury occurring in the course of and arising out of his employment, when he was assaulted"; that such injury resulted "in the activation of a pre-existing tubercular condition in the laryngeal and spinal regions," thereby causing temporary total disability; that consequently he was entitled to compensation, reasonable medical expenses, and "further medical treatment necessary to restore him to the condition existing before the said injury." The company was evidently satisfied with the award because it made no application for a rehearing, and thereafter fully complied with its terms. However, Mullane's condition grew steadily worse, the tuberculosis eventually destroying the larynx, thus preventing the reception of food, and although he was furnished with the best medical and hospital care he died of starvation. His death occurred on July 29, 1930, at the Ross Sanitarium, where he was confined for the several months preceding his death, under the care of Dr. Shipman.

On October 2, 1930, his widow filed her application with the commission, claiming the death benefit allowed by the provisions of said act, and on October 31, 1930, after a full hearing, the commission, in conformity with its previous decision, granted her application. The medical evidence consisted of the oral testimony given by Drs. Pierson, Shipman, and Haber, and the essential findings of fact upon which the commission based its second decision were substantially the same as those made in the former proceeding, it being specifically found that Mullane "sustained an injury arising out of and occurring in the course of his employment as follows: Said Edward Alfred Mullane was assaulted and received injuries to himself, which resulted in an activation of a pre-existing tuberculous condition in the laryngeal and spinal region, and that said injury so received proximately caused" his death on July 29, 1930. It further found that said injuries caused total disability from the date on which they were received up to the time of death, and that his widow, being wholly dependent on him, was entitled to the amount of the death benefit provided for by said act. And the concluding finding was that the "evidence is insufficient to warrant an apportionment of the [cause of] death between injury and pre-existing disease."

Later the company filed a petition for rehearing, and although the petition did not conform to the requirements of section 64 (c) of said act (St. 1917, p. 873) in that it was not verified, the commission granted a rehearing, and thereafter, to wit, on February 24, 1931, without taking any additional evidence and notwithstanding that its third set of findings, relating to the cause of Mullane's disability and death, were in substantial accord with those contained in the two previous sets, the commission denied her application. That is to say, the first of the findings on which it based its third and adverse decision was that Mullane was employed as a salesman by said company, and the remaining ones were as follows: "2. On October 8, 1928, the said employee sustained an injury arising out of and in the course of his employment, consisting of certain bodily injuries caused by a personal assault. 3. The said injuries caused an aggravation of a preexisting tuberculous condition thereby causing temporary disability. 4. The said employee died on July 29, 1930, the immediate and proximate cause of his death being the development of tuberculosis finally affecting the larynx and thus preventing the reception of food or nourishment with the consequent starvation." But, as indicated, the ultimate conclusion of the commission, which was embodied in the fifth and last finding, was that "the death of the said employee was not caused by the said injury occurring on October 8, 1928, and was not caused by injury arising out of or in the course of the said employment"; and therefore petitioner was denied any relief whatever.

[1] Petitioner makes the preliminary point that the commission was without jurisdiction to grant the petition for rehearing because it was not verified, as required by said act. But admittedly no objection was made upon that ground at the time it was under consideration, and therefore, since it is held generally that failure to verify a pleading is a defect which does not operate to deprive a court of jurisdiction to hear and determine the matter presented thereby (Security T. & S. Bank v. Fidelity & D. Co., 184 Cal. 173, 193 P. 102), we find no merit in petitioner's contention.

[2] However, aside from that point, in construing and giving effect to the provisions of the Workmen's Compensation Act, it has been uniformly held by the courts and the commission that "acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration." G. L. Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 200 P. 17, 20; Knock v. Industrial Accident Commission, 200 Cal. 456, 253 P. 712, 714; Maurmann v. Chirchart & Nystedt, 1 I. A. C. 499; Birk v. Matson Navigation Co., 2 I. A. C. 199. In the Eastman Case the employee was afflicted with a preexisting chronic heart trouble, and in holding that the case was nevertheless compensable the court said: "If the disability, although

arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists" (citing numerous authorities). The Knock Case is to the same effect. There the court cites with approval a proceeding from another state and says: "The case of Peoria Co. v. Industrial Acc. Board, 279 Ill. 352, 116 N. E. 651, is also much in point, the court in that case holding, after a review of many cases both in this country and in England, that 'even where a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident,' and is therefore compensable—citing 1 Bradbury on Workmen's Compensation, 385; Elliott, Workmen's Compensation (7th Ed.) 9, and cited cases." And in the Industrial Accident Commission proceedings above cited, both of which involved cases of exacerbated tuberculosis, it was held that where an industrial accident causes a tubercular condition which has long been quiescent, to spring into renewed activity by reason of the shock and shaking up caused by the accident, the subsequent illness due to the renewed tubercular infection is proximately caused by the accident, and compensation may be awarded therefor. However, subdivision 4 of section 3 of said act (as amended by St. 1919, p. 910, § 1) provides that "in case of aggravation of any disease existing prior to such injury, compensation shall be allowed only for such proportion of the disability due to the aggravation of such prior disease as may reasonably be attributed to the injury," and in the present case the commission, as already pointed out, has repeatedly and consistently determined as a fact that although Mullane was afflicted to some extent with a dormant preexisting tubercular condition, his disability and death were proximately caused by an aggravation and exacerbation of such disease activated by the injuries he received in the assault; and all of the medical evidence adduced at both hearings proves without conflict that such was the case. At the first hearing Dr. Voorsanger in his report, after stating that in his opinion Mullane was doubtless afflicted with a pulmonary disease prior to the assault, said: "We do know, however, that a blow, either direct or indirect, a fall, considerable straining or twisting may activate a latent bone tuberculosis such as we have here in the spine. If we can accept this man's statement that he was perfectly well as pain is concerned, prior to this accident [and there is no testimony whatever to the contrary] he should be given the benefit of the doubt and the accident should be looked upon as contributory." Dr. Pierson concluded his report as follows: "I do feel that the local trauma to his back reawakened the tuberculosis in his spine, evidenced by the abscess. I also feel that this general trauma and the bruising of his throat are factors in the developing of his laryngeal tuberculosis. It is therefore evident that, while his pulmonary tuberculosis is not of an industrial nature, the development of his laryngeal involvement, and the reactivation of his spinal focus are chargeable to industry, and should be cared for by the same until he is returned to the condition existing before the accident." And the letter written by Dr. Harbaugh expressly approved the opinion of Dr. Voorsanger.

At the hearing of the second petition, following Mullane's death, Dr. Pierson testified that Mullane's exacerbated tubercular condition of the lungs and spine "and the new development of the tuberculosis of the larynx were definitely the result of his injury at the time." Continuing, he said: "I feel the exacerbation of the previous two and the development of this new phase is the result of the accident, and had it not been for that injury the man might have lived for a considerable length of time." Furthermore, he stated that in his opinion the pre-existing tubercular condition was of very recent origin. There was nothing in the testimony of Drs. Haber or Shipman which conflicted even hypothetically with that given by Dr. Pierson. Dr. Haber frankly stated that he saw Mullane only three times shortly after the assault, and that therefore he was not sufficiently familiar with the case to venture an opinion upon the question of the effect of the assault; and the record shows that Mullane did not come under Dr. Shipman's observation until June, 1929, and therefore his testimony related to Mullane's condition subsequent to that time.

[3] In the state of the record above set forth it is evident that the conclusion of the commission, as set forth in the fifth and concluding finding made on rehearing of the second proceeding, is not only inconsistent with and contradictory to the specific findings which precede it, but manifestly is contrary to the undisputed evidence adduced at both hearings and contravenes the plain provisions of said act, as declared in subdivision 4 of section 3 thereof. Therefore, the decision of the commission based thereon, denying petitioner any relief whatever, should be annulled, and the proceeding remanded to the commission for further action pursuant to the provisions of the act last mentioned, and in accordance with the views herein expressed. Such action will be not at all contrary to, but in complete harmony with, the position taken by said company in applying for a rehearing and with the request made by it to the commission in the briefs it submitted in furtherance of such petition; for, as will be seen by an examination of both, the company clearly recognized the right of Mullane's widow to a considerable portion of the death benefit allowed by said act, and sought only to have the commission make an apportion-

ment thereof. In this regard, in its closing brief, the company says: "We at no time disputed the right of an employee to recover for a disability which resulted from the aggravation of a preexisting non-disabling tuberculous condition. The Compensation Law allows compensation for the aggravation of any preexisting condition regardless of its nature. In the case before us we can see that it is proper to award compensation for the aggravation of the preexisting tubercular condition which ultimately caused the death of Edward Mullane. The only point which we make is that the compensation allowed should be only a proportion of the amount which would otherwise be allowed in a case of death resulting solely from injury and without the complication of a preexisting disease." And in the concluding paragraph it again says: "In view of the foregoing we again repeat that the language of section 3 (4) of the Workmen's Compensation, Insurance and Safety Act of 1917 as amended in 1919 makes it mandatory for the Commission to apportion the compensation or in other words allow only such amount as may *reasonably* be attributed to the injury. We are not particularly concerned with the method used or the amount allowed, except that in our opinion it should be not more than two thirds of the normal compensation allowed in death cases." However, as will be observed, the commission went much farther than requested, and denied petitioner any amount whatever.

For the reasons stated the decision of the commission is annulled, and the application is remanded for further proceedings in accord with the views expressed herein.

We concur: TYLER, P. J.; CASHIN, J.

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121 Cal.App.(Supp.) 765

GALLAGHER v. CAMPODONICO et al.

No. 118 Civ. App.

Appellate Department, Superior Court, City and County of San Francisco, California.

Nov. 30, 1931.

1. Statutes 🔑188.

In ascertaining legislative intent, regard must be had, not so much to exact phraseology, as to general scope of entire legislative scheme embodied in statute.

2. Statutes 🔑184, 217, 225.

In interpreting expressions used in statutes, courts may study history and purpose of enactment, previous law on subject, and other statutes in pari materia.

3. Statutes 🔑183.

Mere verbiage used, which, if literally interpreted, would thwart obvious design, should not be permitted to kill spirit which gives life to statutes.

4. Mechanics' liens 🔑5.

In construing remedial statute providing for enforcement of liens, attention should not always be centered on strict legal definition of terms used.

5. Statutes 🔑236.

Words of remedial statute may receive either large or restricted definitions when by fair intendment acts can thus be brought into consistent and harmonious operation.

6. Statutes 🔑184.

Where possible, statute must be construed in way rendering it reasonable, fair, and harmonious with its manifest purpose.

7. Statutes 🔑184.

Construction involving decided departure from plain purpose of enactment will not be adopted to exclusion of possible, plausible interpretation promoting legislative intent.

8. Courts 🔑42(1).

Doubt whether jurisdiction of tribunal arises under new statute is resolved in favor of jurisdiction, unless established rule of law is violated.

9. Courts 🔑52.

Where jurisdiction is extended by statute, liberality of construction is sanctioned.

10. Statutes 🔑195.

Rule, expressio unius exclusio alterius, is subordinated to primary rule that intent shall prevail over letter.

11. Statutes 🔑190.

Ambiguous expression must be interpreted with reasonable liberality in furtherance of obvious purpose.

12. Statutes 🔑181(2).

Interpretation of statutes leading to impractical consequences is not to be indulged if practical interpretation is equally justified.

13. Courts 🔑188(10).

Statute giving municipal courts jurisdiction in actions to foreclose liens of mechanics, materialmen, artisans, and laborers gives municipal courts jurisdiction of actions to foreclose liens of "contractors" and "subcontractors" (St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2; Code Civ. Proc. §§ 1183, 1191; Const. art. 20, § 15).

"Contractor" is ordinarily understood to be person who undertakes to supply labor and materials for specific improvement under contract with owner; and "subcontractor" is one who is engaged with contractor to perform under him some part of the original contract.

[Ed. Note.—For other definitions of "Contractor" and "Subcontractor," see Words and Phrases.]

Appeal from Municipal Court of City and County of San Francisco; Thomas F. Prendergast, Judge.

Action by Emily F. Gallagher against A. P. Campodonico and others. From a judgment dismissing the action, plaintiff appeals.

Reversed and remanded.

Jacob Samuels and Oscar Samuels, both of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Ralph H. Lachmund, of San Francisco (E. J. Selenger, of San Francisco, of counsel), for respondents.

JOHNSON, P. J.

The question involved in this appeal concerns the jurisdiction of the municipal courts in actions to foreclose liens claimed by contractors and subcontractors under the Mechanics' Lien Law of this state (Code Civ. Proc. §§ 1183–1203).

As originally established by the act of 1925 (St. 1925, p. 648), the municipal courts were not invested with jurisdiction to enforce or foreclose liens on real property; but by the amendment made in 1929 (St. 1929, p. 837), the jurisdiction was expanded; and, among other enlargements, an added measure of equity jurisdiction was conferred. The portion of the amendment calling for construction in this case reads as follows: "Each municipal court shall have jurisdiction in all actions to enforce and foreclose liens of mechanics, materialmen, artizans and laborers, where the amount of such liens is two thousand dollars, or less; provided, that where an action is pending in the superior court and affects property, which is also affected by an action pending in the municipal court to foreclose such a lien, or where the total amounts of such liens sought to be foreclosed against the same property aggregate an amount in excess of two thousand dollars, the municipal court, upon motion of any interested party, shall order such action pending therein to be transferred to the proper superior court." St. 1925, p. 658, § 29, as amended by St. 1929, p. 838, § 2.

The case at bar is an action to foreclose a lien for street work claimed under section 1191 of the Code of Civil Procedure for work done and materials furnished at an agreed price aggregating $1,020 in grading and paving the roadway in front of property now owned by the defendants, and in laying curbs and installing side-sewers. The contract was made between E. J. Gallagher as contractor and C. Campodonico as owner. Both of said parties died during the progress of the work; but the contract was completed and claim of lien was duly filed by Gallagher's administrator. The plaintiff and the defendants are respectively successors in interest of the deceased contracting parties.

At the trial the plaintiff offered to prove the allegations of the complaint, and that in performance of the work the contractor had furnished materials, of a value equal to 75 per cent. of the contract price, which had not been purchased for this particular work, but had been drawn from a general supply maintained in the street improvement business conducted in his lifetime by the contractor. Objection to the offer was made upon the ground that the court was without jurisdiction of an action to foreclose the lien of a contractor. The objection was sustained by the court; and it accordingly refused to hear any testimony, and entered judgment dismissing the action. From that judgment this appeal was taken.

It will be observed that the amendment of 1929 (section 2) mentions "liens of mechanics, materialmen, artizans and laborers," and omits specific reference to contractors or subcontractors. Accordingly, we are to endeavor to ascertain, by aid of the general canons of statutory construction, the real purpose and intent of the lawmakers and the fair import to be given to their language, in order to promote the genuine design of the enactment. The reason of the law is the life of the law, and to seek out the intent is the primary function of the court. That quest requires the piercing of all disguises of verbal expression which tend to obscure the legislative will. For, "To know the law is not to grasp its mere words, but its force and power." 1 Digest of Justinian III, 17.

Specific authority to enact a mechanics' lien law and provide for enforcement of liens thereunder is conferred upon the Legislature by section 15 of article 20 of the Constitution, which provides: "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens."

It will be observed that the description of the groups designated in the Constitution is the same as that in the amendment giving jurisdiction to the municipal courts, except that in the amendment the word "laborers" is not followed by the words "of every class." Doubtless in framing the amendment, the words, "mechanics, materialmen, artisans, and laborers," were adopted because they were the descriptive terms used in the Constitution; and but for the omission of the words "of every class," it could hardly be contended that the jurisdiction of the municipal court, within its monetary limitation, was any less extensive than that of the Superior Court.

Prior to 1929 the Superior Court had exclusive jurisdiction over enforcement of liens on realty; and the Legislature in the exercise of its constitutional prerogative had enacted what is commonly referred to as the Mechanics' Lien Law, embodied in chapter 2 of title 4, sections 1183 to 1203, of the Code of Civil Procedure. Section 1191, under which a lien is claimed in this action, gives a lien to *any person* who, at the request of the owner of real property, does work or furnishes materials in the performance of street work undertaken for the benefit of the property. That section is to be read in connection with section 1183 whereby a lien is given in general terms to "mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary services, or furnishing materials" in the improvement of realty. This and other sections of the statute exhibit the Legislature's conception of the extent of its authority under the Constitution; and the amplified classification has served to give fuller meaning and definiteness to the general terms of the organic law.

Keeping in mind the language of the Constitution, are we then to say that by according to the municipal courts jurisdiction over liens of "mechanics, materialmen, artisans, and laborers," the Legislature intended to shut the doors of those courts to contractors and subcontractors?

[1] In considering this question, it is well to bear in mind the language of the court in Palache v. Pacific Insurance Co., 42 Cal. 418, 430, where it is said: "It is well settled that in the construction of statutes, for the purpose of ascertaining the legislative intent, regard is to be had not so much to the exact phraseology in which that intent has been expressed, as to the general tenor and scope of the entire legislative scheme embodied in the Act. Mere philology often sticks in the bark, and so becomes an obstruction rather than an aid to a correct exposition of the meaning of the statute."

And in People v. Earl, 19 Cal. App. 69, 71, 72, 124 P. 887, 888, the court declared: "The function of the courts in construing statutes is not restricted to a view which shall give literal effect to every word and phrase appearing by the letter of the law. In that analysis reason must have its just proportion, and the intent of the lawmakers is to be ascertained by taking into account several considerations, as the history of the legislation upon the subject treated, and concurrent legislation affecting the same or closely kindred subjects. The fact that the enforcement of a statute according to its literal import will have the effect of prohibiting otherwise necessary and useful acts may also furnish an entirely sufficient reason for concluding that the intent of its framers was not that it should so operate."

See, also, Black on Interpretation of Laws (2d Ed.) § 45.

[2, 3] While it is indeed the general rule that the will of the Legislature is to be found in the language of the statute, yet strict construction is not a precise but rather a relative term. In interpreting the expressions used, the court is free to study the history and purpose of the enactment and the previous state of the law on the subject, as well as other statutes in pari materia and the benefits sought to be provided. The presumption is that the Legislature resorted to those same aids in pursuit of its purpose; and mere verbiage used by inadvertence or otherwise, which if literally interpreted would thwart the obvious design, will not be permitted, through narrow or strictly technical definition, to kill the spirit which gives life to the law. The ground and cause of creating the statute explain the intent; and the meaning attached to the words must be germane to the subject and consistent with rational deductions. Carter v. Stevens, 211 Cal. 281, 286, 295 P. 28.

In Bakkenson v. Superior Court, 197 Cal. 504, 510, 511, 241 P. 874, 877, rules for guidance in searching the intent of an enactment are given by the Supreme Court in quotations from some of its earlier decisions and from text-writers. Part of what is there stated reads as follows: "In the case of Signal Hill v. County of Los Angeles [196 Cal. 161], 236 P. 304, this court quoted with approval the following language from 2 Lewis' Sutherland, Statutory Construction, §§ 347–376, viz.: 'It is indispensable to a correct understanding of a statute to inquire first what is the subject of it, what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained and its general intent, a key is found to all its intricacies—general words may be restrained to it, and those of narrower import may be expanded to embrace it to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied so as to obviate any repugnancy or inconsistency with such intention. * * * Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. * * * The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they were intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning is to be given according to the intention thus indicated.' In the case of In re Haines [195 Cal. 605], 234 P. 883, this court again quoting from the author last above cited said: '"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and, if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. 'While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words.' Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity, it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act." Lewis' Sutherland, Statutory Construction (2d Ed.) § 376, p. 721.'

[4, 5] Hence in construing a remedial statute, like a law granting and providing for enforcement of liens, attention is not always to be centered on the strict legal definition of the terms used. The words may receive either enlarged or restricted definition, when by fair intendment the act can thus be brought into consistent and harmonious operation. Standard Sand & Gravel Co. v. City of New York, 172 App. Div. 80, 157 N. Y. S. 447, 448. 2 Lewis' Sutherland on Statutory Construction (2d Ed.) § 348, p. 665.

It is of course true that for ordinary purposes contractors and subcontractors are in a class apart from materialmen and laborers. A "contractor" is ordinarily understood to be a person who undertakes to supply the labor and materials for a specific improvement under a contract with the owner, while a "subcontractor" is one who engages with the contractor to perform under him some part of the original contract. We are, however, not dealing here with any question of the right to assert a lien, or with any question of priority between contractors, materialmen, and laborers. All such matters are governed by provisions of the lien law. We are concerned merely with the question of jurisdiction.

In some states the lien laws do not embrace contractors or subcontractors; but in California the Legislature giving a broad interpretation to the constitutional classification, enacted, in section 1183 of the Code of Civil Procedure, a statute naming not only mechanics, materialmen, artisans, and laborers, but also contracts, subcontractors, and numerous others who bestow labor or furnish materials in the improvement of property.

Prior to 1929 exclusive jurisdiction over the enforcement of such liens was vested in the Superior Court; but when municipal courts were established and their jurisdiction was extended to cases involving as much as $2,000, the amendment under review was adopted as part of the plan to relieve congestion in the Superior Court and to promote expedition and efficiency in the administration of the law. With that in view, a certain exclusive jurisdiction in lien cases was transferred to the municipal courts; and if the contention of the defendants were to prevail, the beneficial purpose of the amendment would be materially impaired, and the evil sought to be remedied would, in part at least, be perpetuated. It is not reasonably conceivable that the Legislature intended to send a materialman with a claim of $2,000 into the municipal court and a contractor with a claim for the same amount into the Superior Court. Such a construction of the amendment would result not only in inconvenience and hardship but in absurdity.

Moreover, under section 1195 of the Code of Civil Procedure it has been the practise and the established policy of the law to consolidate for trial all actions to foreclose liens affecting the same piece of property. The amendment in question aims to continue this policy; and yet the manifest intention would in certain instances be defeated by a restricted connotation of the terms, when considered with the proviso relative to transfer and consolidation of causes.

[6, 7] The evident intention of the amendment is that if a claimant of any class mentioned in section 1183 should institute in the Superior Court an action to foreclose his lien for an amount in excess of $2,000, then any action or actions begun in the municipal court and affecting the same property should be transferred to the Superior Court, and consolidated with the action there pending so as to have all rights adjudicated in one judgment. But if the municipal court lacks utter competency to entertain an action by a contractor or subcontractor, then under such construction an action begun in that court by a materialman or laborer could not be transferred to the Superior Court, to be consolidated and tried with an action by a contractor or subcontractor there pending, because the lien of the contractor or subcontractor would not, in the language of the amendment, be "such a lien" as the one put in suit in the municipal court, and hence would not be embraced within the purview of the proviso. It cannot be thought that the Legislature planned to create any such serious and purposeless embarrassment to orderly and efficient conduct of judicial business. Wherever possible, a statute is to be construed in a way which will render it reasonable, fair, and harmonious with its manifest purpose, and which will avoid mischievous or absurd consequences. Uhl v. Badaracco, 199 Cal. 270, 284, 248 P. 917. "Therefore," as is said in People v. Merrill, 24 Cal. App. 206, 210, 140 P. 1075, 1077, "when a suggested construction of a statute in any given case necessarily involves a decided departure from what may be fairly said to be the plain purpose of the enactment, such construction will not be adopted to the exclusion of a possible, plausible interpretation which will promote and put in operation the legislative intent."

[8] This is especially true where a question of jurisdiction of a tribunal arises under a new statute; and while construction will not be pressed beyond the fair import of the legislative grant, yet doubts may be resolved in favor of jurisdiction, unless some established rule of law is violated. Endlich on Interpretation of Statute, § 157; Kansas City v. Summerwell, 58 Mo. App. 246, 251; Smith v. People, 47 N. Y. 330, 341; Butler & Vale v. U. S., 43 Ct. Cl. 497, 517.

[9] And while statutes which deprive a court of jurisdiction are strictly construed, the reverse is the rule when jurisdiction is extended, in which case liberality of construction is sanctioned. 2 Lewis' Sutherland on Statutory Construction (2d Ed.) § 569, p. 1053.

[10] The defendants contend, however, that in construing the amendment, the rule, expressio unius exclusio alterius, should control. This is frequently a helpful rule; but it is always to be subordinated to the primary rule that the intent shall prevail over the letter and, wherever possible, the letter will be so read as to conform to the spirit of the act.

In Endlich on Interpretation of Statutes, § 337, expression is given to this cardinal canon of construction in these words: "The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, where best effectuating the intention. They are, indeed, frequently taken not in their strict technical sense, if that would defeat, but in a more popular sense, if that will uphold, and carry out the intention of the Legislature, but in the widest sense, sometimes in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy. Nor is the rule of strict construction ever violated by permitting the words of a statute to have their full meaning, or by the application of common sense to its terms, in order to avoid an absurdity."

[11] In the light of the constitutional mandate, the previous course of legislation, and the exposition of the provisions of our Mechanics' Lien Law in the decisions of this state, it would be unreasonable to attribute to the Legislature a deliberate purpose to exclude contractors and subcontractors from access to the municipal courts. Doubtful or ambiguous expressions are to be interpreted with reasonable liberality in furtherance of the obvious purpose rather than in a way to leave an omission. Treating that subject, the court in Young v. Regents of the University of Kansas, 87 Kan. 239, 261, 124 P. 150, Ann. Cas. 1913D, 701, while recognizing the duty to refrain from judicial legislation, said, quoting in part from English decisions:

"Nevertheless it is the duty of all courts to avoid, if possible, an interpretation of a statute which would reduce a sincere effort on the part of the Legislature to ameliorate social conditions and promote the welfare of the people to a mere stage play with the chief actor omitted.

" 'We ought not to create a casus omissus by interpretation save in some case of strong necessity. * * * Fry, L. J., properly says: "No casus omissus can be admitted," or, I should rather observe, ought to be created.' Lord Fitzgerald in Mersey Docks and Harbour Board v. Henderson Brothers [Law Rep. 1888], 13 App. Cas. (House of Lords) 595, 607, 608.

" 'Whenever the case is clearly within the mischief, the words must be read so as to cover the case if by any reasonable construction they can be read so as to cover it, though the words may point more exactly to another case; this must be done rather than make such a case a casus omissus under the statute.' Cleasby, B., in Scott v. Legg, [Law Rep. 1876–77] 2 Exch. Div. 39, 42.

"To accomplish this purpose the meaning of words may be expanded (Barlow v. Ross [Law Rep. 1890], 24 Q. B. D. 381), or limited and restricted (In re Brockelbank [Law Rep. 1889], 23 Q. B. D. 461), or words may be eliminated (Stone v. Mayor, &c., of Yeovil, 45 L. J. N. S. 657), or others substituted (Rex v. Vasey [Law Rep. 1905], 2 K. B. 748), or necessary words may be supplied. In delivering his judgment in the House of Lords in the case of Langston [and others] v. Langston [and others], 2 Cl. & Fin. 194, 243, Lord Brougham made use of the following language:

" 'There are two modes of reading an instrument; where the one destroys and the other preserves it is the rule of law and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall) that you should rather lean towards that construction which preserves than towards that which destroys. "Ut res magis valeat quam pereat" is a rule of common law and common sense; and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally as it is, or with a somewhat larger and more liberal construction, and by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; and thus again according to the rule "ut res magis valeat quam pereat" to supply, if you can safely and easily do it, that which he per incuriam omitted, and that which instead of destroying preserves the instrument; which, instead of putting an end to the instrument and defeating the intention of the maker of it, tends rather to keep alive and continue and give effect to that intention.'" Page 243 of 87 Kan., 124 P. 150, 158.

The Constitution places the Legislature under duty to provide by law for the speedy and efficient enforcement of liens of mechanics, materialmen, artisans, and laborers of every class who "have bestowed labor or furnished material" in the improvement of property. In Macomber v. Bigelow, 126 Cal. 9, 14, 58 P. 312, the word "bestow" was held to have a broader meaning than the word "perform," and to indicate an intention to give a contractor or subcontractor a lien for labor which he caused his employees to perform. In like manner in Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 302, 111 P. 760, the court declared that it would be a singular principle which would preclude a subcontractor, who had agreed to furnish materials for a structure and to put them in place, from having a lien because the labor had been performed by his employees instead of by himself personally.

[12] An interpretation which would place obstacles in the path of those who have been active in creating the improvement and would lead to impractical consequences is not to be indulged, if a fair and practical interpretation is equally justified.

The Constitution of North Carolina (article 14, § 4) required the General Assembly to "provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject-matter of their labor"; and the statute passed in obedience to this requirement gave a lien "for the payment of all debts contracted for work done * * * or material furnished." C. S. § 2433. Under these provisions it was held in Lester v. Houston, 101 N. C. 605, 609, 8 S. E. 366, that a lien was given in favor of a contractor under whom his employees and agents worked.

In Michigan, the contention was raised in Shaw v. Bradley, 59 Mich. 199, 204, 26 N. W. 331, 333, that an independent contractor was not entitled to a lien under a statute giving a lien to any person performing labor or services in cutting, banking, driving, or running logs. The court declared that the rule qui per alium facit, per seipsum facere videtur was legally applicable to the general contractor having servants or sublaborers under him. "This," said the court, "is the natural construction of the law, and is the uniform construction given to the law relative to liens upon real estate for the labor and material entering into improvements thereon."

In like manner under a statute of Minnesota giving a lien for "labor or services," a contractor or subcontractor was held in Carver v. Bagley, 79 Minn. 114, 116, 81 N. W. 757, to be entitled to a lien for cutting, hauling or banking logs.

And in Indiana in McElwaine v. Hosey, 135 Ind. 481, 489, 35 N. E. 272, a teamster who had hauled materials with his team for use in drilling an oil well was brought within the provisions of a statute in favor of mechanics, laborers, and materialmen.

Again, in numerous instances architects have been included in the category of laborers under laws giving a lien for labor performed or materials furnished. Stryker v. Cassidy, 76 N. Y. 50, 53, 32 Am. Rep. 262; Hughes v. Torgerson, 96 Ala. 346, 348, 11 So. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105; Knight v. Norris, 13 Minn. 473 (Gil. 438); Wanganstein v. Jones, 61 Minn. 262, 264, 63 N. W. 717; Mutual Benefit Life Ins. Co. v. Rowand, 26 N. J. Eq. (11 C. E. Green) 389, 397; Phoenix Furniture Co. v. Put-in-Bay Hotel Co. (C. C. Ohio) 66 F. 683, 685.

In West Virginia a statute (Code 1899, c. 75, § 7) accorded a lien to "every workman, laborer, or other person who shall do or perform any work or labor, by virtue of any contract for any incorporated company doing business in this State." In Wetzel & T. Ry. Co. v. Tennis Bros. Co. (C. C. A.) 145 F. 458, 462, 463, 7 Ann. Cas. 426, this statute was liberally construed in favor of a corporation which had contracted to construct an electric railway. And under a statute of Florida (Laws 1887, c. 3747, § 2) which gave a lien to any person "who shall perform any labor upon or for the benefit of any railroad" the court in Couper v. Gaboury (C. C. A.) 69 F. 7, ruled that the benefits were not meant to be confined to wageworkers alone, but extended to contractors and subcontractors likewise.

In New York one of the owners of a party wall in an unsafe condition, being unable to induce his fellow owner to join in making repairs, had the work done at his own expense and then filed a lien for one-half the amount. Taking a broad view of the statute, the court expressed itself in Kerwin v. Post, 120 App. Div. 179, 104 N. Y. S. 1005, 1007, as follows: "While the terms 'contractor,' 'subcontractor,' 'laborer,' and 'materialman' refer primarily to the man who has a formal contract with the owner, or a subcontract with the contractor, or who performs manual labor or furnishes material, they also embrace, we think, the man who buys the labor and material which enter into the improvement."

These cases all illustrate the application of the rule of interpretation which, in Maxwell on the Interpretation of Statutes (7th Ed.) p. 198, is couched in these words: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar; by giving an unusual meaning to particular words; by altering their collocation; by rejecting them altogether; or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning."

In the defendants' brief certain cases are cited wherein contractors and subcontractors are differentiated from laborers and materialmen. That such distinctions are preserved for various specific purposes will not be disputed. We have examined the cases cited; and without detailing the facts, it is sufficient to say that we do not find any of the decisions invoked pertinent to the jurisdictional question here involved. The California cases cited on the point are Miltimore v. Nofziger Brothers Lumber Co., 150 Cal. 790, 90 P. 114, and Hihn-Hammond Lumber Co. v. Elsom, 171 Cal. 570, 154 P. 12, Ann. Cas. 1917C, 798. In these cases the court was dealing with a section of the lien law in existence at that time, but repealed in 1911, which undertook to establish certain priorities between different classes of claimants. It was held that the section in question was unconstitutional in so far as it attempted to give manual laborers priority over materialmen, but was constitutional in preferring laborers and materialmen to contractors and subcontractors. It was in relation to the rank of the different liens that the differentiation of claimants was made, and nowhere in this state has it been held that a contractor or subcontractor may not "bestow" labor and furnish materials through others employed by him or acting at his instance.

The amendment conferring jurisdiction over enforcement of liens of mechanics, materialmen, artisans, and laborers is intended, like the constitutional provision itself, to have a broad and comprehensive application. In the use of those words in the statute no distinction is made between skilled and unskilled labor, or between manual labor and the service of one who provides or "bestows" and directs the labor of others acting in his behalf. All persons who perform or bestow labor in the construction of a building are brought within the statute regardless of the particular kind of service or the grade of their employment. Stryker v. Cassidy, 76 N. Y. 50, 52, 32 Am. Rep. 262; Hughes v. Torgerson, 96 Ala. 346, 348, 11 So. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105. And just as the contractor, by a fair intendment, may be deemed a laborer in so far as he provides or bestows labor, so may he be deemed a materialman within the spirit of the enactment in so far as he causes material to be furnished at his expense. In asserting his lien for labor and materials combined, he may reasonably be regarded as doing so in the duplex character of laborer and materialman.

While the views expressed have been in relation to contractors and subcontractors at large, they apply with still greater force to contractors asserting liens for street work, as in this particular case, under section 1191 of the Code of Civil Procedure. That section gives to any person performing street work at the request of an abutting owner a lien "for his work done and materials furnished."

Assuredly it is not contemplated in that section that the contractor must personally perform the labor or personally manufacture the materials. He has his lien because of the benefits bestowed by the labor and materials supplied at his expense. And in the present case there was an offer to prove that the value of the materials furnished from the contractor's general supply on hand represented 75 per cent. of the contract price. Since the value of the materials equaled three-quarters of the contract price, it would require no forced interpretation to include the contractor within the description of a materialman for the purposes of an action in the municipal court to enforce his lien. Bennett v. Davis, 113 Cal. 337, 339, 45 P. 684, 54 Am. St. Rep. 354.

[13] In our opinion, however, the comprehensive terms of the statute are intended to embrace contractors and subcontractors in general; and an equitable interpretation in promotion of the evident design of the Legislature leads us to conclude that enforcement of their liens, subject to monetary limita-

tions, is within the jurisdiction of the municipal courts.

The judgment of dismissal is reversed, and the cause remanded for a trial on the merits.

CONLAN and GOODELL, JJ., concur.

214 Cal. 308

GOLDEN GATE BRIDGE AND HIGHWAY DIST. v. FELT et al.

S. F. 14392.

Supreme Court of California.

Nov. 25, 1931.

As Modified on Denial of Rehearing Dec. 24, 1931.

1. Highways 🔑90.

Formation of Golden Gate bridge and highway district *held* legal and constitutional (St. 1923, p. 452, as amended; St. 1931, p. 77).

2. Action 🔑8.

Action not founded upon actual controversy between parties is collusive and will not be entertained.

3. Action 🔑6.

Suit, sole object whereof is to settle third persons' rights, will not be entertained.

4. Highways 🔑90.

Secretary of bridge and highway district, though removable at pleasure of board, could refuse to sign bonds he believed invalid, as regards question whether mandamus proceeding presented genuine controversy (St. 1923, p. 452, as amended).

Secretary, although ministerial officer, was not bound to take step which might conceivably involve personal liability on his part in event of subsequent judicial declaration of unconstitutionality of act or falsity of recitals in bonds, as regards question whether mandamus proceeding by board against secretary presented genuine controversy, and it was immaterial that secretary was removable at pleasure of board, for his successor would be in exactly same position.

5. Mandamus 🔑11.

Friendly mandamus proceeding by bridge and highway district against secretary to compel signing of bonds *held* to present genuine controversy, giving Supreme Court jurisdiction (St. 1923, p. 452, as amended).

Genuine controversy existed between board and secretary, where secretary contended that legislative provisions giving power to tax were unconstitutional and that recital in bonds respecting taxation was therefore incorrect, and where it appeared that same opinion had been expressed by many persons including lawyers of repute, that question was also raised in prior litigation involving district and expressly left undecided, and that able counsel were retained to present secretary in Supreme Court, and it was not suggested that they were lacking in diligence or good faith in their preparation of case.

6. Amicus curiæ 🔑3.

Mandamus proceeding, where amici curiæ were urged to present views, *held* not brought to reach collusive determination of their rights.

Such third parties could not claim proceeding was collusive, it appearing that amici curiæ were invited by petitioner for mandamus and by court to bring clients into proceeding by intervention, and that, although they refused to do so, opportunity was offered them to present to court as fully as they might deem desirable their objections to proposed bond issue, validity of which was involved in proceeding.

7. Municipal corporations 🔑64.

In California, there is no inherent right of local self-government.

8. Highways 🔑122.

Statute *held* not, by providing for appointment of board of bridge and highway district authorized to levy and collect taxes, to violate constitutional provision prohibiting Legislature from taxing for "municipal purposes," but authorizing Legislature to empower "corporate authorities" of municipality to do so (St. 1923, p. 452, as amended; Const. art. 11, § 12).

St. 1923, p. 452, as amended, did not, in providing for appointment of board of directors by boards of supervisors of counties, violate Const. art. 11, § 12, as against contention that to come within meaning of "corporate authorities" such board must be elected by electors of district. Furthermore, such district is quasi municipal corporation, and its taxing power exercised for state purpose rather than "municipal purposes."

[Ed. Note.—For other definitions of "Corporate Authorities" and "Municipal Purposes," see Words and Phrases.]

9. Highways 🔑138.

Statute *held* not to require board of bridge and highway district to fix tax rate in July (St. 1923, p. 460, § 14).

St. 1923, p. 460, § 14, providing that board of directors shall in "month of July of each year determine the amount necessary to be raised by taxation, and shall fix a rate of taxes to be levied which will raise the amount of money required by the district, * * *" clearly requires that estimate of necessary funds be made in July, but specifies no particular time for fixing of tax rate. Board may do so at any time so long as it certifies rate to boards of supervisors of respective counties "within a reasonable time previous to the time when the boards of super-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

visors are required by law to fix their tax rates."

10. Highways 🔑122.

Statute providing for bridge and highway district *held* not unconstitutional as not adequately providing for equalization of property values (St. 1923, p. 460, § 14; Pol. Code, § 3692; Const. art. 13, § 9).

St. 1923, p. 460, § 14, adequately provides for equalization, since it requires board to certify rates to boards of supervisors of each county, with direction that at time and in manner required by law for levying of taxes for county purposes such board of supervisors shall levy and collect a tax. This method involves usual process of valuation by county boards of supervisors and by state board of equalization.

11. Taxation 🔑319(2).

It must be presumed county supervisors and state equalization board will properly perform duties (Pol. Code, § 3692; Const. art. 13, § 9).

12. Highways 🔑90.

Judgment 🔑702.

In mandamus proceeding to compel signing bridge and highway district bonds, that petitions for formation of district were signed by insufficient number of electors could not be urged, in view of previous decisions and validating act (St. 1923, p. 452, as amended; St. 1931, p. 77, § 1).

Although signatures of electors were less than 10 per cent. of votes cast for Governor in general election, and these facts appeared on face of petition, nevertheless, irregularity could no longer be urged, since previous litigation involving district had as it object determination of validity of its formation and inclusion of territory within its boundaries, and decisions were conclusive on all points which were raised or could have been raised therein, and since St. 1931, p. 77, § 1, expressly confirmed organization of district.

13. Constitutional law 🔑193.

Legislature may, by curative statute, declare that nonobservance of requirements of former act shall not be subject to further inquiry.

14. Statutes 🔑97(1).

Statute, general in terms, validating organization of bridge and highway districts, *held* not "special law" (St. 1923, p. 452, as amended; St. 1931, p. 77; Const. art. 4, § 25).

[Ed. Note.—For other definitions of "Special Law," see Words and Phrases.]

15. Judgment 🔑702.

In mandamus proceeding by bridge and highway district against secretary, prior proceedings wherein others raised same point *held* res judicata of contention that boundaries were arbitrarily fixed (St. 1923, p. 452, as amended).

16. Constitutional law 🔑233.

Power of taxation given Golden Gate bridge and highway district with present noncontiguous boundaries *held* not to violate equal protection clause (St. 1923, p. 452, as amended).

17. Highways 🔑122.

Bridge and highway district is quasi municipal corporation, and its tax is not tax on property directly benefited by construction of local improvement (St. 1923, p. 452, as amended).

Its tax is general tax levied like, and for same purpose, as general municipal tax which is imposed for carrying on governmental functions and utilitarian objects of duly incorporated cities or towns.

18. Highways 🔑90.

That noncontiguous land was included in bridge and highway district *held* not ground for constitutional attack (St. 1923, p. 452, as amended).

19. Highways 🔑90.

That other land receiving equal benefit was not included in bridge and highway district, or not subject to tax, *held* not to render formation of district invalid (St. 1923, p. 452, as amended).

20. Highways 🔑122.

Amendment, after bond election, authorizing bridge and highway district to levy tax for payment of principal or interest on bonds, *held* no substantial change in obligations of taxpayers (St. 1923, p. 463, § 21, as amended by St. 1931, p. 241, § 2).

Original act, though somewhat uncertain in its details, conferred general power of taxation for bonds upon district, and amendment of 1931 merely clarified its provisions and was merely procedural in character.

21. Highways 🔑90.

Statutory indication of preferential fund for payment of interest on bridge and highway district bonds *held* not repudiation of obligation to pay interest save as indicated (St. 1923, p. 463, § 21, as amended by St. 1925, p. 720, § 4).

St. 1923, p. 463, § 21, as amended by St. 1925, p. 720, § 4, which permitted levy of taxes if revenues of district were, or in judgment of board of directors, would probably be inadequate, but qualified this by providing that until operation of work had commenced and the same had commenced to yield revenue, interest should be paid out of principal obtained from sale of bonds, did not, by qualifying clause as to interest, destroy power to tax, but merely prevented tax for interest in pursuance of previously granted power to levy such tax as long as there were funds available from proceeds of sale of bonds.

22. Statutes 🔑245.

Strict construction of tax statutes does not require unnatural construction to defeat tax.

23. Statutes 🔑219.

Official interpretation of statute has no efficacy when in conflict with law itself.

24. Highways 🔑90.

Electors voting on highway bond issue *held* presumed familiar with statute (St. 1923, p. 452, as amended).

25. Highways 🔑90.

Amendment, after bond election, that running expense of bridge and highway district during construction was deemed part of cost and payable out of proceeds of bonds, *held* not to render bonds invalid (St. 1923, p. 460, § 14, as amended by St. 1931, p. 240, § 1).

This provision placed no extra burden on taxpayers, since it contemplated no tax, and, in fact, expenses of district during such period might reasonably be said to be part of cost of construction, since district had no other purpose than construction of bridge.

26. Highways 🔑90.

Amendment, after bond election, providing for creation of funds for reserve interest, operating expenses, repairs and depreciation, and sinking fund, *held* not to render bonds invalid (St. 1923, p. 463, § 21, as amended by St. 1931, p. 241, § 2).

Such amendment had no adverse effect on validity of bonds, since, if board may validly collect money for statutory purposes, it may segregate funds so collected for these purposes, regardless of statute.

27. Highways 🔑90.

Amendment, after bond election, changing method of distribution of surplus revenues of bridge and highway district, *held* not to render bonds invalid (St. 1923, p. 463, § 21, as amended by St. 1931, p. 241, § 2).

Such amendment, changing method of distribution of surplus revenues by deducting certain sums for previous deficits, operating expenses for next six months, and reserve interest, before dividing it among counties of district, had no adverse effect upon bonds, since use of such surplus partially to reduce ultimate obligation of district could not injure taxpayers.

28. Highways 🔑90.

Amendment, after bond election for bridge and highway district, permitting interest paid out of proceeds of sale of bonds until six months after board's estimate of period of completion of work, instead of until completion, *held* not to render bonds invalid (St. 1923, p. 463, § 21, as amended by St. 1931, p. 241, § 2).

Amendment did not adversely affect validity of bonds, since purpose of amendment was to guard against default in payment of interest by reason of inability of district to secure necessary funds immediately upon completion, either by revenues or taxes, and no injury to taxpayers could result from such provision.

29. Highways 🔑90.

Amendment, declared urgency measure, of statute respecting bridge and highway districts, *held* applicable to bonds authorized by previous election (St. 1923, pp. 460, 463, §§ 14, 21, as amended by St. 1931, pp. 240, 241, §§ 1, 2).

Such amendment applied retroactively to such bonds, since amending act was declared to be urgency measure and was obviously designed to facilitate issuance of bonds by only district as yet organized under statute.

30. Statutes 🔑74(1).

Amendment of statute respecting bridge and highway districts, though applied to bonds issued under previous election, *held* not violative of uniformity of operation clause (St. 1923, pp. 460, 463, §§ 14, 21, as amended by St. 1931, pp. 240, 241, §§ 1, 2; Const. art. 1, § 11).

Contention that retroactive interpretation would result in lack of uniformity under Const. art. 1, § 11, was untenable, notwithstanding only one district was as yet organized under statute, where statute as amended applied uniformly to all bridge and highway districts and to all bonds to be issued by them.

PRESTON, J., dissenting.

In Bank.

Petition by the Golden Gate Bridge and Highway District for a writ of mandate to compel W. W. Felt, Jr., as Secretary of the Board of Directors of the Golden Gate Bridge and Highway District, to sign certain bonds proposed to be issued by said district.

Motion of amici curiæ to dismiss the petition denied. Writ granted.

Rehearing denied; PRESTON, J., dissenting.

George H. Harlan, of San Rafael, W. H. Orrick and Sullivan, Roche, Johnson & Barry, all of San Francisco (Orrick, Palmer & Dahlquist, of San Francisco, of counsel), for petitioner.

Thelen & Marrin, of San Francisco, for respondent.

John J. O'Toole, City Atty., of San Francisco, amicus curiæ.

Allen G. Wright, of San Francisco, for San Francisco Chamber of Commerce, amicus curiæ.

W. B. Mathews, of Los Angeles, for Metropolitan Water Dist. of Southern California, amicus curiæ.

Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, amicus curiæ.

Warren Olney, Jr., J. M. Mannon, Jr., A. Crawford Greene, and James D. Adams, all of San Francisco, amicus curiæ.

LANGDON, J.

This is a petition for a writ of mandate, to compel respondent, as secretary of the board of directors of Golden Gate bridge and highway district, to sign certain bonds proposed to be issued by said district. Respondent justifies his refusal by the claim that the bonds are invalid. A brief review of the history of the district is necessary for an understanding of the questions raised by this proceeding.

In 1923 the Legislature enacted a statute, the purpose of which is thus expressed in its title: "An act to provide for the incorporation and organization and management of bridge and highway districts and to provide for the acquisition and construction by said districts of [highways] bridges and approaches thereto, and for the acquisition of all property necessary therefor, and also to provide for the issuance and payment of bonds by said districts, for the levying of taxes and the collection of tolls by said districts and for the annexation of additional territory thereto." Stats. 1923, chap. 228, p. 452. The act was amended in 1925 (Stats. 1925, chap. 387, p. 714), in 1927 (Stats. 1927, chap. 344, p. 574), and in 1931 (Stats. 1931, chap. 169, p. 239). Under it, the principal steps in the organization of a bridge and highway district are as follows: The boards of supervisors in the counties in which organization is contemplated determine whether to organize, either by calling elections and securing a popular vote, or by adopting ordinances consenting to such organization, which ordinances are subject to referendum. Thereafter petitions for the formation of the district must be signed by qualified electors of each county and within the boundaries of the district, equal to at least 10 per cent. of the number who voted in the last election for Governor. These petitions are filed with the secretary of state, who publishes them for three weeks, together with a notice stating the period in which protests by property owners against inclusion of property within the district will be heard. Such protests are heard by the superior court of the county in which the protesting taxpayer resides, and the court is given power to exclude any lands from the proposed district. Its decision may be reviewed by this court.

In 1925, after the enactment of this statute, an interested group applied to the boards of supervisors of the counties of Del Norte, Humboldt, Mendocino, Lake, Napa, Sonoma, Marin, and the city and county of San Francisco, to pass uniform ordinances as provided in the act. No such action was taken in Humboldt and Lake counties, but the other six adopted the ordinances. Thereafter petitions were signed by the required number of voters in these counties and notice was published by the secretary of state. Protests were filed by property owners in all of the included counties except Del Norte. These were heard in the superior court, and in December, 1928, judgments were entered. These judgments determined that the whole of the counties of Del Norte, Sonoma, Marin, and the city and county of San Francisco would be benefited by the formation of the district. The court excluded a large portion of the county of Mendocino, and a small portion of the county of Napa. The court further determined that the county of Del Norte was properly included in the district notwithstanding the fact that it was not contiguous to the remaining territory, basing this part of its decision on the 1925 amendments to the statute permitting the inclusion of noncontiguous territory. On December 4, 1928, the secretary of state issued his certificate of incorporation of the district, and notified the boards of supervisors of these counties to appoint members of the board of directors, as required by the act. This was done, and the board then met and commenced its duties, levying and collecting taxes in the district at various times for its expenses. On August 27, 1930, it adopted plans and specifications, engineering and financial, for the construction of a bridge across the Golden Gate between San Francisco and Marin county, which was the object of its organization. By another resolution an election was called to vote upon the proposition of incurring a bonded indebtedness of $35,000,000. After due notice, the election was held on November 4, 1930, in all parts of the district, and the proposition was carried. Subsequently, on June 17, 1931, the board by resolution provided for the issuance of bonds in the principal amount of $35,000,000, and for the sale of $6,000,000 worth, to draw 4¾ per cent. interest per annum, payable semiannually. The said bonds were ordered to be dated July 1, 1931, and to be signed by the president and secretary of the board.

Notice of their intended sale was published, and a bid was received and accepted. The board then demanded that respondent sign them. Upon his refusal to do so, this proceeding was commenced.

It should be noted that the Legislature in 1931 enacted a validating statute (Stats. 1931, chap. 70, p. 77) as an urgency measure, which confirmed the incorporation of any such district as of the date of issuance of its certificate of incorporation, and declared valid the boundaries of the district, whether contiguous or noncontiguous. It also ratified the appointment of the members of the board, and all of their proceedings, including those taken for the issuance of bonds.

[1] Prior litigation has determined certain issues involved herein. A writ of mandate was issued by this court compelling the secretary of state to publish the notice required by the act upon the filing of the petitions. Doyle v. Jordan, 200 Cal. 170, 252 P. 577. Upon review in this court at the instance of protesting property owners in the counties of Mendocino, Sonoma, Napa, and the city and county of San Francisco, the judgments of the superior court with respect to the inclusion of land within the district were affirmed. Wheatley v. Superior Court, 207 Cal. 722, 279 P. 989, and memorandum decisions in Dempster v. Superior Court, 207 Cal. 795, 279 P. 991; Esaisa v. Superior Court, 207 Cal. 796, 279 P. 992, and Crawford v. Superior Court, 207 Cal. 797, 279 P. 992. An appeal was taken to the United States Supreme Court, and an application was made for a writ of certiorari. The appeal was dismissed and the writ denied. Crawford v. Superior Court, 281 U. S. 692, 50 S. Ct. 238, 74 L. Ed. 1121. As a result of these decisions, it is now settled that the proceedings taken in the formation of the district sufficiently complied with the Constitution and statutes of this state, and that such proceedings did not conflict with any right under the federal Constitution.

The present proceeding involves only the validity of the proposed bonds and the power of the district to levy taxes in payment of the interest and principal thereof. These matters were expressly reserved in the prior decisions above mentioned. The attack upon the bonds made by respondent and by amici curiæ rests upon a number of grounds, which may be briefly noted under the following heads: (1) The power of an appointive board to tax; (2) the alleged lack of provision for equalization of property values; (3) the insufficiency of the petitions of the electors in the city and county of San Francisco; (4) inequalities arising from the boundaries of the district; (5) the applicability of the statutory changes in 1931. Before considering any of these points, however, it is necessary to decide whether this proceeding is one of which this court may take jurisdiction, for the purpose of determining them. It is contended by amici curiæ, representing certain taxpayers not parties herein, that the proceeding is fundamentally collusive in its nature by reason of the fact that there is in reality no controversy between petitioner and respondent. These amici curiæ have filed and argued a motion to dismiss the petition. It is to this motion that we first address ourselves.

Preliminarily it may be observed that to grant this motion would be to prevent a speedy determination of the validity of the proposed bonds, and hence to delay the commencement of the project, perhaps for years. Such a result should be avoided if it is reasonably possible to do so. The value of the proposed bridge is state-wide; when constructed, it will become an integral part of the Redwood Highway, linking the northern and southern parts of the state with one continuous modern avenue for traffic, and also a part of the state highway entering two neighboring states. The board of directors has completed its plans, has already entered into exceptionally favorable contracts for construction, and has solicited bids for its bonds. All such bids, however, have been conditioned upon a judicial determination of their validity. The Legislature itself has, in enacting the 1931 amendments to the statute and the Validating Act, declared the urgency of prompt action, both to relieve congested traffic and to furnish work for a large number of people now unemployed. This court cannot lightly thrust aside a proceeding so important to the welfare of the citizens of the state. In our opinion, a controversy is presented of which we have jurisdiction.

[2-5] It is conceded that respondent secretary is personally desirous of a decision in favor of petitioner. In other words, this is a friendly suit. It appears that the bridge district agreed to reimburse respondent for the expense incurred by him in the litigation, in the event that the contractors or the bidders for the bonds or other persons interested did not do so. It likewise appears, however, that the bidders for the bonds have agreed with respondent to secure payment of the expenses of the litigation incurred by him, and that there is no agreement with such bidders and the district for reimbursement from the district for such expenses. These facts, amici curiæ assert, show that the proceeding is fictitious and collusive, being a mere attempt to secure an advisory opinion without an actual contest. They further contend that the validity of the bonds is not even an issue in the case, for the reason that respondent, an employee of the board, is bound to sign them regardless of his opinions, and that he may be discharged for his refusal to do so. The real controversy, they claim, is between the district and taxpayers who are not parties to the suit.

Neither on principle nor authority does this position commend itself to us. It is, of course, the prevailing doctrine in our judicial system that an action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law, is collusive and will not be entertained; and the same is true of a suit the sole object of which is to settle rights of third persons who are nót parties. Haley v. Eureka County Bank, 21 Nev. 127, 26 P. 64, 12 L. R. A. 815. That is not the situation here. Respondent, though an employee of the board and serving at its pleasure, is a public official, holding office pursuant to the provision made by the statute, and bound by oath to support the Constitution and laws of this state. His signature on the bonds is required by the statute. The bonds which he refused to sign recite that "provision has been made by law for the levy and collection of a direct annual tax upon all taxable property within said district sufficient to pay the principal and interest of this bond." He contends that the legislative provisions giving such power to tax are unconstitutional, and that the recital is therefore incorrect. This same opinion has been expressed by many persons, including lawyers of repute. It was also raised in the prior litigation involving this district, and was by this court expressly left undecided. Doyle v. Jordan, supra; Wheatley v. Superior Court, supra. If respondent's contention is sound, and he were forced to sign, he would be acting in violation of his public duty, and as sisting in the deception of prospective purchasers of the bonds. He is not bound to take a step which might conceivably involve a personal liability on his part in the event of a subsequent judicial declaration of unconstitutionality of the act, or falsity of the recitals in the bonds. Brandenstein v. Hoke, 101 Cal. 131, 35 P. 562; Denman v. Broderick, 111 Cal. 96, 43 P. 516; Hopkins v. Clemson Agricultural College, 211 U. S. 636, 31 S. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243; see discussion in Field, Unconstitutional Statutes and Public Officers, 77 Univ. Pa. L. Rev. 155; Raspacz, Officers Acting Under Void Statutes, 11 Minn. L. Rev. 585; Crocker, Liability of Public Officers, 2 So. Cal. L. Rev. 236. Though a ministerial officer, he may nevertheless refuse to sign an instrument believed by him to be invalid. City of North Sacramento v. Irwin, 94 Cal. App. 652, 271 P. 788, 272 P. 767; State v. Dolley, 82 Kan. 533, 108 P. 846. Nor is the fact that he is removable at the pleasure of the board material, for his successor would be in exactly the same position. A genuine controversy existed, therefore, between petitioner and respondent as to matters vitally affecting the duties and perhaps the liabilities of the latter. Able counsel were retained to present the case for respondent to this court, and it is not suggested that they were lacking in diligence or good faith in their preparation of the case. Under these circumstances this court can properly consider the petition and adjudicate the issues raised therein. We said in Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 516, 258 P. 387, 393: "It may well have been that the mayor of the city and the chairman of the board of supervisors would have liked to see this public improvement carried out; nevertheless, it is a fact found by the court and warranted by the evidence that these officers doubted the legal validity of the contract and the power of the city and county to enter into it. It is also true that reputable counsel of high standing representing the interested parties denied the validity of the contract and the power of the city and county to enter into it and the interests financing the construction of the improvement refused to proceed until the validity of the contract had been determined. The litigation was thereupon fought in good faith with fairness and earnestness * * * and upon such a showing the conclusion must be that the court's implied finding that collusion was absent, is supported." In Floersheim v. Board of Commissioners, 28 N. M. 330, 212 P. 451, 453, referred to in the foregoing decision, the court pointed out that there is nothing improper in a friendly suit by a party who, though attacking the validity of bonds, is hopeful that they will be upheld: "The personal desires of the parties as to the result of the litigation are of no moment, provided no fraud or collusion is resorted to." See, also, State v. Dolley, 82 Kan. 533, 108 P. 846; W. E. Bowen Improvement Co. v. Van Hafften, 209 Mo. App. 629, 238 S. W. 147; Parker v. State, 132 Ind. 419, 31 N. E. 1114; Ex parte Steele (D. C.) 162 F. 694; Cone v. Gilmore, 79 Or. 349, 155 P. 192; McCoy v. Carran, 179 Ky. 590, 201 S. W. 463.

This court has over a long period of years taken jurisdiction in many proceedings substantially similar to the instant case; that is to say, it has, on petition for writ of mandate, determined the validity of the bonds or contracts of a public corporation. A few of the more recent cases are Los Angeles County Flood Control District v. Wright (Cal. Sup.) 2 P.(2d) 168; California Toll Bridge Authority v. Wentworth (Cal. Sup.) 298 P. 485; City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630; Slavich v. Hamilton, 201 Cal. 299, 257 P. 60; City of Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333; La Mesa, etc., Irr. Dist. v. Halley, 197 Cal. 50, 239 P. 719; Montecito County, etc., District v. Doulton, 193 Cal. 398, 224 P. 747; Los Angeles County, etc., District v. Hamilton, 177 Cal. 119, 169 P. 1028. Several earlier decisions have been cited by amici curiæ which might appear, to some extent, in conflict with this array of authority. In City of Los Angeles v. Lelande, 157 Cal. 30, 106 P. 218, mandate was sought to require the city clerk to certify that an ordinance was *duly passed*, and he based his refusal on the claim that it was *illegal*. The court, in a brief opinion, denied the petition. In County of Orange v. Backs, 77 Cal. App. 744, 247 P. 519, a similar case, involving the duty of a county clerk to attest an ordinance calling an election to determine whether bonds should be issued, he refused on the ground of the illegality of the bonds if they should be voted. In Marin Municipal Water District v. Dolge, 172 Cal. 725, 158 P. 187, the proceeding was to compel the auditor of the district to countersign certain bonds, and the court said that there was no statutory necessity that he do so; the requirement being established by the mere direction of its board of directors. It is contended by petitioner that there are important differences between the instant case and those just discussed, in that the signature of respondent is a statutory requirement, and such signature attests not the due passage of an ordinance, but the obligation of the bond itself. Irrespective of such differences, however, the cases are contrary to the uniform course of decision pursued by this court in granting writs of mandamus, and any language in them which might suggest that it is always the duty of a ministerial officer to act according to the direction of his superiors irrespective of his own views as to the validity of such action, must be considered dictum, and disapproved by later decisions.

[6] Amici curiæ were invited by petitioner and by this court to bring their clients into this proceeding by intervention, a procedure which has been heretofore permitted by this court (Wright v. Jordan, 192 Cal. 704, 221 P. 915), provided that the issues raised were relevant. La Mesa, etc., Irr. District v. Halley, 195 Cal. 739, 235 P. 999. Opportunity was also offered them, whether they intervened or not, to present to the court as fully as they might deem desirable, their objections to the proposed bond issue. Their refusal to intervene was chiefly based upon what we consider to be a wholly untenable ground, namely, that it might jeopardize their right of appeal to the United States Supreme Court. We need not enter into a discussion of this or the other grounds for such refusal, since the only bearing it has on the motion to dismiss is in relation to the claim of collusive action between petitioner and respondent. It surely cannot be said that this proceeding was brought to reach a collusive determination of the rights of such third parties, when they were urged to come into court and present their own views of the case.

We are satisfied that this court may properly determine the issues hereinbefore mentioned, and that our determination will have the usual force and effect of a final judgment on those issues. Price v. Sixth District Agricultural Ass'n, supra. The motion to dismiss is therefore denied, and we come now to a consideration of the merits of the controversy.

[7, 8] The first objection made by respondent is that the bridge and highway district act violates article 11, § 12, of the California Constitution, in providing for the *appointment* of the board of directors of petitioner by the boards of supervisors of the counties. The said section is as follows: "The legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the *corporate authorities* thereof the power to assess and collect taxes for such purposes." Respondent contends that to come within the meaning of "corporate authorities," such board must be *elected* by the electors of the district. Preliminarily, it may be noted that this contention is grounded mainly upon the notion of an "inherent right" of local self-government, which is contrary to the great weight of authority, and cannot be said to have been adopted in this state. See Johnson v. San Diego, 109 Cal. 468, 42 P. 249, 30 L. R. A. 178; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244; Lillard v. Melton, 103 S. C. 10, 87 S. E. 421; Trenton v. New Jersey, 262 U. S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A. L. R. 1471; State v. Williams, 68 Conn. 131, 35 A. 24, 421, 48 L. R. A. 465; 6 R. C. L. 23; 12 C. J. 754; 1 Dillon, Municipal Corporations (5th Ed.) 154; McBain, Right of Local Self-Government, 16 Columb. L. Rev. 190, 299. Furthermore, such a contention takes no account of the manifest assent of the voters expressed in their passage of the ordinances and their favorable vote at the bond election. But considering the language of the Constitution, we think the suggested interpretation is unsound, and is, in fact, inconsistent with other provisions. Thus, article 11, § 5, provides for the *election or appointment* of county, township, and municipal officers; and article 20, § 4, declares generally that all officers whose election or appointment is not provided for elsewhere in the Constitution, and *all officers whose offices or duties may hereafter be created by law*, "shall be elected by the people, or appointed, as the Legislature may direct." For a discussion of the interpretation of similar constitutional provisions, see Milheim v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 P. 649; State v. Edwards, 38 Mont. 250, 99 P. 940; State v. Cooney, 70 Mont. 355, 225 P. 1007.

Irrespective of this interpretation of "corporate authorities," the objection must fall by reason of the prior decisions of this court to the effect that the section is limited to taxes for local "municipal purposes" and has no application to the taxing power of a district organized for a state purpose. That the development of the highway system of the state is a state purpose is obvious, and it has been so declared. Matter of Schuler, 167 Cal. 282, 139 P. 685, Ann. Cas. 1915C, 706. In Wheatley v. Superior Court, supra, 207 Cal. 722, 726, 279 P. 989, 991, we pointed out that the petitioner was a quasi municipal corporation, substantially similar to "a municipal water district, a public utility district, a municipal utility district, and a metropolitan water district." The effect of this holding as to its nature, coupled with the fact that it has a state purpose, is to take it out of the above-mentioned constitutional limitation, and to bring it within the rule that the Legislature has the power to provide for taxation by appointive boards in such districts. Stuckenbruck v. Board of Supervisors, 193 Cal. 506, 225 P. 857; City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630; Henshaw v. Foster, 176 Cal. 507, 169 P. 82; Pixley v. Saunders, 168 Cal. 152, 141 P. 815.

[9-11] The second objection of respondent is that the act is unconstitutional in failing to make definite provision for equalization of property values and the ascertainment of tax rates. The argument is that under the statute the tax rate must be fixed in July; that the county boards of supervisors sit as boards of equalization in July, and the state board of equalization sits in August; and that therefore the rate must be fixed prior to the determination of the property values. Although it has been declared that there is no constitutional necessity that equalization precede the fixing of the tax rate (People v. Latham, 52 Cal. 598), section 14 of the act does not require the construction given it by respondent. It reads, in part, as follows: "The board of directors shall in the month of July of each year determine the amount necessary to be raised by taxation, and shall fix a rate of taxes to be levied which will raise the amount of money required by the district. * * *" This section clearly requires that the *estimate* of necessary funds be made in July, but it specifies no particular time for the fixing of the tax rate. The board may do so at any time so long as it certifies the rate to the boards of supervisors of the respective counties "within a reasonable time previous to the time when the boards of supervisors are required by law to fix their tax rates." The further suggestion that no adequate provision for equalization exists is equally untenable. Section 14 requires the board to certify the rates to the boards of supervisors of each county "with a direction that at the time and in the manner required by law for the levying of taxes for county purposes such board of supervisors shall levy and collect a tax. * * *" It is plain that this method involves the usual process of valuation by county boards of supervisors and by the state board of equalization. California Constitution, art. 13, § 9; Pol. Code, § 3692. It must be presumed that such boards will properly perform the duties imposed upon them by the Constitution and the general law.

[12-14] Another contention made by respondent and also by amici curiæ is that the city and county of San Francisco was never properly made a part of the district. By some curious mischance, only 13,094 signatures of electors were obtained on the petition, and the total number of votes cast for Governor in the general election was 132,225. These facts appeared on the face of the petition. Nevertheless, this irregularity can no longer be urged. The previous litigation involving the district had as its object the determination of the validity of its formation and the inclusion of territory within its boundaries. The decisions in Doyle v. Jordan, and Wheatley v. Superior Court, supra, are conclusive on all points which were raised or could have been raised therein. Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Floersheim v. Board of Commissioners, 28 N. M. 330, 212 P. 451; State v. Willis, 19 N. D. 209, 124 N. W. 706. The passage of the Validating Act, moreover, removes all possible doubt as to this result. Section 1 of that act expressly confirms the organization of the district. Stats. 1931, chap. 70, p. 77. The defect under consideration was a failure to comply with the terms of the prior statute; there was no violation of the Constitution. In such case, the Legislature has power, by the enactment of a curative statute, to declare that the nonobservance of any of the requirements of the former act shall not be subject to further inquiry. Marr v. Southern California Gas Co., 198 Cal. 278, 245 P. 178; Watkinson v. Vaughn, 182 Cal. 55, 186 P. 753; Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 169 P. 1028; Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 P. 113; Wood v. County of Calaveras, 164 Cal. 398, 129 P. 283; Chase v. Trout, 146 Cal. 350, 80 P. 81. The assertion that this validating act is special legislation is without foundation. It is general in its terms, and though it applies only to this one district which has already been organized, it is nevertheless the rule that the constitutional inhibition (Const. art. 4, § 25) does not apply. San Pedro, etc., R. R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L. R. A. (N. S.) 686.

[15] Another objection of respondent and amici curiæ which is urged with some force is that the boundaries of the district are fixed so arbitrarily as to constitute a denial of equal protection of the laws. The particular ground for this contention is the inclusion of Del Norte county, noncontiguous with the rest of the district, and separated from the remainder by Humboldt county, which did not come in. The provision for the inclusion of noncontiguous territory was, as hereinbefore mentioned, part of the amendments of 1925. The possibility of one county which receives benefit from the project refusing to pass the ordinance was in the contemplation of the organizers of the district and was known to all of the boards of supervisors when they passed the ordinances;

and the present boundaries of the district, embracing noncontiguous territory, were likewise known to the electors when they voted in favor of the bond issue. In addition, taxpayers had the right to seek a referendum upon the passage of any ordinance, and the right to protest to the superior court against the inclusion of any of their lands. Finally, in the prior cases before this court, they had the opportunity to raise this point, and, in fact, it was raised and thoroughly argued. The decisions of this court in Doyle v. Jordan, and Wheatley v. Superior Court, supra, are conclusive on the validity of the organization of the district. In short, the point urged now by respondent, and by amici curiæ on behalf of certain taxpayers not parties herein, could have been presented in the regular manner provided by the act and within the three months' period specified therein from the date of issuance of the certificate of incorporation (see Miller & Lux v. Secara, 193 Cal. 755, 227 P. 171), and was actually presented by other taxpayers and decided adversely to their claims. The decisions are final, and the matter is res judicata at this time. Price v. Sixth District Agricultural Ass'n, supra; Farncomb v. City and County of Denver, 252 U. S. 7, 40 S. Ct. 271, 64 L. Ed. 424.

[16-19] It is argued, however, that the refusal of this court in the Doyle and Wheatley Cases to determine the power to tax leaves open the question of the validity of the boundaries, in so far as the taxing power is concerned. In order to lay at rest any doubt as to this point, therefore, we now hold expressly that the power of taxation given to the district with its present boundaries does not violate the constitutional guaranty of equal protection. It is not an assessment district, where the tax must be levied in accordance with benefits actually received by the individual taxpayer. It is, as we declared in the Wheatley Case and as hereinbefore repeated in this opinion, a quasi municipal corporation. As such, its tax "is not a tax or assessment on property directly benefited by the construction of some local improvement, but is a general tax levied just as, and for the same purpose that, any general municipal tax is imposed for carrying on the governmental functions and utilitarian objects of duly incorporated cities or towns." In re Orosi Public Utility District, 196 Cal. 43, 58, 235 P. 1004, 1010. The inclusion of noncontiguous land in such a district is not a ground for constitutional attack. Nor is it a valid objection that other land which receives equal benefit is not included or for some other reason is not subject to tax. As the court said in Randolph v. County of Stanislaus, 44 Cal. App. 322, 330, 186 P. 625, 628. "It is a matter of common knowledge that in the state of California municipal corporations are not often contiguous, but are separated by intervening territory, and if the formation of districts composed of two or more municipal corporations is to be confined to municipal corporations that are adjacent to each other, then very few public utility districts composed entirely of municipal corporations can be formed in the state of California." See, also, People v. Town of Loyalton, 147 Cal. 774, 82 P. 620.

There remains finally the problem of the amendments to the statute enacted in 1931, by which changes were made in sections 14 and 21 (St. 1931, pp. 240, 241, §§ 1, 2). It is most vigorously contended by respondent and by amici curiæ that these amendments, enacted after the bond election, make such a substantial change in the conditions of the authorization of the bonds as to invalidate them if they are issued under the act as amended. The argument, directed mainly at the changes in section 21, is to the effect that the original act provided for the issuance of certain bonds upon a vote of the electors; that prior to completion of the project the principal and interest of such bonds were payable only from proceeds of the sale of the bonds; and that no tax could be levied unless and until the bridge were completed. In its present form section 21 plainly authorizes a tax prior to such completion, and in effect it places the taxing power of the district behind the bonds by permitting either principal or interest to be raised by taxation where necessary. Hence, if the interpretation of the original act urged by respondent and amici curiæ is correct, a basic change was made.

[20-22] Petitioner's answer is twofold: First, it is stated that the original act, though somewhat uncertain in its details, conferred the general power of taxation for its bonds upon the district and that the amendments of 1931 clarified its provisions and were merely procedural in character. After a careful study of the original act, we have reached the same conclusion. Section 21, prior to 1931, read in part as follows: "If the revenues of the district are, or in the judgment of the board of directors, will probably be inadequate for any cause to pay the principal or interest on any bonded debt of the district, as it becomes due, the board of directors must cause a tax to be levied as herein provided sufficient to provide for such deficit and to pay the amount of such principal and interest as the same becomes due, except that until the operation of the works of the district has commenced, and the same commenced to yield a revenue, the interest on the bonded debt shall be paid out of the principal obtained from the sale of the bonds, and after the operation of its works no taxes shall be levied except for deficits, either actually incurred or estimated for the fiscal year in which the same are levied. * * *"

St. 1923, p. 463, § 21, as amended by St. 1925, p. 720, § 4.

The statutory direction is clear up to a certain point: Until the bridge is built and revenues are received, interest on the bonds is to be paid out of the proceeds of the sale of the bonds. The language used contains the assumption that until the bridge is built and money is earned, there will be sufficient funds derived from the sale of the bonds to meet the interest payments. But as to the procedure in the event of a lack of such funds, section 21 is silent. And that is all that can be said in support of the position of respondent and amici curiæ. Section 21 was drafted with no express provision for that particular contingency. It does not state that interest shall be payable *only*, *solely*, or *exclusively* out of the designated fund; nor does it say that it shall not be paid at all until the bridge is in operation. The indication of a preferential fund from which interest is to be paid cannot be deemed to imply a repudiation of the obligation to pay interest save in the manner indicated. Avery v. Job, 25 Or. 512, 36 P. 293; United States ex rel. Concord Sav. Bank v. Fort Scott, 99 U. S. 152, 25 L. Ed. 348; United States ex rel. Johnston v. County Court, 96 U. S. 211, 24 L. Ed. 628; Norris v. Montezuma Valley Irr. District (C. C. A.) 248 F. 369.

Considering the situation as to the *principal* of the bonds, the objection is even less impressive. The clause which reads "except that until the operation of the works of the district has commenced" applies only to *interest*. The preceding provision, covering "principal or interest," permits the levy of taxes if the revenues of the district are, "or in the judgment of the board of directors, *will probably be* inadequate." The power to tax for the principal of the bonds is directly given by this section, without any qualification at all; and the same is true of the power to tax for the interest, unless the power as to interest is destroyed by the subsequent clause. It would be most unreasonable for the Legislature to provide that the district could, by taxes, meet the binding obligation of the principal of the bonds, and could never by such method meet the equally binding obligation of the interest. The unreasonableness of such an interpretation is further apparent if the first and second parts of the section are compared. The first part declares the right to tax for principal *or interest*; can it be assumed that the legislature in one sentence intended both to give and to take away that power? Such a result cannot be conceded unless the language leaves no alternative. In fact, it does leave an alternative which is both obvious and reasonable. The qualifying clause as to interest does not destroy the power to tax, given by the preceding language; it merely restricts that power. It prevents any tax for interest in pursuance of the previously granted power to levy such tax as long as there are funds available from the proceeds of the sale of the bonds. We are convinced that this was the legislative intention and that it is reasonably deducible from the language of the section. We are aware of the doctrine of "strict construction" of tax statutes, but to say that such a statute must be strictly construed does not mean that it is to be given an unnatural construction to defeat the tax. It should be construed reasonably. Riley v. Havens, 193 Cal. 432, 225 P. 275; Estate of Parrott, 199 Cal. 107, 248 P. 248; see 2 Cooley on Taxation (4th Ed.) 1123.

We have thus far confined ourselves to section 21, but an examination of other parts of the original act fully confirms our conclusion. Considered as a whole, the act made the bonds a binding obligation of the district. Subdivision 8 of section 10 gives such a district the power "to borrow money, incur indebtedness, and to issue bonds or other evidences of such indebtedness." Section 15 provides for the calling of an election when it is deemed necessary to incur a "bonded indebtedness." Section 17 provides that any bonds issued by it are "legal investments for savings banks," and they are given "the same force and value and use as bonds issued by any municipality." If the district is not obligated to pay either principal or interest save from revenues, its bonds cannot be an "indebtedness" of the district; and it would be in the highest degree absurd to make them legal investments for savings banks unless the district stood behind them. But if they have the force, value and use of municipal bonds, they are, like municipal bonds, general obligations in payment of which taxes can be levied. Finally, section 10, subd. 9, specifically provides that such a district shall have power "to cause taxes to be levied for the purpose of paying running expenses, the organization expenses and the investigation expenses of the district before the issuance of bonds, and after the issuance of bonds to cause taxes to be levied for the purpose of paying any obligation of the district. * * *" This language is certainly broad enough to authorize taxes to pay the obligation of the district incurred through the issuance of bonds.

[23, 24] Upon the theory that the act at least was ambiguous in its provisions prior to 1931, amici curiæ advance the further contention that the ambiguity was resolved by the district against the taxing power by reason of the publication of a 110-page report of the chief engineer on the general plan of the project, which contained the brief declaration that "taxes may be levied only for preliminary expenses," "or to cover deficiencies of revenue after construction has been

completed." It seems too plain for argument that this statement, part of a lengthy report on other subjects, cannot be deemed to be an official interpretation by the district of the legal effect of the act. In any event, it has no efficacy when in conflict with the law itself. The proposition as it appeared on the ballot was more accurately expressed. It specified that "interest shall be paid" out of proceeds, and did not use the word "only." It also stated that the proposition was to "incur a bonded indebtedness." Although this point goes only to the good faith of the district and not to the validity of the bonds, still it may not be amiss to express our view that the voters were not deceived by the report, the ballot, or the original act. They believed that proceeds from the sale of bonds and revenues from the operation of the bridge would be resorted to for the payment of interest and principal before any tax would be levied, and in this belief they were of course correct. They were, however, presumed to be familiar with the statute (Los Angeles County Flood Control District v. Wright [Cal. Sup.] 2 P.(2d) 168; Inglewood v. County of Los Angeles, 207 Cal. 697, 280 P. 360), and they certainly knew that a costly project was to be built and financed by bonds selling at par with a low rate of interest. All of these factors tend to indicate full knowledge on their part that the bonds were to be general obligations of the district, supported by the power of taxation.

[25-28] The other changes made by the 1931 amendments require only brief mention. Section 14 was amended (St. 1931, p. 240, § 1) to provide that running expense of the district during the period of construction was to be deemed part of the cost of construction and could be paid out of proceeds of the sale of the bonds. This places no extra burden on taxpayers, since it contemplates no tax; and, as a matter of fact, the expenses of the district during that period may reasonably be said to be part of the cost of construction, since the district has no other purpose than the construction of the bridge. Section 21 provides for the creation of certain funds for reserve interest, operating expenses, repairs and depreciation, and a sinking fund. If the board may validly collect money for its statutory purposes, it may segregate the funds so collected for these purposes, and doubtless would have had such power without express statutory provision. Section 21 further authorizes the board to borrow money in anticipation of taxes, to meet deficits in payment of principal or interest of bonds. The original act gave express power to borrow money for all proper purposes of the district. Section 10, subd. 8. Another amendment to section 21 changes the method of distribution of surplus revenues, by deducting certain sums for previous deficits, operating expenses for the next six months and reserve interest, before dividing it among the counties of the district. Plainly, the use of such surplus partially to reduce the ultimate obligation of the district cannot injure taxpayers. Finally, section 21 as amended permits interest to be paid out of proceeds of the sale of bonds until six months after the board's estimate of the period of completion of the work, instead of until completion, as previously specified. The purpose of this is to guard against default in the payment of interest by reason of inability of the district to secure the necessary funds immediately upon completion, either by revenues or taxes. No injury to taxpayers can result from this provision.

[29, 30] Our conclusion, already stated, is that the amendments of 1931 were of a procedural character, and made no substantial change in the obligations of the taxpayers. It is therefore unnecessary to consider the contention of petitioner that even substantial changes might be validly made by the Legislature after a bond election, where, as here, there is no constitutional requirement of an election. Nor is it necessary to dwell upon the contention that as a matter of construction the amendments should not be applied retroactively to the bonds authorized at the election of November 4, 1930. The legislative intention is unmistakable; the amending act is declared to be an urgency measure, and was obviously designed to facilitate the issuance of bonds by petitioner, the only district as yet organized under the statute. The further contention of amici curiæ that such a retroactive interpretation would result in a lack of uniformity under article 1, § 11, of the California Constitution, is equally untenable. The statute as amended applies uniformly to all bridge and highway districts and to all bonds to be issued by them.

There being no merit in any of the objections to the issuance of the proposed bonds, it is the duty of respondent to sign them as directed by petitioner. It is therefore ordered that the writ of mandate issue.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

PRESTON, J.

I dissent.

Not so much from the conclusion as from the reasoning of the main opinion that assumes to make applicable to this bond issue the so-called 1931 amendments to the act and also from the further reasoning employed to hold that the judgment in this action is res adjudicata on the question of the power to tax the property of the district to retire the indebtedness.

I would have no objection to a holding of the court in this action that it is the plain duty of the respondent to attest these bonds, if the above-mentioned propositions were eliminated as grounds for the conclusion. In other words, the respondent, as an official, may properly question the validity of the organization of the district and the regularity of the bond election and any subsequent proceedings pursuant to the act up to the point of issuance of the bonds, but no further, for it must not be overlooked that the express intent and tenor of the legislation under which petitioner is organized is to retire the bonds issued from the revenues received from the operation of the bridge and not from taxation; hence the question of taxation may never arise. The power to tax comes into being only upon the happening of a certain event. Or to put it still another way: The bonds are regularly issued whether the power to tax the property of the district for their payment is conditional or absolute; therefore, the opinion, in my judgment, makes a gratuitous excursion into fields beyond the scope represented by respondent.

This dissent need not be extended and I shall confine my discussion to the following propositions: (1) Power to tax property of the district involves serious state and federal questions which cannot be settled by determination of the issues in this proceeding and moreover as a matter of policy should not be attempted. (2) The 1931 amendments to the act import radical and revolutionary alterations in the liability of the taxpayers of the district, to their detriment, and the said amendments should be held inapplicable to the bond election already held. These questions will be considered in the order named.

This is a mandamus proceeding by the district against its own secretary to compel him to subscribe or attest the bond issue. Numerous taxpayers have been allowed to appear as amici curiæ to urge that grave legal questions are involved and that respondent cannot and does not represent them as to such issues and, moreover, as to them, this court is entirely without jurisdiction. I see no reason why respondent, even though personally interested adversely to the taxpayers, may not officially represent them in all matters germane to the issues made by the pleadings but this is far from authorizing the determination of questions outside these issues.

The act of 1923, as amended in 1925, contained sections 20 and 21 which read as follows:

Section 20 (Stats. 1923, p. 463). "The board of directors shall require the general manager to furnish an estimate of the rates necessary to pay the obligations of the district, and upon the recommendation of the general manager, or such modifications thereof as they may adopt, shall fix such rate as will pay the operating expenses of the district, provide for repairs and depreciation of works, owned or operated by it, pay the interest on any bonded debt, and so far as possible, provide a sinking or other fund for the payment of the principal of such debt, as it may become due, it being the intention of this act to require the district to pay the interest and principal of its bonded debt from the revenues of the district."

Section 21 (Stats. 1925, p. 720, § 4). "If the revenues of the district are, or in the judgment of the board of directors, will probably be inadequate for any cause to pay the principal or interest on any bonded debt of the district, as it becomes due, the board of directors must cause a tax to be levied as herein provided sufficient to provide for such deficit and to pay the amount of such principal and interest as the same becomes due, except that until the operation of the works of the district has commenced, and the same commenced to yield a revenue, the interest on the bonded debt shall be paid out of the principal obtained from the sale of the bonds, and after the operation of its works no taxes shall be levied except for deficits, either actually incurred or estimated for the fiscal year in which the same are levied. If from any cause the revenues of the district shall be more than adequate to pay all of the expenses of the district for the current year and surplus shall be divided by the directors of the district, and apportioned to the respective counties within the district in the proportion which the assessed value of property within such county, city and county or parts of counties within the district bears to the total assessed value of property within the district."

It can thus be seen that the bonds voted by the taxpayers of this district rest primarily upon the revenues from the operation of the improvement. The power of taxation is conditional; it may be exercised only to supply a deficit in the revenues and this only an anticipated deficit for the current fiscal year. Liability is thus made secondary and indemnatory and not primary. If the revenues are sufficient (and the board has power to make them such), the question of taxation will not arise. In refusing to sign, respondent, therefore, is "borrowing trouble" and anticipating events which the act contemplates that the board, by a fixation of proper tolls, shall prevent. For example, in the Statutes of 1929, chapter 763, pp. 1492, 1494, §§ 5 and 8, are found provisions authorizing a bond issue to span San Francisco Bay resting solely upon the revenues to be derived from the operation of the improvement; the right to tax nowhere exists, yet the bonds may issue for that project. It may even be conceded that as a legally organized district, the abstract right to tax is involved in the issues represented by respondent. But this, if true, is far from saying that respondent represents the issue as to when taxation under this particular act may be had.

The doctrine of Price v. Sixth District, 201 Cal. 502, 258 P. 387, must not be perverted and extended to issues not properly included in the pleadings as made or in the issue as determined. The issue held determined in that case related simply to the validity of a certain contract and the power and authority of the public officers involved to execute it. The holding in that case does not foreclose inquiry into questions that were not a necessary ingredient of the issue determined. The issue as to when the power to tax arises and the conditions under which such power may be exercised are not necessarily involved in the validity of the district or the regularity of the proceedings leading up to the bond issue. In other words, the power of taxation may or may not come into being upon the happening of certain eventualities and such a contingency is no necessary part of the issue between the district and respondent. That the issue of taxation has not been foreclosed by any previous decision of this court has twice been expressly held. See Doyle v. Jordan, 200 Cal. 170, 190, 191, 252 P. 577, and Wheatley v. Superior Court, 207 Cal. 722, 726, 279 P. 989, 991, where the court in reviewing the Doyle Case says: "* * * It is urged that the act under consideration presents certain unconstitutional features with reference to its provisions for taxation, and we are asked to decide that question here. We think such a problem is not presented at this time. In the case of Doyle v. Jordan, supra, it was expressly stated that, regardless of the validity of the taxing provisions of the act, the district, when formed, may become a valid and constitutional agency of the state, and that, if the directors thereof have been given any unlawful powers, in a proper proceeding, when they attempt to exercise them, such exercise will be controlled or prevented by the courts. As in the case of Doyle v. Jordan, supra, we are herein concerned only with the proceedings incorporating the district."

It may not be said that respondent is interested in the validity or invalidity in the recital on the face of the proposed bonds, as follows: "* * * That provision has been made by law for the levy and collection of a direct annual tax upon all taxable property within said District sufficient to pay the principal and interest of this bond." This is at most but a mere conclusion of law; it is not a recital of fact as was the case in Municipal Imp. Co. v. Thompson, 201 Cal. 629, 258 P. 955. If the power to tax exists, it exists regardless of the statement on the face of the instrument; if the power to tax does not exist, no recital in the bond can confer it.

But aside from the contention that a foreign issue is injected into this case, we may at once see from a glance at a map of the district that when the question of taxation arises, if it does arise, state and federal questions of a serious nature will be presented by reason of the omission from the boundaries of the district of large areas which as a matter of judicial knowledge may be seen to be equally if not more benefited than some of the areas included within the district. Del Norte county, for example, is probably more than one hundred miles distant from the nearest boundary of the contiguous area comprising the body of the district. It requires no resort to evidence but is clear from facts of which this court may take judicial knowledge that the property owners of Humboldt, a large and prosperous county of the state, and of Lake county, lying between the separated areas of the district, are equally if not more benefited than the property owners of numerous areas within the district such as, for example, said Del Norte county and Mendocino county. That such discrimination raises the question of due process of law and equal protection of the law has been repeatedly held by the Supreme Court of the United States. As said in Memphis & Charleston Ry. v. Pace, 282 U. S. 241, 246, 51 S. Ct. 108, 110, 75 L. Ed. 315: "But, however the tax may be laid, if it be palpably arbitrary, and therefore a plain abuse of power, it falls within the condemnation of the due process clause, Houck v. Little River District, supra [239 U. S. 254, 36 S. Ct. 58, 60 L. Ed. 266]; Valley Farms Co. v. Westchester, supra [261 U. S. 155, 43 S. Ct. 261, 67 L. Ed. 585]; and if it be manifestly and unreasonably discriminatory it falls within the condemnation of the equal protection clause. Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 36 S. Ct. 254 [400], 60 L. Ed. 523 [1239]; Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S. 658, 41 S. Ct. 604, 65 L. Ed. 1151; Thomas v. Kansas City Southern Ry. Co., 261 U. S. 481, 43 S. Ct. 440, 67 L. Ed. 758; Road Improvement District No. 1 v. Missouri Pacific R. R. Co., 274 U. S. 188, 47 S. Ct. 563, 71 L. Ed. 992."

In Milwee v. Tribble, 139 Ark. 574, 214 S. W. 56, 57, the court said: "The act is unconstitutional and void because, as shown by the allegations of the complaint, it contains an entire section 'which is situated at a distance of five miles from the remaining lands described in the act and constituting the body of the district,' and excludes, or rather does not include, the lands intervening. * * * It is impossible that the lands in section 18, and the other lands five miles distant, constituting the main body of the district, would be benefited, while the intervening lands receive no benefit whatever. The act, therefore, upon its face shows an arbitrary discrimination between the landowners, who necessarily derive benefit from the improvement. * * *"

It is no answer to this contention to say that the taxpayers are estopped to raise the question of the power of taxation by reason of the recent bond election. In the first place, this is begging the question because the taxpayers may have and doubtless did believe that a direct tax would never be levied. I say this because the record contains a printed report of the chief engineer, which presumably was widely circulated among the voters and which contained in bold type these words: "Taxes may be levied only * * * to cover deficiencies of revenue after construction has been completed." Indeed, the above language is almost a direct quotation from section 21 of the act itself which states "no taxes shall be levied except for deficits."

Nor can it be said that the taxpayers are estopped because the act provides a method by which a hearing may be had as to whether their lands will or will not be benefited by the improvement, for the act nowhere provides that they may have any of their lands excluded upon the ground that lands outside the district were arbitrarily excluded therefrom. The act is wholly lacking in conferring power to extend this kind of relief. This grotesque situation can be logically emphasized by supposing that the district were composed of Marin, San Francisco and Del Norte counties only, omitting therefrom Sonoma, Mendocino, Lake, and Humboldt counties. Could it then be said that there was no discrimination or arbitrary action by reason of the omission of all these intervening territories from the district? This, under the procedure authorized by the act, might well happen. It is too clear for controversy that the district is a legalized anomaly and when it comes to the point of attempting to place a tax upon the property of the district as constituted, serious and far-reaching questions, both under the state and federal Constitutions, will arise. It is putting this court in an awkward predicament to anticipate these questions and to attempt in a friendly suit between the district and its secretary, to force upon the taxpayers of the district, a liability about which they have had no opportunity to be heard and over which the court in fact has no jurisdiction.

The handling in the main opinion of the question of the effect of the 1931 amendments to the act under which the district was formed and the bonds voted is even more open to question than is the other position disclosed by the above discussion. We have already noted that under section 20 of the act, the express intent of the Legislature was "to require the district to pay the interest and principal of its bonded debt from the revenues of the district" and that the revenues only were to be resorted to for operating expenses, repairs, depreciation, sinking funds, etc.; that under no circumstances was taxation to be resorted to except to pay items of principal and interest for the current fiscal year where the revenues had become or might become insufficient. This fact, which lies at the foundation of the proper interpretation of the whole act, is entirely omitted from discussion in the main opinion. That the bonds shall be retired from the revenues and the tolls shall be fixed to accomplish this purpose, is the keystone of the entire scheme for bridging the Golden Gate. Only a tax for deficiencies in revenue may be allowed under the act and this conforms to the decision of the district itself at the time when, with the provisions of sections 20 and 21 in mind, it stated that taxes would be levied only for deficiencies. The plain meaning of these sections is that after the bridge is built and opened to traffic, tolls fixed, and revenues begin to come in, if a deficit as to principal and interest on the bonds exists or is foreseen for the current fiscal year, then and then only may a tax be levied and that only to relieve the then present deficit. In furtherance of this requirement, accruing interest prior to construction and operation must be paid from the proceeds of sale of the bonds. In other words, on this bond issue taxpayers may rest secure from tax until construction of the bridge and its operation and they may then be taxed only respecting the bonds for yearly deficits in revenue which the district is charged with the duty of preventing by the levy of sufficient tariff rates. The liability of the taxpayers is that of a guarantor and not that of a maker of an obligation. The main opinion undertakes to divorce section 21 of the original act from section 20, which it ignores, and thereby assumes ground upon which to indulge a strained, artificial, and in fact absurd construction, a construction that petitioner even shows a lack of faith in.

Now come the amendments of 1931, and what do they provide? In short, they relegate revenue from the operation of the bridge to a minor place in the scheme and make the obligation of the taxpayers primary—not only after construction of the bridge, but before as well. In other words, the liability of the bondholders is not to provide a fund that shall build and put in operation a bridge where tolls are the primary source of revenue but the responsibility for the bridge, its construction and perhaps for a new bond issue, are all lifted from the bondholders and shifted to the shoulders of the taxpayers. What will a taxpayer think when he realizes what has been done? What will future electors think when they come to vote at a bond election, reflecting that in the Golden Gate bridge and highway district the voters asked "for bread" and "received a stone"? By this legislation characterized as an amendment to section 21, through circumlocution, by retroactive interpretation and by the free use of assumptions and innuendos, the conditional liability of the taxpayers is made an absolute and primary one.

It extends the time of payment of interest from the proceeds of the bond sales to a period of six months beyond the estimated period of completion of the structure. This the taxpayers could hardly object to. But with this concession as an allurement, comes the next provision that in July of the contemplated year of completion and pending this estimated period, if delay is forecast, a tax shall be levied to pay one year's interest on the bonds. This is a plain alteration of the contract between the taxpayers and the district under the former section to the effect that no tax should be levied for anything except deficits and this only after the completion of the bridge and the operation thereof. The amendment then sets up four funds (Stats. 1931, p. 242): (1) To pay operating expenses of the district; (2) to provide for repairs and depreciation of the works; (3) to pay the interest of such bonds as it becomes due, and (4) to provide a sinking or other fund, etc., and a provision for borrowing money upon the faith of the revenues and taxes. Then follows the astounding change that in July of each year (whether the bridge is built or not or whether a new bond issue becomes necessary or not) each of the above funds shall be supplied and replenished. In other words, if the bridge is not built and, of course, no revenues come in, yet these funds are to be supplied and kept supplied from taxation. Can the most credulous and unwary not see that this plan alters radically and revolutionarily the liability imposed by the former section? There no tax except for deficits as to principal and interest after construction and operation existed and for these items only as to the current year. Here exists primary tax liability before construction and operation, which is another way of saying that regardless of construction or operation, a tax may be imposed not alone for current deficits in principal and interest but for operating expenses, repair, depreciation, repayment of sums borrowed, and, lastly, for the maintenance of a sinking fund for the liquidation of the bonded debt. To say that these and similar changes which I shall not stop to enumerate are not high-handed alterations in the obligation assumed by the voters is simply to obliterate plain facts by judicial fiat. Yes, it is tantamount to a complete disregard of the will of the voters and will have a paralyzing effect on all bond elections hereafter where this doctrine is known. A taxpayer would be standing in his own light to cast any other ballot than "no" on any bond issue of a public corporation.

Petitioner, half admitting the justice of the strictures I have made, replies that the Legislature has power to override the will of the voters and issue bonds upon any conditions it sees fit. In other words, that the propositions upon which the taxpayers voted need not be respected but may be changed at liberty. To put it more bluntly, that the taxpayers may be deceived into pledging their assets to a given proposition by their ballots and afterward the Legislature may radically alter that proposition to mean anything it likes and the taxpayers are powerless to secure relief therefrom. To state this proposition is to demonstrate its lack of force as well as its manifest injustice. The cases cited below are direct authority that, the vote being sufficient, a bond election creates an obligation in the nature of a contract that must be respected and a material departure from the proposition as voted will not be upheld. Skinner v. City of Santa Rosa, 107 Cal. 464, 465, 40 P. 742, 29 L. R. A. 512; Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044. See, also, O'Farrell v. County of Sonoma, 189 Cal. 343, 348, 208 P. 117, 119, where the court said: "The order calling the election and the ratification of that order by the electors constituted a contract between the state and the individuals whose property was thereby affected. Peery v. City of Los Angeles, 187 Cal. 753 [19 A. L. R. 1044], 203 P. 992. After the contract had been made, it could not be altered by one of the parties, only, but by all of the parties thereto. When by its order, duly accepted by the vote of the electors, the length of the road had been specifically defined, its terminals specifically located, and the cost of the whole established, these elements became a part of the contract. As to them the board, acting alone, could not redivide the contract. Neither could it directly expend the moneys on only a portion of the road. What it could not do directly it could not do indirectly. Such fact is of the utmost importance to the interested parties."

In David v. Timon, a Texas Civil Appeals case, 183 S. W. 88, 92, we have an exact parallel in principle with the situation before us. There the voters supported a proposition to float a bond issue upon similar terms. The Legislature undertook to alter the terms and conditions upon which the bonds were issued. This was held to be in violation of the Constitution of the State of Texas (article 1, § 16) which provided that "no bill of attainder * * * or any law impairing the obligation of contracts, shall be made." In that connection the court said: "The bonds must be issued and sold according to the very terms of the submission of the matter to the voters, and no material departure from the terms can be tolerated."

The doctrine announced in the cases relied upon by petitioner is not in point, typical of which is La Mesa, etc., Irr. Dist. v. Halley, 197 Cal. 50, 61, 62, 239 P. 719, 723. Such cases as the above do no more than hold that the legislature may change the terms and conditions upon which the district was organized, the relation between the taxpayer and the district not being of contract. But this does not reach the situation here where the assets of the taxpayer are pledged to an obligation, thus bringing into operation the relation of parties to a contract. This is pointed out by the following language from the La Mesa Case: "The respondents herein, however, make the contention that this court, in the recent case of Peery v. City of Los Angeles, 187 Cal. 753, 19 A. L. R. 1044, 203 P. 992, has approved in its broadest application the doctrine which the respondents insist was declared in that decision; but an examination of the later case will disclose that the doctrine that the Legislature may not change the law governing the issue and terms of disposition of bonds by cities was given application to a condition wherein certain bonds of the city of Los Angeles had already been voted and issued prior to the making of a change in the law permitting such bonds to be disposed of below par in contravention of the terms of the law in existence at the time of the election, whereby the electors voted to issue and sell the bonds of the city at par and not otherwise. It is clear that no such question is presented in the instant case, and nothing said therein can be interpreted as warranting the application of the doctrine applicable to the particular facts of the earlier case to the situation presented in the case at bar."

I deplore the action of the court in this case. It opens us to the criticism that we are transcending our just province and making a decision as a pure expediency. The bonds which were not readily salable when voted, have by the act of the Legislature been changed without the consent of the voters for the purpose of making them merchantable and we are indorsing that kind of procedure. The legislature has not only attempted to impair the obligation of a contract but in effect has itself levied a tax for municipal purposes in violation of article 11, § 12, of the Constitution, which provides: "The legislature shall have no power to impose taxes upon counties * * * for county * * * or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

Progress in public improvements is laudable, but such progress should not be made at the expense of justice and fair dealing. The conclusion in this case undertakes to saddle upon the taxpayers an obligation which they did not assume and doubtless would not have assumed. The doctrine of the main opinion is not only unsound but dangerous and far-reaching and I withhold my signature from it.

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214 Cal. 402

PEOPLE v. BLACKBURN.

Cr. 3449.

Supreme Court of California.

Nov. 30, 1931.

1. Larceny ⚷65.

Evidence *held* sufficient to sustain conviction for grand theft.

2. Criminal law ⚷1144(14).

Refused instructions referred to in brief by description only, without quotation therefrom, will be assumed to have been covered in instructions given.

3. Larceny ⚷71(1).

Refusal, in prosecution for grand theft, of instruction relative to defendant's intent to defraud, *held* erroneous.

> Requested instruction was to effect that evidence having been offered tending to prove that money or property contributed by complaining witness was used to pay living expenses of various members of certain association; that jury, if finding such to be a fact, could consider such facts in determining whether or not there was intent to defraud complaining witness on part of defendant; and that if complaining witness knew purpose for which contributions were to be used and that they were actually used for that purpose, it would be their duty to find defendant not guilty.

4. Criminal law ⚷369(5).

Admission, in prosecution for grand theft, of evidence respecting defendant's attempt to procure poison several years before transaction involved and before acquaintance with complaining witness, *held* erroneous.

> Testimony was to effect that defendant had attempted to procure poison from witness for purpose of killing husband of complaining witness' daughter; the conversation, however, taking place several months before defendant became acquainted with complaining witness, and approximately three years before alleged offense.

5. Larceny ⚷43.

Evidence, respecting defendant charged with grand theft having instructed follower as to preparation of daughter's body to keep it for resurrection, was erroneously admitted.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

May Otis Blackburn was convicted of grand theft, and she appeals.

Reversed.

For opinion of District Court of Appeal herewith adopted, see 297 P. 599.

Thos. Wade Cochran and Henry M. Lee, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Dep. Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Dep. Dist. Atty., both of Los Angeles, for the People.

SEAWELL, J.

The opinion of the District Court of Appeal, Second District, Division One, by Conrey, P. J., is hereby adopted and forms a part of the opinion and decision of this court. Said opinion reads:

By information containing twelve separate counts, defendant was charged with the crime of grand theft, committed at various times, of which the first date is July 1, 1927, and the latest is October 28, 1928. While the case was on trial counts 6 and 7 were dismissed by the court. On counts 4 and 12 there was a verdict of not guilty. The convictions are on the remaining eight counts. The defendant appeals from the judgment of conviction, and from an order denying her motion for a new trial.

The first count of the information charges that on July 1, 1927, the defendant unlawfully took away $2,700 of the personal property of one Clifford R. Dabney. (The other counts on which the defendant was convicted are of like tenor except as to dates and amounts of money taken.)

According to the testimony of the witness Dabney, he became acquainted with the defendant at the city of Los Angeles about December 1, 1924. Between that time and the times of the several payments of money made by him to the defendant, sundry representations of fact were made to him by the defendant in a series of conversations. In those conversations she informed him that she had written a book entitled "The Great Sixth Seal," or "The Lamb's Book of Life"; that this book contained various mysteries of science and secrets of life and death; the secret of how to raise the dead; the secret of locating gold and precious jewels and all the hidden treasures of the earth; that it contained the lost measurements of Solomon and Noah, by which all precious minerals of the earth could be located; that it contained the secret of radioing from planet to planet and from this earth to other planets; that she and her daughter Ruth Wieland knew all these secrets and that they had been revealed to her by the angel Gabriel and the angel Michael; that the work would be finished in February, 1925; and that it took a certain amount of money, around $5,000, to get everything in readiness so that the Sixth Seal could be printed. There are many further details of these representations, which we need not set forth at length. The witness testified that the defendant asked him for money to complete this work and that he gave her sums of money, varying in amounts, over an extended period of time; that in contributing these moneys he had relied upon and believed these various representations made to him by the defendant; that from time to time she had set the dates when "The Great Sixth Seal" would be completed, but they did not come about and defendant represented that this would require more time and would require more money; that he gave the defendant $2,700 on the first day of July, 1927; that he was commanded to pay the money "to make a concord" for Bessie Mosier; that "Bessie Mosier was to make a concord, which concord was to be the finished concord before another date was set for the finished work, for everything to come about—for another date to be set so everything could come about so the Sixth Seal could be published." Other witnesses testified to similar representations made by the defendant, and payments made by said Clifford R. Dabney to the defendant, as well as payments of money made by some of said witnesses to the defendant. Evidence was introduced showing that said book, The Great Sixth Seal, was never published. Other circumstances were shown in evidence, from which an inference might fairly be drawn not only that the representations made by the defendant to the plaintiff were untrue, but also that in fact she knew that they were untrue, and that she knowingly made such false representations for the purpose of imposing upon the credulity of Dabney in order to obtain his money.

During the progress of these affairs an association of the followers of the defendant was formed, under the name of The Divine Order of the Royal Arms of the Great Eleven; during the year 1926 land was purchased at a place referred to as the Santa Susanna hills, in Ventura county; buildings were erected, and the association established there a community home occupied by the members of the order. A considerable amount of the money furnished by Dabney went into the improvement of this property and for other expenses of the community. It was the theory of the defendant, in support of which she introduced evidence, that the defendant in good faith was establishing two religious societies ("The Divine Order of the Royal Arms of the Great Eleven" and "The Church of the Divine Science of Joshua, the Branch, the Headstone of the Corner"), of which Dabney and others became members, and that the moneys paid by Dabney were merely contributions to the funds of these associations in which the defendant and said Dabney and the other members of the societies were alike and in good faith believers.

The grounds of appeal on which appellant relies are stated in seventeen propositions. We shall use the numbers as given in the brief for appellant, but shall consider them in a different order.

[1] Point XVIII. That the verdict is not supported by the evidence. The evidence is sufficient to sustain the verdict of conviction on each of the several counts. The representations made, and Dabney's reliance thereon in paying money to defendant, are not seriously controverted facts. The real defense was that defendant in good faith believed in those representations, and did not make them with intent to deceive and defraud. The jury having determined that branch of the inquiry against defendant, and there being evidence of a substantial nature to justify that decision, the conviction must be sustained unless there were, in the trial, prejudicial errors which deprived defendant of a fair trial and so caused a miscarriage of justice.

Point XXI. That the offenses were not proved to have been committed within the county of Los Angeles. This contention is without merit. Pen. Code, § 781; People v. Bocchio, 80 Cal. App. 138, 144, 251 P. 672.

[2] Points II to XV. These are assignments of error by the court in refusing to give to the jury instructions requested by the defendant. In the brief of appellant, these several refused instructions are referred to by description, without quotation of them and (except under point II), without stating where they may be found in the record. In only two instances (points II and III) is it asserted that the law on the same subject was not properly covered in other instructions which were given to the jury. Therefore, we shall assume that these matters were so covered, by correct statements of law in the instructions given to the jury. This assumption is reenforced by the facts concerning these instructions as set forth in the brief for respondent, and also by the fact that on reading the entire record of instructions given they appear to constitute a very complete and fair statement of the law applicable to the case.

[3] As to points II and III it is asserted by appellant that the court did not in its other instructions give any correct statement of the law on the subjects of those instructions. The requested instruction discussed under point II is shown at page 78 of the clerk's transcript. The same language, with unimportant variations, was used in other instructions given to the jury. Clerk's Transcript, pp. 99 and 109.

The requested instruction discussed under point III reads as follows:

"Evidence has been offered tending to prove that the money or property contributed by the complaining witnesses was used to pay living expenses of the various members of the so-called Divine Order Of The Royal Arms Of The Great Eleven, including the personal expenses of the complaining witnesses as members thereof. You are instructed that if you find this to be a fact and that such money or property was not used to enrich the defendant or diverted to her personal gain, you are to consider such facts in determining whether or not there was an intent to defraud the complaining witnesses on the part of defendant and if you further find that the complaining witnesses knew the purpose for which their contributions were to be used and that they were actually used for that purpose, then no offense is shown to have been committed and it will be your duty to find the defendant not guilty as to each and every count of the information."

We are of the opinion that this requested instruction is correct, and in view of the evidence referred to therein the defendant was entitled to have such instruction given to the jury. It follows that the refusal of the court to give this instruction was an error, unless an equivalent of the requested instruction was given. Appellant asserts that this was not done. In reply the Attorney General has quoted certain instructions given, but they do not appear to give the defendant the full benefit of the rule stated in the requested instruction.

[4] Point XVI. That the court erred in permitting the introduction of evidence of a conversation between the defendant and one Eleanor Sandrosky, concerning one Sammy Rizzio. Mrs. Sandrosky testified that she and her husband conducted a drug store in the city of Los Angeles; that in July, 1924, the defendant came to her drug store and asked her to come to Mrs. Blackburn's residence in Los Angeles; that the witness complied with this request; that the defendant at her residence had a large number of manuscripts which she said were a part of the Great Sixth Seal. Among other things, the witness said: "She told me to raise up my right hand and repeat after her, 'I swear to the living God and by all that is holy and the Holy Ghost that I will not reveal what is told me,' so I did. Then Mrs. Blackburn stated, she says, 'Now, prepare yourself, as this is going to be terrible.' She says, 'The angel commanded that I kill Sammy Rizzio and you supply me with poison.'" The testimony further shows that Rizzio was the husband of Ruth Wieland, the defendant's daughter. The witness further testified that in the month of August, 1924, and at the same place, the defendant renewed her request for a poison and told her "To be sure it is the real thing." The witness said that she did not give Mrs. Blackburn any poison, but gave her some colored water.

"Q. When was the date of the last conversation you had with Mrs. Blackburn about Sammy Rizzio? A. It was on a Sunday, the last time I ever seen Sammy Rizzio.

"Q. That was the last time you ever saw him? A. Yes, sir. The first Sunday in August of 1924."

It will be noted that these conversations with the druggist took place several months before defendant became acquainted with Clifford R. Dabney. In so far as this evidence related to the proposed use of poison, we agree with counsel for appellant when in his brief he says: "It was not germane to any issue in this case; did not tend to prove or disprove any material issues; it was not shown to have ever been connected in any way with the complaining witness, Clifford R. Dabney, or that he ever heard or knew of any such conversation; it was far too remote to have had any causal connection with any act or omission of the defendant May Otis Blackburn in the summer of 1927, three years later, that was the cause or a cause of the complaining witness' parting with any money or property, it did not constitute a representation and was clearly incompetent for any purpose in the case on trial."

It is urged by respondent that the objections made to the admission of the foregoing testimony, with reference to poison to be used to bring about the death of Rizzio, were not made in sufficient form or substance to authorize appellant now to complain of the admission of such testimony. We have examined the objections and the rulings thereon, and we think that they were sufficient and were made at a proper time to advise the court of the objections and the grounds thereof.

[5] Point XVII. One W. P. Rhoades was among the followers of defendant and with him was his daughter Willa Rhoades, a sixteen year old girl. This daughter died on the 1st day of January, 1925, at the home of Rhoades in Los Angeles. He testified that the defendant instructed him to prepare the body and to keep it for the resurrection, and that in accordance with these instructions the body was kept in salt packs and ice. Again the witness said:

"Q. Did she say that she was going to raise the body? A. Well, if I remember right she said she could."

And further on he said:

"Q. Well, she never at any time stated to you that she then had the power to raise the dead or resurrect the dead, did she? A. No.

"Q. But she did state that after the Passover and the resurrection that they would then be able to raise the dead; is that what she said? A. Yes, sir."

It was further shown by the evidence that after fourteen months the body was finally buried in a cemetery and that surrounding it the bodies of seven dogs were buried; that said dogs were to have some part in the work of resurrection. It is not denied that sufficient and timely objections were made to the testimony concerning these transactions. The death of Miss Rhoades occurred at a date near the time when Dabney first became acquainted with the defendant, but there is no evidence that the statements made by the defendant concerning Miss Rhoades were made to Dabney, or in his presence, or that he ever heard of them. Dabney testified that he did not know when Willa Rhoades died or what was done with her body after her death, and that he could not remember that he had ever had any conversation with the defendant concerning the body of that young woman. All of the testimony on that subject was improperly admitted.

The issue concerning the guilt or innocence of the defendant of the crime of grand larceny in obtaining said sums of money from Dabney, and appellant's defense thereto, turned largely upon the question of good faith and actual belief of the defendant in the truth of the representations made to Dabney, and which induced Dabney to pay over the money. There was substantial evidence in favor of the prosecution, but also there was substantial evidence in favor of the defendant upon that issue. Under this condition of the case it becomes clear that the evidence in relation to Rizzio, and concerning the death of Miss Rhoades and the subsequent transactions in that connection, was extremely prejudicial to the defendant. There is a reasonable probability that without the creation of such prejudice in the minds of the jury as was likely to be created by this evidence, the jury would not have been satisfied beyond a reasonable doubt that the defendant was guilty of willful fraud and deception in making the representations to Dabney upon which he relied in paying money to defendant. It matters not how absurd the faith of the defendant and her followers may seem to be, if in good faith she believed in the cult or creed upon which she was founding this new society, and in the truth of the said representations. Defendant had the same right to organize a society based upon that faith, that her followers had to join with her in creating the society and establishing the community, provided only that they did not conspire together for some purpose prohibited by law. And if for the purposes of such society they chose to invest their money, that was no crime against the state. In presenting her defense to the charge that by willfully false representations she had obtained the moneys received by her from Clifford R. Dabney, the defendant was entitled to the benefit of an unprejudiced jury. Such right is not secure, where evidence tending to degrade the defendant, but not tending to prove the facts relied upon to establish her guilt, has been placed before the jury. And when, as here, it is reasonably probable that the erroneous admission of evidence has created a prejudice which led to a verdict which otherwise might not have been rendered, the judgment of conviction should not be allowed to stand.

The case in many of its features is a most unusual one. The defendant was charged in general language with the crime of grand theft. The specific acts, however, upon which the prosecution relied, and upon which the convictions were obtained, consisted of various acts of false representations as to the use the defendant was to make of moneys furnished by the complaining witness Dabney in promoting a cult, if it may be so called, of which defendant was the founder and ruling power and the complaining witness Dabney had been a zealous devotee and understudy of said defendant for approximately four and a half years. In fact, he had served as the president of the organization and was at all times during said period active in promoting its temporal and spiritual welfare. In general business affairs he was experienced and successful, and had become affluent. His wife was in hearty and active co-operation and accord with him in the financial assistance which he rendered the defendant to the end that she might bring to pass the things which passed all understanding.

The evidence introduced by the prosecution took a wide range embracing within its scope the claims of the defendant (as asserted by the prosecution's witnesses), that she was an ambassador of the Lord invested with divine power. The claim of the prosecution is and must be that she was a mere pretender, an imposter, and knew that she possessed no such power. If she was misguided in her professions of power, but in fact actually believed that she possessed it, she would not be amenable to the criminal law, but her case would be psychopathic in form. Her mental status, however, is one of fact which the jury and not the court may adjudge.

Criminal statutes which prescribe punishment for false representations primarily were intended to protect persons against those who report falsely with respect to their earthly and material possessions. Any legislative attempt to limit or regulate persons in their claims to the possession of exceptional spiritual power or knowledge would be rejected as a dangerous invasion of the state into the realm of religious freedom and privilege, which, from the beginning of our government, has been guarded by constitutional barriers. The framers of our criminal statutes had in mind material affairs and not spiritual matters nor the punishment of persons who claim or represent themselves, by divine favor, to be endowed with supernatural power, unless the intent to defraud is discernable in the pretense as to the possession of supernatural powers. This power in the instant case, according to the prosecution's evidence, was claimed by defendant to be derived from God agreeable with His written word as recorded in holy scripture. That book is an open record and all who will may solve for themselves the extent or degree of divine power that mortals may hope to attain. Each person is at liberty to interpret it for himself. That a mere pretender who wittingly and fraudulently imposes upon the credulity of the weak in mind to their financial loss, is guilty of fraud, there can be no doubt. Persons mentally healthy will not be so imposed upon. In the instant case, no claim is made of a weakening of mentality on the part of those who accepted the defendant in the role she manifested herself, but they meticulously relate her claim of omniscient power, even sufficient to resurrect the dead, and her claim of knowledge of, and power over, all phenomena of nature and all the wealth that heaven and earth contain. The complaining witness and others of defendant's disciples testified that they had absolute faith in her powers to accomplish the things she pretended to have been empowered to do. Running through the case, there appears a vast amount of evidence as to what the defendant in an elaborate, but incongruous undertaking, hoped and promised to do. The whole plan of life and salvation is a babel of incoherency abounding in absurdities of an extreme type, and the wonder is that rational minds should have become obsessed by such chimerical delusions.

The crux of the people's case did not consist in asserted spiritual power or promises of a spiritual nature, although such matters occupy a large portion of the record, but consists in the promise of a material matter, to wit, that "The Great Sixth Seal," or "The Lamb's Book of Life," a book of many pages, had been written by the defendant and her daughter under angelic dictation; that the labor of taking the dictation had been a most intensive task, continuing day and night through a series of years; that defendant had obtained several thousands of dollars from the complaining witness for the express purpose of printing said book, but that she had failed to fulfill her promise. Said complaining witness had had many conferences with defendant as to what the book was to contain and among other things he was told that it explained the mysteries of science and the secrets of life; the secrets of resurrecting the dead; the secret of locating gold and precious jewels and all hidden treasures of the earth; restored lost measurements of Solomon and Noah by which all precious minerals could be located, and it contained the secret of radioing from planet to planet. Said complaining witness testified that he was told by the defendant that all of the above secrets had been revealed to them by the Angels Gabriel and Michael. The failure to publish and print the book as described by the complaining witness constitutes the main grounds of the prosecution. It is true moneys had been advanced for buildings and maintaining a colony or community and to meet incidental expenses generally, but the interest of the complaining witness centered in the completion and printing of "The Great Sixth Seal" or "The Lamb's Book of Life." It was, he professed to believe, the key of entry into the arcanum of all knowledge and the paltry dollars which he had expended in its promotion were as trifles compared with its priceless gifts. What its market or commercial value would have been, if published, is another question.

We have set forth but briefly disclosures of the record before us, and in our investigation we have been unable to see what relevancy the gruesome story of the preservation of the body of Willa Rhoades, in the promise of resurrection, could have borne to the issue of whether or not the defendant applied the moneys which she received from the complaining witness to the purposes for which they were procured. The same lack of relevancy exists in the admission of evidence directed to the alleged attempt of the defendant to administer poison to one Sammy Rizzio. We feel, as did the District Court of Appeal, that the evidence as to both of the events above adverted to, must have prejudiced the defendant in the minds of the jury to the extent that the testimony offered in her defense could not have received the deliberate consideration that the law accords to all persons charged with crime. All other matters of importance have been properly disposed of in the decision of said District Court of Appeal.

The judgment and order are reversed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

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214 Cal. 350

Ex parte PAGE.

Cr. 3454.

Supreme Court of California.

Nov. 25, 1931.

1. Courts 🔑**212.**

Statute authorizing hearing in Supreme Court of habeas corpus proceeding in criminal case prosecuted by indictment or information *held* inapplicable to prosecution begun by complaint (Pen. Code, § 1506, as added by St. 1927, p. 1061).

2. Courts 🔑**212.**

In prosecution begun by complaint, Constitution does not authorize transfer of habeas corpus proceeding to Supreme Court for hearing (Pen. Code, § 1506, as added by St. 1927, p. 1061; Const. art. 6, §§ 4a, 4b, 4c, and § 4, amended in 1904 [see St. 1905, p. xxxiv]).

In Bank.

Petition by Milton Page for a writ of habeas corpus against the Sheriff of Los Angeles County. The District Court of Appeal granted the petition and discharged the petitioner from custody (298 P. 178), and the People applied to the Supreme Court for a hearing.

Proceeding for a hearing before the Supreme Court dismissed.

Charles P. Johnson, City Prosecutor, Joe W. Matherly, and John L. Bland, Deputies City Prosecutor, all of Los Angeles, for petitioner.

Paul W. Schenck, of Los Angeles, for respondent.

RICHARDS, J.

Milton Page was proceeded against by complaint filed in the municipal court in and for the city of Los Angeles upon the charge of having violated section 2a of Ordinance No. 16259 (N. S.) of said city, prohibiting the publication, distribution, sale, or giving away of tips or other information upon or concerning horse races or upon or concerning betting upon horse races. Upon his trial, he was adjudged guilty, and was imprisoned upon said judgment. He appealed to the appellate department of the Superior Court in and for the city of Los Angeles, but, after a hearing therein, the Superior Court affirmed the judgment of the trial court. A petition for rehearing was denied; whereupon he petitioned the District Court of Appeal in and for the Second Appellate District for a writ of habeas corpus, contending that said ordinance, and more particularly section 2a thereof, was unconstitutional and void, and that he was therefore illegally restrained of his liberty. The District Court of Appeal issued said writ, and, after a hearing thereon granted the defendant's petition, holding the ordinance and the requirements thereof to be void, and thereupon made its decision and order discharging the defendant from custody. 298 P. 178. The people through the Attorney General filed a petition for rehearing before said District Court of Appeal, but which court, though allowing the petition for rehearing to be filed, dismissed the same upon the ground that the judgment was final, and that no petition for rehearing was provided for by law in such a proceeding. Thereupon the people, through the Attorney General, applied to this court for a hearing after decision by the District Court of Appeal, basing the right so to do primarily upon the provisions of section 1506 of the Penal Code as enacted in 1927. St. 1927, c. 628, p. 1061. Said application was granted by this court and a hearing had thereon, at which the defendant appeared and through his counsel objected to the hearing and determination of the matter by this court upon the general ground that this court was without jurisdiction or power to grant said hearing or to hear or determine the merits of the applicant's petition for a writ of habeas corpus, or to review upon such hearing the final action of the District Court of Appeal in granting the writ and in the discharge of the defendant upon a hearing before the appellate tribunal thereon. The defendant further particularly insisted that section 1506 of the Penal Code had no application to this case or to proceedings by way of habeas corpus initiated in the District Court of Appeal and predicated upon cases prosecuted otherwise than by indictment or information in a court of record and wherein a defendant had been discharged after a hearing before said appellate tribunal.

[1] The first question presented for our determination is as to whether or not the provisions of section 1506 of the Penal Code can be given application to this proceeding. Section 1506, as enacted in 1927, reads as follows: "An appeal may be taken to the district court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant after his conviction, in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered, and in such cases to the supreme court; and in all criminal cases prosecuted by indictment or information in a court of record, where upon appeal or original application after conviction of the defendant an application for a writ of habeas corpus has been heard and determined in a district court of appeal, either the defendant or the people may apply for a hearing in the supreme court. Such appeal shall be taken and such application for hearing in the supreme court shall be made in accordance with rules to be laid down by the judicial council. If the people appeal, or petition for hearing in either the district court of appeal or the supreme court, the defendant shall not, in any case in which the judgment of conviction has become final, be discharged from custody pending final decision upon the appeal or petition for hearing and he must, in such cases, be retaken into custody if he has been discharged; provided, however, that in bailable cases the defendant may be admitted to bail, in the discretion of the judge, pending decision of the appeal or petition for hearing." It will be seen at a glance that the foregoing provisions of this section of the Penal Code which purport to provide for a hearing in this court after decision by the District Court of Appeal either granting or denying said application is by the express terms thereof limited to "all criminal cases prosecuted by indictment or information in a court of record," wherein, after conviction of the defendant, "an application for a writ of habeas corpus has been heard and determined in the district court of appeal." It is the contention of the defendant that, since the proceeding against him in the municipal court was one prosecuted neither by indictment nor information, but by a complaint filed against him in the municipal court charging the commission of a misdemeanor, to wit, the violation of said ordinance, the provisions of section 1506 of the Penal Code cannot be so far extended as to have application to his case, or as to permit or provide for a hearing before this court after a decision in his favor upon such habeas corpus proceeding instituted, heard, and determined by the District Court of Appeal. The Attorney General, on the other hand, undertakes to argue that the language of the foregoing section of the Penal Code having particular reference to criminal cases prosecuted by indictment or information in a court of record should be so liberally interpreted as to also embrace criminal cases prosecuted by complaint in a court of record, or, in other words, to misdemeanors as well as felonies. We are unable to give our assent to this contention. The words "indictment" and "information," as used in the criminal laws of this as well as other jurisdictions, have acquired and been accorded a very precise definition. They have been applied to proceedings for the prosecution of felonies in courts of record, and have never been given application to mere misdemeanors, the prosecution of which is initiated by the filing of complaints in the lower tribunals which may not be courts of record at all. We are cited to no authority directly construing section 1506 of the Penal Code, and the cases of People v. Jordan, 65 Cal. 644, 4 P. 683, and Garrett v. Superior Court, 79 Cal. App. 273, 249 P. 871, having reference to certain other sections of the Penal Code, are clearly to be differentiated by the very terms thereof from the instant proceeding. We are therefore of the opinion that the Attorney General, in urging upon this court that it should take and retain jurisdiction over this matter under the provisions of section 1506 of the Penal Code, cannot be given support.

[2] It is further, however, contended on behalf of the people that this court should entertain this proceeding under the broad provisions of article 6, sections 4, 4a, 4b, and 4c of the state Constitution. Section 4 of article 6 of the Constitution defining the appellate jurisdiction of the Supreme Court of California formed a part of the Constitution as adopted in 1879. It was, however,

amended in 1904 (see St. 1905, p. XXXIV), at the time of the creation of our system of District Courts of Appeal, and as so amended it proceeded in part to provide that "the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a district court of appeal, which shall be ordered by the supreme court to be transferred to itself for hearing and decision, as hereinafter provided. The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." By section 4b of said article, as amended, the District Courts of Appeal were provided for and their jurisdiction defined, and it was therein declared that: "The said courts shall have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction." In 1928 the foregoing provisions of the Constitution were revised, and section 4c was added to said article which repeated the phraseology of said article in its original form, and proceeded again to state that: "The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court. The order last mentioned may be made before judgment has been pronounced by a district court of appeal, or within fifteen days in criminal cases, or thirty days in all other cases, after such judgment shall have become final therein. The judgment of the district courts of appeal shall become final therein upon the expiration of fifteen days in criminal cases, or thirty days in all other cases, after the same shall have been pronounced. The supreme court shall have power to order causes pending before a district court of appeal for one district to be transferred to the district court of appeal for another district, or from one division thereof to another, for hearing and decision." The foregoing provisions of the state Constitution, as originally enacted, came before the Supreme Court of this state for interpretation in Matter of Zany, 164 Cal. 724, 130 P. 710, in the year 1913, the precise question presented for determination in that matter being as to whether an application for hearing in said court after decision by a District Court of Appeal in a habeas corpus proceeding discharging the petitioner therein from custody could be entertained by the Supreme Court under and by virtue of the provision of sections 4 et seq. of article 6 of the state Constitution in the form and phrasing thereof existing at the time of said decision. It may be stated parenthetically that the substance and effect of said provisions of the Constitution as they then existed have not been materially changed by the more recent revision. It was therein decided by the Supreme Court, five justices thereof concurring, that under the foregoing provisions of the state Constitution the Supreme Court had been given no power to transfer a proceeding in habeas corpus initiated in a District Court of Appeal to the Supreme Court for a hearing therein after decision thereof, whether for or against the petitioner, by the appellate tribunal. To the conclusion thus arrived at by the majority members of said court, Mr. Justice Shaw presented a vigorous dissenting opinion, urging that a habeas corpus proceeding initiated in a District Court of Appeal was as much a "cause" instituted and pending therein as any other proceeding, the institution, pendency, and decision of which was committed to the District Courts of Appeal by virtue of the foregoing provisions of the state Constitution. The prevailing opinion in the Matter of Zany, supra, has, however, remained the rule by which later cases, not a few in number, have been controlled during the intervening years. In the year 1927, however, the state Legislature undertook to legislate upon the subject through the enactment of section 1506 of the Penal Code, the text of which enactment is fully set forth in an earlier part of this decision. In so doing the Legislature undertook to declare, not only that an appeal may be taken to the District Courts of Appeal by the people from a final order of a Superior Court made upon the return of a writ of habeas corpus discharging a defendant after his conviction in all criminal cases prosecuted by indictment or information in a court of record—with the exception of capital cases—in which a direct appeal is allowed to the Supreme Court, but also undertook to provide that: "In all criminal cases prosecuted by indictment or information in a court of record, where upon appeal or original application after conviction of the defendant an application for a writ of habeas corpus has been heard and determined by a District Court of Appeal, either the defendant or the people may apply for a hearing in the Supreme Court." In the case of In re Alpine, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500, there was brought before this court for its determination the question as to whether under the foregoing provisions of section 1506 of the Penal Code a petition for hearing would be entertained and determined by this court after a decision by the District Court of Appeal discharging a writ of habeas corpus sued out by petitioner therefor after he had been held to answer in the Superior Court upon an information filed therein charging him with murder, in which case, after an exhaustive consideration thereof by this court, it was decided that the state Legislature had power to confer the jurisdiction provided for in said section of the Penal

Code upon this court. The effect of that decision was none other than to hold that a habeas corpus proceeding initiated in a District Court of Appeal, after the conviction of the defendant, in all criminal cases prosecuted by indictment or information in a court of record, was such a "cause" pending in said appellate tribunal as to permit an application for hearing to be made to the Supreme Court after the decision of such habeas corpus proceeding by the appellate tribunal. It will thus be seen that the state Legislature, in enacting section 1506 of the Penal Code, and that this court in its aforesaid recent decision upholding said legislation, has each gone far in the direction of changing the rule laid down in the Matter of Zany, supra. It is therefore urged by the Attorney General upon this application for a hearing in the instant matter that this court should go further than the Legislature has done in the enactment of section 1506 of the Penal Code, or than this court has furthermore done in the Matter of Alpine, supra, upholding said legislation to the extent of deciding that every proceeding by way of habeas corpus instituted and pending in a District Court of Appeal, whether for the review of cases prosecuted in courts of record by indictment or information, or of cases prosecuted in courts of record by complaints, filed therein in misdemeanor cases should be subject to proceedings for a hearing in this court after decision by the appellate tribunal under the foregoing broad provisions of the state Constitution. We are of the opinion, however, that, in view of the fact that the Zany Case has stood as the rule of decision in such matters for so many years, and of the further fact that the state Legislature has recently undertaken to enact legislation which, it is true, has only gone part way in overthrowing the effect of the Zany decision, this court ought not at this time attempt to go further than the Legislature in its recent endeavor has already done, and which we have thus far upheld, in the adoption of a statutory enactment entirely dealing with the subject of hearings before this court in habeas corpus matters of whatever character or origin pending in District Courts of Appeal. We have therefore concluded not to attempt to expand the rule thus far embodied in section 1506 of the Penal Code so as to embrace cases having their origin in prosecutions instituted by the filing of complaints in lower tribunals, at least until the Legislature has been given an opportunity to further expand the rule upon that subject thus far expressed and covered by the provisions and limitations of section 1506 of the Penal Code.

In harmony with these conclusions, it is therefore ordered that the proceeding for a hearing herein before this court, after decision by the District Court of Appeal discharging the defendant, should be, and the same is hereby, dismissed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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214 Cal. 792

In the Matter of the Application of Gus PALMER for Writ of Habeas Corpus.

Cr. 3455.

Supreme Court of California.

Nov. 25, 1931.

In Bank.

Application for writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure release of petitioner on the ground of illegal restraint. Proceeding dismissed.

Charles P. Johnson, City Prosecutor, Joe W. Matherly, and John L. Bland, Deputies City Prosecutor, all of Los Angeles, for petitioner.

Paul W. Schenck, of Los Angeles, for respondents.

PER CURIAM.

This matter being identical as to the issues involved with the Matter of the Application of Milton Page (Cal. Sup.) 5 P.(2d) 605, for a writ of habeas corpus, this day decided, on the authority of that decision the proceedings herein are hereby dismissed.

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214 Cal. 166

BOWERS v. CONTINENTAL LIFE INS. CO.

S. F. 14367.

Supreme Court of California.

Oct. 26, 1931.

Insurance ⚷451(1).

Death of one driving tractor which tipped over *held* not covered by policy insuring against death by wrecking of "motor-driven car."

[Ed. Note.—For other definitions of "Motor-Driven Car," see Words and Phrases.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Mary Bowers, as administratrix of the estate of James T. Bowers, deceased, against the Continental Life Insurance Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

For judgment of affirmance by District Court of Appeal, see 300 P. 97.

McEnerney & Morris, of San Francisco, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondent.

PRESTON, J.

This record discloses that the ordinary Fordson tractor is an agricultural implement and not a "motor-driven car" within the meaning of the insurance policy involved in this action. This was the holding of the District Court of Appeal (300 P. 97), and upon further consideration of the cause we have been led to agree with its conclusion. Perry v. North American, etc., Co., 104 N. J. Law, 117, 138 A. 894. The front wheels of this implement have a sharp disc or blade wholly unsuited for highway travel; the rear wheels are equipped with spikes to gain traction in the ground and they, too, are unfit for highway use.

Plaintiff's intestate was insured in defendant corporation against injury or death effected through "violent and accidental means" arising out of certain relationships, among which were: "(A) By the wrecking or disablement of any private automobile, motor-driven car or horse-drawn vehicle, in which the insured is riding or driving, or by being accidentally thrown from such wrecked or disabled automobile, car or vehicle. (Motorcycles excepted.)" The deceased, while operating a Fordson tractor of said type, met his death when the tractor upturned as he attempted to drive it across a ditch, situated in an orchard; the implement at the time was being used to draw a sled loaded with brush.

Defendant had judgment in the court below, which found that the vehicle was a farming implement not included within the coverage provisions of said policy. Plaintiff appealed.

It seems clear that the policy does not cover a vehicle of the type above described. In the case of Perry v. North American, etc., Co., supra, the same language, "motor-driven car," was held not to include a motorcycle. The case before us presents a much weaker situation than that, and the reasoning there employed we think is applicable here.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

VOWINCKEL v. N. CLARK & SONS.*

S. F. 14331.

Supreme Court of California.

Nov. 30, 1931.

Rehearing Granted Dec. 28, 1931.

1. Appeal and error ⚿460(2).

Appeal from injunction granting both prohibitive and mandatory relief stayed mandatory part and not prohibitive part.

2. Appeal and error ⚿460(2).

In determining whether injunctive relief is mandatory, and therefore stayed by appeal, or prohibitive, and not stayed, court looks, not to its designation by trial judge, but to its effect on defendants.

3. Injunction ⚿5.

For injunction to be classed as "mandatory," it must grant directly or indirectly affirmative relief.

[Ed. Note.—For other definitions of "Mandatory Injunction," see Words and Phrases.]

4. Appeal and error ⚿460(2).

Injunction providing that kilns, not themselves nuisances, are not to be operated until fireproof wall is constructed, *held* mandatory, the refusal to stay which justifies supersedeas.

5. Injunction ⚿5.

Injunction simply enjoining operation of kilns and furnaces, without more, *held* prohibitive, and not mandatory.

In Bank.

Action by F. W. Vowinckel against Clark & Sons, a corporation. Plaintiff recovered judgment, and defendant appealed, and, on vacation of previous order staying execution on the judgment pending his appeal, petitions for writ of supersedeas.

Writ granted.

John L. McNab and S. C. Wright, both of San Francisco, for appellant.

A. E. Shaw, of San Francisco, for respondent.

PER CURIAM.

This is a petition for a writ of supersedeas to stay the execution of a judgment for injunctive relief pending an appeal. Defendant, a pottery and terra cotta manufacturer, has its factory located in the city of Alameda, in a section mainly industrial in character. Plaintiff's residence adjoins these premises. The factory had been in operation for many years prior to the coming of plaintiff. An action was commenced by him against defend-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 13 P.2d 733.

ant; the complaint alleging that the factory was a nuisance, and specifically that it was operated day and night, and caused great vibration, noise, flashes of light, and pollution of the atmosphere, destruction of plaintiff's trees and plants, and discoloration of his dwelling with soot. It was also alleged that it constituted a fire hazard. The trial court found in favor of plaintiff on some of his allegations, and granted relief as follows: (1) Defendant was enjoined from operating four of its kilns and furnaces; (2) defendant was enjoined from operating the remaining kilns and furnaces unless and until it should erect between them and the property of plaintiff a substantial fireproof fence or wall at least fifteen feet in height. Defendant moved for a new trial, offering to build a fireproof wall in accordance with samples submitted, but the motion was denied. Defendant gave notice of appeal, and thereafter, on May 1, 1931, the trial judge made an order staying execution upon the judgment pending the determination of the appeal, upon defendant giving a satisfactory bond in the sum of $10,000. The bond was furnished, and approved but subsequently, on May 20, 1931, another judge of the Superior Court set aside the previous order staying execution. Petitioner then sought this writ.

[1-3] The principles applicable to this situation are well settled. A mandatory injunction is stayed by an appeal; a prohibitive injunction is not. Where a judgment gives injunctive relief which is both prohibitive and mandatory, the appeal will stay the mandatory part and not the prohibitive part. And, in determining whether the relief is prohibitive or mandatory, this court will look not to its designation by the trial judge, but to the effect of its provisions on the parties against whom it is issued. In order that it may be classed as a mandatory injunction, it must grant, directly or indirectly, affirmative relief. Ohaver v. Fenech, 206 Cal. 118, 273 P. 555.

[4] A consideration of the circumstances and the findings of the court will indicate that the judgment is partly mandatory. It provides (in the second part set forth above) that certain kilns and furnaces shall no longer be operated unless and until a fireproof wall is constructed. The object sought is, of course, the construction of the wall, a mandatory act. Instead of contenting itself with this order, the court has attached to it what amounts to a penalty for failure to comply with it. That penalty is in the form of a prohibitive injunction, but the prohibition there made is not the true relief granted by the court. The judgment clearly shows that the court did not consider these particular kilns and furnaces a nuisance, provided that the fire wall were built. We think it reasonable, therefore, to conclude that this part of the injunction was mandatory, indirectly requiring the affirmative act of construction of the wall. As such, its operation should be stayed on appeal, and the refusal of the lower court to grant such a stay justifies the issuance by us of a writ of supersedeas. Baar v. Smith, 201 Cal. 87, 255 P. 827; In re O'Connell, 75 Cal. App. 292, 242 P. 741; Mark v. Superior Court, 129 Cal. 1, 61 P. 436.

[5] As to the other part of the injunction, which without alternative or qualification requires the cessation of operation of four kilns, there can be no doubt that it is prohibitive. While this court without doubt has power to stay even a prohibitive injunction pending appeal (Ohaver v. Fenech, supra), we find no facts in the present controversy sufficient to demand an exercise of that power with respect to the definitely prohibitive part of this injunction.

It is hereby ordered that a writ of supersedeas issue, directing the lower court, upon the furnishing of a satisfactory bond by defendant, to stay the execution of that part of the judgment which reads as follows: "That said defendant be and it is hereby restrained and enjoined from operating the remaining kilns and furnaces of the defendant on the westerly side of its property and north of the four furnaces hereinbefore referred to, unless and until the said defendant shall erect between said furnaces north of the four furnaces hereinbefore referred to and the said property of the plaintiff a substantial fireproof fence or fireproof wall at least fifteen feet in height."

121 Cal.App. 758

McGLOTHLIN v. LARUSSA et al.*

Civ. 7877.

District Court of Appeal, First District, Division 1, California.

Nov. 21, 1931.

Rehearing Granted Dec. 21, 1931.

1. Appeal and error ⇨1002.

Verdict upon conflicting evidence cannot be disturbed (Code Civ. Proc. § 1847).

2. Automobiles ⇨244(36).
Carriers ⇨306(4).

In jitney bus passenger's action for injuries sustained in collision with municipal truck, passenger's proof that negligence of each driver proximately contributed to damage warranted verdict against jitney driver and municipality.

3. Automobiles ⇨245(14).
Carriers ⇨320(21).

In action by jitney passenger injured in collision with municipal truck, question of negligence was for jury.

4. Automobiles ⇨171(12), 201(8).
Carriers ⇨300, 305(6).

Both jitney bus driver speeding into intersection and driver of municipal truck turning to left without passing beyond center of intersection *held* negligent in colliding with each other, each proximately contributing to bus passenger's injuries (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30; St. 1923, p. 558, § 129, as amended by St. 1929, p. 541, § 54).

5. Appeal and error ⇨1004(1).

Verdict cannot be set aside as excessive unless it warrants conclusion it resulted from prejudice.

6. Appeal and error ⇨932(1).

Reviewing court must give respondent benefit of every reasonable inference from evidence, in considering excessiveness of damages.

7. Damages ⇨132(3).

$15,000 for skull fracture, brain contusion, etc., permanently disabling 28 year old typist earning $100 monthly, *held* not excessive.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Fern McGlothlin against Guiseppe Larussa and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Henry Heidelberg, Dep. City Atty., both of San Francisco, for appellant city and county of San Francisco.

Emery F. Mitchell and Charles V. Barfield, both of San Francisco, for appellant Larussa.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment entered upon a verdict against defendants and in favor of plaintiff.

The action was for damages alleged to have been sustained by plaintiff while a passenger in a jitney bus, operated by defendant Larussa, which came into collision with a truck operated by the city and county of San Francisco.

The municipality claims that the implied finding that its employee was negligent is unsupported; that the evidence shows that the sole proximate cause of the injuries complained of was the negligence of defendant Larussa; and further, that the verdict is excessive, notwithstanding an order of the trial court reducing its amount. Appellant Larussa has filed no brief.

At about 8 o'clock a. m. of November 22, 1929, the jitney bus in which plaintiff was a passenger was proceeding north on the right-hand side of Valencia street in San Francisco. It was testified that when the jitney reached the intersection of Valencia street with Nineteenth street, which runs east and west, it passed the southerly curb line of Nineteenth street at a speed of from 30 to 35 miles an hour. As it passed into the intersection, its driver saw a five-ton truck, 21 feet long and 7 feet wide, owned by the municipality and which had been traveling south on Valencia street, make a left-hand turn diagonally across the northerly half of the intersection and directly in front of the jitney. The truck passed to the north of the button in the center of the intersection, and, although the driver of the jitney attempted to avoid it, a collision occurred. The testimony was sharply conflicting as to the speed of the vehicles, but sufficient appears to justify the conclusion that the speed of both was excessive under all the circumstances.

[1] The municipality insists that certain witnesses whose testimony was favorable to plaintiff and unfavorable to defendants were contradicted in material particulars by other witnesses, and that their testimony should have been rejected by the jury. Without quoting therefrom, it will suffice to say that we have read the testimony in question, and the same was not inherently improbable or impossible of belief. The question of the credibility of the witnesses was one for the

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*For subsequent opinion see 10 P.2d 116.

jury (Code Civ. Proc. § 1847); and, where the testimony is conflicting, a verdict or findings based thereon cannot be disturbed, even though an appellate court might think that a different conclusion should have been reached. Clopton v. Clopton, 162 Cal. 27, 121 P. 720.

[2, 3] To warrant a verdict against defendants, it was sufficient for the plaintiff to prove by a preponderance of the evidence that the negligence of each proximately contributed to the damage (Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. [N. S.] 559, 139 Am. St. Rep. 134; Springer v. Pacific Fruit Exchange, 92 Cal. App. 732, 268 P. 951; 19 Cal. Jur., Negligence, § 20, p. 572), and the question of negligence was also one for the jury. Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393.

[4] It was the duty of the driver of the truck in turning to the left to pass beyond the center of the intersection (California Vehicle Act, § 129 [as amended by St. 1929, p. 541, § 54]); and it was also the duty of the jitney driver to drive his vehicle at a careful and prudent speed, not greater than was reasonable and proper, having due regard for the traffic. California Vehicle Act, § 113 (as amended by St. 1927, p. 1436, § 30). The evidence, though conflicting, was amply sufficient to support findings that both defendants were negligent, and that the negligence of each was a proximate cause of the damage.

[5-7] The jury returned a verdict for $25,000, which later was reduced to $15,000. Plaintiff, who was 28 years of age, was employed as a typist at a salary of $100 per month. As a result of the accident, she suffered a depressed fracture of the skull, and, as her physician testified, not only a brain concussion, but a brain contusion, a brain tearing, his opinion being "that there were adhesions of both meninges of the brain in the fracture, which is permanent"; further, that she is "disabled from the vocation of clerk or stenographer or working as a relief telephone operator in a large business"; also that she suffered a well-marked nervous shock "the effect of which will be projected into months and years." Another physician, who performed an operation upon her skull, made necessary by her injuries, described their extent and the lacerations which she received. Plaintiff also described her injuries and their after effects, from which she was still suffering at the time of the trial; and in this connection one of her physicians testified that she will show a lowered nervous reserve, and, as a reasonable certainty, a mental type of "dynamo-pathical apoplexy"—as he explained, "periods when she is not up to standard mentally."

The verdict of a jury finding damages cannot be set aside as excessive unless it is so plainly so as to warrant the conclusion that it was the result of passion or prejudice. Perry v. Angelus Hospital Association, 172 Cal. 311, 156 P. 449. The question in the first instance is for the trial court, and, in considering an attack upon a verdict as excessive, the reviewing court must treat every conflict in the evidence favorably to respondent, and give him the benefit of every inference which can reasonably be drawn in support of his claim. Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513. It is a reasonable conclusion from the evidence that plaintiff's injuries were not only serious and painful, but that they will be permanent; and we cannot say as a matter of law that the amount to which the judgment was reduced is excessive.

Finally, it is urged that the trial court unduly restricted the cross-examination of one of plaintiff's witnesses.

There is no merit in this contention.

We are satisfied that the verdict on the question of the negligence of the defendants was fully supported; that the judgment as finally entered is not excessive; and that no error has been shown which would justify the reversal of the judgment.

The judgment is affirmed.

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118 Cal.App. 416

MILLER & LUX, Inc., v. BOARD OF SUPERVISORS OF MADERA COUNTY et al.

Civ. 4429.

District Court of Appeal, Third District, California.

Nov. 19, 1931.

Rehearing Denied Dec. 19, 1931. Hearing Denied by Supreme Court Jan. 18, 1932.

1. Waters and water courses 🔑225.

Affidavit of publishing annexed copy of petition to organize irrigation district combining notice of hearing authorized board of supervisors in finding notice was legally published (St. 1917, p. 752, § 2).

> A newspaper published, as required by California Irrigation District Law (St. 1917, p. 752, § 2), a petition for organization of an irrigation district. Immediately following the petition was a notice of the time and place of hearing thereof. At the hearing the board of supervisors had before it the printer's affidavit stating that the petition of which the annexed was a printed copy had been published. The petition and notice were printed together. The affidavit did not state that the notice had been published.

2. Waters and water courses ⚷225.

Proof of publication of petition and notice to organize irrigation district being reasonably sufficient, board of supervisors' conclusion that legal requirements were met will not be disturbed.

Appeal from Superior Court, Madera County; E. N. Rector, Judge.

Action for review of proceedings for establishment and organization of an irrigation district by Miller & Lux, Inc., against the Board of Supervisors of Madera County and others. From an adverse judgment, petitioner appeals.

Affirmed.

See, also, 189 Cal. 254, 208 P. 304.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for appellant.

Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, Stephen W. Downey, of Sacramento, and Mason A. Bailey, of Madera, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The respondents had judgment in an action wherein the appellant petitioned the Superior Court of the county of Madera for a writ of review for the purpose of inquiring into the validity of an order of the board of supervisors relative to the establishment and organization of the Madera irrigation district. The petition sets forth, among other things, that the appellant is the owner of certain lands in the county of Madera lying within the exterior boundaries of the Madera irrigation district, and was such owner at all times herein mentioned; that on the 3d day of November, 1919, A. M. Acton and others presented to the board of supervisors of the county of Madera a petition for the formation of an irrigation district to be known as the Madera irrigation district. The petition was drawn pursuant to the act of March 31, 1897, and the amendments thereto; 310,000 acres of land are included within the boundaries of the district.

The petition alleges that on the 3d day of November, 1919, the board of supervisors continued the hearing of the petition until the 17th day of November, 1919, on which date the petition came on for hearing, and thereupon the board of supervisors passed and adopted a resolution by which it found and determined that all the requirements of the act regarding the organization of said proposed district had been fully complied with; that the petition for the organization of the district was published for at least two weeks before the time at which the same was presented, together with a notice of the time and place at which the petition would be presented; that the same were published and printed in the Madera Weekly Tribune. The petition then sets forth that there was no evidence introduced or presented to the board of supervisors of said county showing, or purporting to show, that the petition presented by A. M. Acton and others had been published as set forth in said resolution, or otherwise, and also that no evidence was introduced or presented to the board of supervisors showing, or purporting to show, that prior to the presentation of said petition any notice of such presentation or of the time set forth had been published for at least two weeks before such time, etc.

[1] Upon this appeal only one question is presented, to wit: Was sufficient evidence presented to the board of supervisors that notice of the time and place of the presentation of the petition for the formation of the Madera irrigation district had been published as required by law?

Section 2 of the California Irrigation District Laws (St. 1917, p. 752, § 2), among other things, contains the following: "Said petition shall be presented at a regular meeting of said board and shall be published for at least two weeks before the time at which the same is to be presented in some newspaper of general circulation printed and published in the county where said petition is presented together with a notice stating the time of the meeting at which the same will be presented [etc.]. * * * When said petition is presented, said board of supervisors shall hear the same and shall proceed to determine whether or not said petition complies with the requirements hereinbefore set forth and whether or not the notice required herein has been published as required, and must hear all competent and relevant testimony offered in support of or in opposition thereto."

It will be observed that, while the section provides that the petition for the formation of the district shall be published for at least two weeks before the time of its presentation, together with a notice stating the time and place of the meeting when and where it will be presented, there is no provision in the section requiring the board of supervisors to ascertain and determine that the petition has been published for two weeks, but only that it shall determine "whether or not the notice herein has been published as required." The section, however, does require that the petition to be presented shall be published together with the notice, etc. A careful reading of the section also discloses that it fails to point out the procedure to be taken by the board of supervisors in ascertaining and determining whether the notice of the time and place of the presentation of the petition has

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been published as required by law. Section 2010 of the Code of Civil Procedure being general in its terms, would supply this defect, as it points out a manner in which such proof may be made, although there is nothing in section 2 of the Irrigation District Laws which would make the method provided for in the Code of Civil Procedure exclusive. However, in the instant case the record does not disclose any evidence or testimony upon which the board of supervisors acted, other than an affidavit to which we will presently refer.

As a part of the record upon appeal in this cause, a photostatic copy of the petition for the organization of the Madera irrigation district, together with a notice of the time and place for the hearing thereof, was presented in support of the regularity and sufficiency of the evidence showing publication of notice as required by law, the original of the photostatic copy having been presented to the board of supervisors and also to the trial court as Exhibit A in this action. By this photostatic copy it appears that the petition, together with the notice, was printed and published as one document, and presented to the board of supervisors for their consideration, as one document. The petition and the notice are printed together, the notice following the petition without any separation or distinguishing marks or anything which would indicate that the board of supervisors should or could consider the document as other than a petition for the organization of the district, together with a notice of the time and place of the hearing thereof, combining in one document both petition and notice.

The contention of the appellant in this action is based upon the fact that in a blank space in the affidavit made by the publisher of the Madera Weekly Tribune, the newspaper in which the petition, together with the notice, was published, did not contain the word "notice." The affidavit, after setting forth the fact that the affiant possessed the necessary qualifications to make the affidavit, reads as follows: "That at all times said newspaper has been established, printed and published in said town of Madera, in said County and State, at regular intervals for more than one year preceding the first publication of the notice herein mentioned; that the petition for organization of the Madera Irrigation District, of which the annexed is a printed copy, was printed and published in said newspaper at least two weeks commencing on the 16th day of October, 1919, and ending on the 30th day of October, 1919, both days inclusive, and as often during said time as said newspaper was regularly issued—October 16, 23 & 30, 1919." This contention, however, overlooks the fact that the board of supervisors had before it the "annexed printed copy" which contained the notice. The provisions of section 2, supra, direct that the petition shall be published together with the notice. The "annexed copy" was the instrument published in the Madera Weekly Tribune, and constituted the facts upon which the board of supervisors of Madera county was authorized to ascertain and determine that the petition had not only been published for two weeks, but that it was published together with the notice for two weeks preceding the date set for the presentation of the petition. The "annexed copy" which affiant swore that he had published in and of itself constituted evidence upon which we think the board of supervisors was authorized to adopt and pass a resolution finding the facts as it did in this instance.

Both appellants and respondents have called our attention to the case of the Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780, 785, and to the language of the opinion relating to the publication of the notice and petition involved therein, which reads as follows: "The proof of the publication of the notice and petition was made by the affidavit of the publisher of the newspaper in which it was made. This was competent and sufficient evidence thereof"—citing Code Civ. Proc. § 2010. On behalf of the appellant, it is contended that the sufficiency of the affidavit of publication involved in that proceeding was not presented to the court for consideration; no contention being made in that case relative to its sufficiency. However, as a photostatic copy of the affidavit, petition, etc., for the formation of the Imperial water district, is made a part of the record, and brought here for our consideration, the original being introduced in the trial court as Exhibit B, we will quote therefrom the following: "That I am the manager of the Imperial Valley Press, a newspaper of general circulation printed and published in said County and State, and as such manager, have charge of all advertisements in said newspaper; that the notice of petition for Irrigation District, of which the annexed is a true copy, was published," etc. The "annexed" and "true copy" in that case presented to the board of supervisors of Imperial county was the petition for the organization of the district, together with the notice of the time and place of the presentation thereof. It may be, as urged by appellant, that the language found in the opinion of the Supreme Court, with reference to the proof of publication of the notice, has no place therein, but it is almost inconceivable that the Supreme Court read the affidavit or the portion thereof which we have quoted involved in the Imperial Water District Case without giving some thought as to its sufficiency by reason of the fact that the annexed copy of what was published showed that publication had been had as required by section 2 of the Irrigation District Laws.

[2] No contention is made that the notice published in the instant case was not sufficient in and of itself; all that is presented, as we have stated, is that sufficient proof of notice was not presented to the board of supervisors.

In the case of In re Central Irrigation District, 117 Cal. 382, 49 P. 354, 357, the sufficiency of the notice was involved. As the law then read, the notice required signatures as well as the petition. The notice in the present case was signed by three of the petitioners. Our attention is called to the following language used by the court in deciding the Central Irrigation District Case, to wit: "Such petition shall be presented at a regular meeting, etc., and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented." The opinion then holds that the notice is the process by which the property owners to be affected are notified and given an opportunity to present their objections, if any, to the board of supervisors. It was then held that, as the notice was defective in and of itself, in that it did not comply with the law as it then read, the board of supervisors of the county in which the proposed district was located never acquired jurisdiction to hear the petition. We find nothing in that case which can be considered as an authority supporting appellant's contention that the board of supervisors of Madera county never acquired jurisdiction to hear the petition for the organization of the Madera irrigation district. This proceeding was before the Supreme Court upon a demurrer to the appellant's petition, and the opinion deciding the demurrer appears in 189 Cal. 254, 208 P. 304, 313. The opinion holds that there must be some proof showing the publication of the notice of the presentation of the petition, but it does not hold that the proof presented to the board of supervisors was insufficient, as appears from the following excerpts taken therefrom: "Upon the allegations of the petition a writ of review should have been issued, and if it appeared from the return, as alleged, that no showing whatever was made before the board of supervisors in support of the petition, the order of the board of supervisors in question should have been annulled." Again, as to what evidence is sufficient, was not decided, as shown by the following excerpt: "However, in the case of Wolfskill v. City Council of Los Angeles, 178 Cal. 610, 174 P. 45, this court declined to follow the case of Stumpf v. Board of Supervisors [131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350], supra, in so far as it held that the only evidence which the board could consider upon such a hearing was evidence which would be acceptable in court. The case still stands, however, as authority for the proposition that there must be some sort of evidence or proof, not only as to the allegations of the petition, but also as to the sufficiency of the signatures thereto. The petition in this case alleges that no such evidence was received."

While a number of cases are cited in the opinion just referred to showing that the record upon which the board of supervisors acted must contain all that is necessary to give jurisdiction, the quantum of proof is not even considered. In other words, if there is proof of the publication of the petition and notice reasonably sufficient to satisfy the board of supervisors, then and in that case the conclusion of the board of supervisors will not be disturbed because additional proof or more satisfactory proof might have been presented. Or just as said in Wolfskill v. City Council of Los Angeles, supra: "We are of the opinion that the trend of both recent legislation and decision has been toward a relaxation of this rigid rule in respect to the procedure before official bodies chiefly political in their character and powers and only occasionally exercising judicial functions, with a view to upholding the action of such bodies, which, though informal in some respect, is taken with a view to advancing the public interest and welfare of the community within the limited range of their jurisdiction. The instant case would seem to furnish an apt illustration of the class of tribunals and of cases to which the more modern and relaxed rule should be applied."

In Fogg v. Perris Irr. Dist., 154 Cal. 209, 97 P. 316, the court expressly held that there could be no objection to embodying the notice and the petition in one document and publishing them as one. To the same effect is the case of People v. City of Montebello, 192 Cal. 489, 221 P. 207.

Being of the opinion that the evidence presented to the board of supervisors of Madera county that the petition for the formation of the Madera irrigation district, together with the notice of the time and place of presenting the petition had been published as required by law, was sufficient to justify the board of supervisors in finding both the fact of the publication of the petition and the publication of the notice, it follows that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

FEARN v. RALPH HAMLIN, Inc., et al.*

VOEGTLIN v. SAME.

Civ. 7684.

District Court of Appeal, First District,
Division 1, California.
Nov. 24, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Granted by Supreme Court Jan. 21, 1932.

1. Automobiles ⚷194(4).

A "free lance" auto salesman who was paid commission only when he procured purchaser for car was "independent contractor," and not "employee" of dealer as regards dealer's liability for salesman's negligence.

[Ed. Note.—For other definitions of "Employee" and "Independent Contractor," see Words and Phrases.]

2. Automobiles ⚷194(4).

Dealer was not liable to persons injured through negligence of "free lance" salesman while latter was on way to demonstrate dealer's auto to prospective purchaser.

3. Appeal and error ⚷1068(3).

Where verdict was only one possible as matter of law, alleged errors in instructions are immaterial.

KNIGHT, J., dissenting.

Appeals from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Separate actions by Howard R. Fearn and Albert J. Voegtlin against Ralph Hamlin, Inc., and another. From judgments for defendant Ralph Hamlin, Inc., plaintiffs appeal.

Affirmed.

Janeway, Beach & Pratt, of Los Angeles (Spencer T. Hankey, of Los Angeles, of counsel), for appellants.

Hardy, Elliott & Aberle, Joseph Musgrove, Joe Crider, Jr., and F. O. McGirr, all of Los Angeles (Rex Hardy and Vernon W. Hunt, both of Los Angeles, of counsel), for respondents.

PARKER, Justice pro tem.

These actions were to recover damages on account of personal injuries sustained in an automobile accident, alleged to have been occasioned by and through the negligence of defendants. Both actions involve the same accident; the separate plaintiffs having been fellow passengers in the car driven by plaintiff Voegtlin. Inasmuch as the facts were identical in each case, there was an order of consolidation, and a joint trial was had. The trial was by jury and separate verdicts returned awarding damages to each plaintiff as against the defendant Taylor, but nothing against the defendant Hamlin corporation. No question is before us on the liability of Taylor; he prosecutes no appeal. The sole and only question concerns the liability of Hamlin corporation.

[1, 2] The point to be determined on the appeal is this: Where a so-called "free lance" salesman, engaged in the sale of automobiles, including the kind and make handled by a dealer, and being paid only by commission in the event of a sale being effected, takes one of the dealer's cars with the dealer's permission and consent for the purpose of making a demonstration of the car to a prospective purchaser in the endeavor to sell a car of the type belonging to the dealer, and, in the course of driving the dealer's car from the dealer's place of business to the residence of the prospective purchaser in order to make such demonstration, collides with another car, is the dealer liable for negligence of the salesman? The question as stated embraces all of the facts necessary. The leading case on the subject, and the one most discussed by counsel, is the case of Barton v. Studebaker Corporation of America, found reported in 46 Cal. App. 707, 189 P. 1025. With an interchange of names, the facts therein stated could, up to a certain point, be accepted as the facts in the instant case. However, there are some marked differences in the factual structure. In the Barton Case the salesman was driving his own car, operated by himself on gas and oil of his own purchase. In the Barton Case the salesman was pursuing his own general quest for purchasers, with no definite prospect in view. As far as the relationship between Taylor and the Hamlin corporation is indicated in the instant case, it is the exact counterpart of the relationship existing between the salesman in the Barton Case and the Studebaker Company. There may be some occasional fact in the instant case differing from some fact in the cited case, but the parallel is so exact that it would be needless to attempt differentiation.

Conceding then that an automobile salesman of the class to which Taylor is assigned, without hours or compensation, without the control of the dealer, and operating wholly according to the dictates of his own judgment or fancy, is an independent contractor, the natural question arises as to the nature of his business. The salesman owns no cars that he may sell, nor does he bear any direct agencial relationship to any dealer or manufacturer. He has no right to consummate any sale, nor has he any control over the terms of sale, if sale is effected. His business then can be said to be that of procuring purchasers for automobiles handled by dealers or distributors. Obviously he is not a seller of automobiles, having none to sell, and nei-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 8 P.2d 1015.

ther power nor authority to contract a sale. The scope of his business is to interest prospective purchasers in some particular make of car, through solicitation and demonstration. It is held in the cited case that one thus engaged is an independent contractor, disconnected from the dealer, and this regardless of the fact that the dealer receives the benefit of the sale and that the dealer furnishes the cars for display and permits to the salesman the use of the display room and office. It is true that the entire work of the salesman redounds to the benefit of the dealer, minus the small commission allowed, and likewise true that the business of the dealer depends for its success upon the promotion of sales. From the foregoing it appears that the only classification into which Taylor, the salesman in the instant case, would fall, would be that of an independent contractor. From this starting point we then approach the additional facts urged in the contention that Taylor acquired a different status in the instant case.

After Taylor, in the pursuit of his independent calling, had interested a purchaser to the extent of the latter consenting to a demonstration, he called upon the dealer and informed him of his prospect. The dealer was in possession of a variety of Franklin cars of various models and prices. Taylor stated to the dealer that he desired to take out one of these cars and demonstrate it to his prospect. He had no right to take one out unless he had the permission of the dealer. Thereupon the dealer consented that a car be furnished Taylor for his demonstration, and the car so furnished was adequately supplied with gas and oil and put in running shape for a demonstration. While en route to the home of the prospect, the accident occurred. And here it might be further noted that the injuries the demonstrator car sustained were repaired at the cost of the dealer. Appellant urges that these points distinguish the case before us from the Barton Case. We can see no definite points of differentiation, and we have the present alternative either of accepting the doctrine of the cited case or definitely overruling it; there is no middle ground, nor is the rule susceptible of qualification to meet the needs of this particular case. It is true, much persuasive argument may be advanced against the conclusions heretofore reached by the courts of this jurisdiction. Many facts surrounding the relationship between Taylor and the Hamlin corporation are argued out in support of appellants' effort to distinguish the instant case sufficiently to bring it without the rule announced, but we may repeat the language of the court as found in the Barton Case, 46 Cal. App., at page 715, 189 P. 1025, 1028, as follows: "But more important than these considerations, which really involve evidence only tending to show the relationship, the probative value of which as disclosing the nature of the relationship must, of course, be measured by other considerations more directly addressed to the fact, is the fact, clearly and unquestionably established, that" the business of the salesman "under his engagement with the Corporation was merely that of seeking and finding and procuring purchasers of its automobiles (for which service he was paid a commission), and the further fact that, in prosecuting that business or work, he was at liberty under his engagement with the company to go where and when he pleased and to exercise his own judgment and discretion as to the parties whom he should seek as purchasers or to whom he might present propositions for the sale and the purchase of the Corporation's automobiles."

It seems clear and unquestioned that, if the accident had happened while the salesman was soliciting the prospect or demonstrating his own car, no liability could be imposed upon the Hamlin corporation; likewise is it clear that, even if the salesman were conveying the prospect to the salesroom of the corporation, the latter's exemption from liability would still attach. The reason supporting this nonliability is the absence of the right of control. Where, then, would the fact that the salesman, pursuing his independent calling, was driving a car belonging to the corporation, affect this right of control? Appellant argues that, because the corporation had the right to refuse the use of the car, the situation is changed. In the face of the fact that they did permit its use, it becomes immaterial whether they might not have done so. Further, it is argued that the fact that the corporation had the right to forbid the salesman to haul a load of cement on the demonstrator car and to demand of him that he return the car whenever it was requested, demonstrates a relationship of master and servant. If these facts demonstrate anything, they merely confirm the power of control over the disposition or use of the property, in so far only as the rights of ownership thereof are concerned. To make minute inquiry as to the rights of the corporation would lead us afar into speculative fields. Manifestly the corporation had the right to refuse to have any dealings whatsoever with this salesman. But we are here dealing, not with what might have been the situation under a different state of fact, but with the condition as it is presented. Under the authorities included in the cited case, there can be no difference between the salesman getting the car to demonstrate and his getting only some particular part thereof. It might often happen, and no doubt it often does, that a salesman would go to the dealer and procure some distinct working part of the car he was seeking to sell or even go for a prospectus or other advertising matter. In his journey to and from the dealer there would be no liability upon the latter for the results of any mishap that might occur.

Appellant strenuously argues that Taylor's name was carried on the books of the Hamlin corporation as a commission salesman, and from that fact his status as employee is definitely determined. The record answers the contention, and, quoting therefrom, we find: "Taylor was working as a 'free lance' purely on a commission basis. He was not paid at all unless he brought about the sale of a car. His name was on the books of the corporation listed as a commission salesman. He was not required to report * * * at any particular time."

Appellant does not argue that the mere ownership of the car is in anywise decisive. True, ownership raises some inference of control and the further inference that the car is being used in the business of the owner. Appellant does not press this inference as all controlling or as sufficient in itself, under the facts here, to raise a conflict in the testimony. The fact of ownership with its resulting inference is presented simply as one of many facts. In any event, the whole theory of the appeal concedes that the ownership alone would not justify a reversal. Appellant must concede that no verdict, under the facts, could be upheld as against the Hamlin corporation on the mere fact of ownership with the remaining facts admitted. There is abundant authority, beyond the necessity of citation, that, even where ownership and general control and direction exists in a master, no liability attaches for the acts of the servant where the latter departs from the line of his employment on business entirely apart from that of his master. While this principle of law hardly enters into the determination of the instant case, it is mentioned merely to indicate the slight responsibility following mere ownership.

[3] The foregoing disposes of the appeal. Many claims of error are urged, predicated upon the instructions of the court. An analysis of these claims would be purely academic. From the admitted facts, but one verdict could result, and, if the jury reached the only verdict within its power, it is immaterial that some improper instructions may have been given.

The judgment is affirmed in both cases.

I concur: TYLER, P. J.

KNIGHT, J. (dissenting).

In my judgment, all of the elements necessary to charge the defendant Ralph Hamlin, Inc., with liability for the negligence of Taylor under the doctrine of respondeat superior have been established as a matter of law and therefore I am unable to agree with the conclusions reached on that issue in the majority opinion.

As stated therein, it is admitted that the automobile which collided with plaintiffs and caused their injuries belonged to said company, and that at the time of the collision it was being operated by Taylor under the express authority of the company and at its expense. If, therefore, in addition to these admitted facts, it was shown that, while Taylor was thus operating the same, his relationship to said company was that of agent or servant and that the automobile was being used in furtherance of the company's business and for its benefit, then all the elements of the doctrine of respondeat superior are established, and the liability of the company for Taylor's negligent acts necessarily follows. McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Dierks v. Newsom, 49 Cal. App. 789, 194 P. 518; Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747; Perry v. A. Paladini, Inc., 89 Cal. App. 275, 264 P. 580; Lemka v. Nauman, 103 Cal. App. 757, 284 P. 1062.

The evidence on these issues was without conflict, and, briefly stated, the material facts disclosed thereby were as follows: The Hamlin Company was a dealer in automobiles, and held the selling agency for Franklin cars in the southern part of the state. Taylor was a commission salesman, and his name appeared as such on the books of the company. As will hereinafter more particularly appear, under the working arrangement existing between him and said company, whenever he found a prospective buyer he was granted express authority, upon making request therefor, to take one of its cars for the purpose of demonstration and sale. If he was successful in inducing the prospect to buy, the transaction, as to terms, price, and other details, was closed by said company; and thereupon Taylor received a commission. The cost of conducting the demonstration was borne by the company, and upon completing the demonstration Taylor was required to return the car to said company. He had no authority to use it for any other purpose, nor for his own use. Taylor found a prospective buyer, and on the day of the accident was expressly authorized by the company to take one of its new cars for the purpose of demonstrating and selling it; but, while driving to the home of the prospect, he collided with an automobile in which plaintiffs were riding, and they were injured.

The established test to be used in determining the relationship of master and servant is to ascertain whether the employee was subject to the employer's orders and control as to the mode and manner in which the work should be done, and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it. May v. Farrell, 94 Cal. App. 703, 271 P. 789, and cases cited therein. In the present case, it is true that Taylor was not permitted to use the company's cars without express authority being granted therefor; but, when such authority was granted, his services and the use and operation of the company's car were subject to its control and direction. It retained the right to say where he should take the car, how long he should have it, the purpose for which it should be used, and how it should be driven; and any disobedience to instructions given in that behalf or any attempt on Taylor's part to use the car in any other manner or for a different purpose would have given the company the absolute right to terminate his services at once and retake possession of its car; and beyond question, at the time of the collision, the automobile was being operated in furtherance of the company's business and for its benefit, to wit, for the purpose of demonstrating and bringing about a sale of its property.

It would seem, therefore, that there is no reasonable ground upon which the doctrine of respondeat superior may be excluded; and in a number of cases from other states, involving similar facts, it has been so held, among them being Fostrom v. Grossman, 161 Minn. 440, 201 N. W. 929; Borah v. Zoellner Motor Car Co. (Mo. App.) 257 S. W. 145, 146; Ben v. Eastern Motor Co., 94 N. J. Law, 34, 109 A. 286; Hoffman v. Liberty Motors, Inc., 234 Mass. 437, 125 N. E. 845. In the Minnesota case, the relationship between the dealer and the driver of the car, named Richmond, was exactly the same as it was here. He was a salesman working on a commission basis. He sought customers wherever he chose to go, made his own dates with prospective customers, went about at will, and called on any one to whom he hoped to make a sale. He was permitted to make sales either in or out of the dealer's place of business; and, if a prospect asked for a demonstration, the dealer permitted him to take one of its cars for such purpose. He was not directed to follow any particular route in making the demonstrations; his general instructions being merely to return the car as soon as possible and to use it as little as possible. At the time of the accident, he was driving one of the dealer's cars, having taken the same, with the dealer's consent, to demonstrate it for a prospective purchaser, and the accident occurred while he was returning the car to the garage, following an indirect route. The facts of the New Jersey case, so far as the decision therein discloses, were substantially the same as those of the Minnesota case. In the Missouri case, the accident occurred while the salesman was driving one of the dealer's trucks to the home of a prospective buyer who had failed to keep an appointment with the salesman; but the relationship between the dealer and the salesman was precisely the same as it was here. He "was compensated solely by the payment of a commission upon sales made by him. He went when and where he pleased. Defendant exercised no control over him whatever in the details of his salesmanship, but he sought his own customers, and made sales without any control of his actions by defendant, and without any suggestions from it in any way. He did, with the consent of defendant, as he testified, use machines belonging to defendant in going to see prospective purchasers." In holding that the doctrine of respondeat superior applied, the court said: "In this case, there can be no question that Bridges [the salesman] was acting as agent for defendant in selling automobiles. He was not an independent dealer nor a dealer at all. He did not buy and resell. All he did or had the power to do was to sell the property of defendant. In making a sale, there is no pretense that he could fix the price, or dictate terms, or extend credit, or pass on securities in case of credit, or that he became personally responsible to defendant for the payment of any bills of any kind. His only power began and ended with the one thing of making sales of machines belonging to defendant. To make a binding contract of sale, he must act as agent for defendant. The binding force of whatever he did in the prosecution of his employment depended solely on the fact of his right to represent defendant as its agent. In the sale of automobiles, he was clearly the agent of defendant, and the manner in which he was paid for his service, to wit, by a commission on the amount of sales, could not alter his relation to defendant. While defendant did not in any way control Bridges in the details or the manner in which he made sales, it clearly had the right to do so. Bridges' agency was not one coupled with an interest so that it could not be terminated at will by either party. Had defendant given instructions to Bridges in relation to the details of making sales, and had he disregarded such instructions, there can be no question of defendant's right to discharge him and stop the service at any time. Had he been an independent actor acting for himself and not for defendant, then defendant could not interfere, and he could obey or disobey defendant's instructions as suited his own judgment or caprice. This he clearly could not do under his employment by defendant as detailed by the evidence in this case. Was he then, at the time of the collision with plaintiff, in his use of the truck of defendant, engaged in the service of defendant? We think most clearly so. His entire duty was to make sales, and to make them he must go from place to place to see prospective purchasers. On these trips, he, with the consent of defendant, used cars of defendant as suited his convenience. Under that state of facts it was not necessary to make a further showing that special permission to use the car had been given in this particular instance." It would seem that the foregoing language, without qualification, fits the present case.

Because a salesman is not steadily employed, or does not devote all of his time to the business of his employer, are not of themselves facts sufficient to take the relationship of the parties out of the rule of respondeat superior. The test is, as stated, whether, while engaged in performing services for the benefit of the employer, he is subject to the employer's orders and control with reference to the manner in which the same shall be performed and liable to discharge for disobedience or misconduct. May v. Farrell, supra. Therefore he may be employed to perform a particular service requiring only a limited period of time; but, if in the performance thereof his services are subject to the control of the person by whom he is engaged to perform the service, the doctrine of respondeat superior applies. Standard Oil Co. v. Parkinson (C. C. A.) 152 F. 681. Nor does the fact that he is paid a commission instead of a salary take the relationship out of the operation of the rule. May v. Farrell, supra.

The majority opinion, as will be observed, is based on the decision in Barton v. Studebaker Corp., of America, 46 Cal. App. 707, 189 P. 1025; but, as conceded in the majority opinion, "there are some marked differences in the factual structure" of the two cases. There the plaintiff was injured while riding with a commission salesman in an automobile belonging to the salesman and operated entirely at his expense. Therefore, as pointed out in the decision therein, the services of the salesman and the use of his car were at no time subject to the control or direction of said company. He could at all times come and go, and do with his car, as he pleased. The element of control, therefore, which is the essential feature of the doctrine of respondeat superior, was entirely lacking. The specific grounds upon which it was there sought to hold the Studebaker Company responsible were that the salesman was permitted to use the company's salesrooms for the purpose of showing automobiles to his prospective customers, and that his authority to represent said company in selling its cars was evidenced by a printed card, furnished by the company. But manifestly, as there held, those facts were legally insufficient to supply the element of control over the salesman's services or the use of his car. Here Taylor was at liberty to exercise his own judgment as to when and in what manner he secured prospective buyers; but, after he secured the prospect and the Hamlin Company placed him in possession of one of its automobiles for the purpose of demonstrating and selling it, his services and the use of its car were subject to its control and direction. It is true that the matter of ownership of the automobile involved in an accident is not always a controlling factor in determining liability; but, when established in connection with other material facts, such as the use thereof at the time of the accident on the owner's business, by one who is authorized by the owner so to use it, it may and often does serve as the controlling element. See cases cited in Barton v. Studebaker Corp. supra; also in Perry v. A. Paladini, Inc., supra.

Nor can the Hamlin Company be absolved from liability for the negligence of Taylor under the so-called "borrower's" rule (as it was in force prior to the enactment in 1929 of section 1714¼ of the Civil Code [added by St. 1929, p. 566]), because the application of such rule depends mainly upon the presence of facts showing either that the automobile was taken without the owner's permission; or, if taken with his permission, that it was to be used exclusively on the business of the borrower; or, that the owner knew at the time of lending the car that the borrower was inexperienced, incompetent, careless, or reckless. Rock v. Orlando, 100 Cal. App. 498, 280 P. 377; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697; Hall v. Puente Oil Co., 47 Cal. App. 611, 191 P. 39; Easton v. United Trade School Con. Co., 173 Cal. 199, 159 P. 597, L. R. A. 1917A, 394. And admittedly the present case does not involve any of those questions.

If, therefore, the doctrine of respondeat superior does apply, a meritorious appeal has been presented.

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118 Cal.App. 525

LEY v. BABCOCK et al.

Civ. 8066.

District Court of Appeal, First District, Division 2, California.

Nov. 24, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Denied by Supreme Court Jan. 21, 1932.

1. Pleading ⚷8(6).

Allegation in complaint for deficiency judgment on notes that trustee after due notice of sale under trust deed and Code sold notes *held* not conclusion of law (Code Civ. Proc. § 692).

2. Mortgages ⚷375.

Alleging sale of lot under trust deed after giving required notice, in complaint for deficiency judgment, *held* authorized by statute (Code Civ. Proc. §§ 459, 692).

> Code Civ. Proc. § 459, provides that it is sufficient to plead that party duly performed all conditions on his part required by statute on which he depends.

3. Evidence 🔑370(4).

Trustee's deed, in action for deficiency judgment on notes, showing on face it was duly recorded, due execution and acknowledgment being proved, *held* admissible under statute (Code Civ. Proc. § 1951).

4. Appeal and error 🔑237(2).

Objections to deed, received in evidence subject to motion to strike, in action for deficiency judgment, it not appearing motior was made or ruled on, *held* waived.

5. Evidence 🔑383(7).

Recitals of trust deed regarding sale thereunder *held* sufficient evidence supporting finding of trial court that sale under deed was duly conducted.

6. Mortgages 🔑341.

Sale under trust deed by trustee not licensed auctioneer under city ordinance *held* valid.

> Such sale was valid, since purpose of ordinance was to regulate those engaged in business of selling property at auction, and would not contemplate sale by individual of his own property, or sale by trustee under deed of trust which specifically authorized him to make sale.

7. Mortgages 🔑354.

Notice of sale under trust deed given in compliance with terms of deed and provision of statute *held* sufficient (Code Civ. Proc. § 692).

8. Appeal and error 🔑1008(1).

Trial court's finding on evidence before it that in sale under trust deed, posting notices in three places on courthouse was in three "public places" under statute *held* conclusive on appeal (Code Civ. Proc. § 692).

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Le Roy V. Ley against E. S. Babcock and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

Stewart & Shaw and Arvin B. Shaw, Jr., all of Los Angeles, for appellants.

Raymond J. Kirkpatrick, of Long Beach, and Frank D. McClure, of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued to collect the deficiency on two promissory notes each in the principal sum of $2,500. Plaintiff had judgment, and defendants appeal on a bill of exceptions.

On March 3, 1926, defendants purchased from plaintiff's assignor a lot near Long Beach, Cal., for $10,000, paying $5,000 of the purchase money in cash and giving to the vendors the two promissory notes in suit which were secured by a deed of trust. The defendants failed to pay any portion of the balance due, and the two promissory notes with the security therefor were duly assigned to the plaintiff, who caused the real property to be sold under the trust deed. At this sale the property was bid in for the sum of $400. A deed was executed and delivered to the purchaser, and the plaintiff then commenced this action to recover the deficiency.

[1, 2] The first point raised on the appeal is that the demurrer to the amended complaint should have been sustained because the allegation that the trustee "after due notice of the time and place of sale given in accordance with the terms and provisions of said deed of trust and in full compliance with the provisions of 692 of the Code of Civil Procedure * * * did * * * sell," etc., is a mere conclusion of law. The point is without merit. The action is one for a deficiency judgment on promissory notes in which it would have been sufficient to have alleged that a sale had been had and that but $400 was received. Furthermore, the form of pleading is expressly authorized by section 459, Code of Civil Procedure, where it is declared that it is sufficient to plead that the party duly performed all the conditions on his part required by the statute on which he depends.

[3, 4] It is argued that the trustee's deed was erroneously admitted in evidence because it had not previously been shown that the deed was delivered. The deed showed on its face that it had been duly recorded; evidence had been received proving its due execution and acknowledgment. It was admissible under the express provisions of section 1951, Code of Civil Procedure. When the deed was offered in evidence, the appellants objected on the ground that it was incompetent, irrelevant, and immaterial, and that no foundation had been laid. From the briefs its appears that the latter ground only was urged. However, it was received in evidence subject to a motion to strike, and it does not appear that such motion was made or ruled on. For this reason the appellants must be deemed to have waived the point. Estate of Wempe, 185 Cal. 557, 197 P. 949; Conte v. Busby (Cal. App.) 2 P.(2d) 458.

[5] It is argued that the trial court erred in finding that a sale under the trust deed

was duly conducted. The recitals in the deed were sufficient evidence of this fact, even though the controversy here is not one between a bona fide purchaser at the trustee's sale and another party. If for this reason it may be said to be hearsay, it is nevertheless sufficient, in the absence of any evidence to the contrary. Hopkins v. J. D. Millar Realty Co., 106 Cal. App. 409, 414, 289 P. 221. The appellants cite numerous authorities holding that the recitals in the deed are not conclusive evidence in a suit between the parties to the deed. They are not in point. The question here is, Are they evidence supporting the finding of the trial court?

[6] The appellants argue that the entire sale should be held illegal and void because it was not conducted by an auctioneer licensed under the ordinance of the city of Los Angeles regulating the business of auctioneers. No authorities are cited in support of the point, and we have been unable to find any. It would seem apparent that the purpose and effect of the ordinance was to regulate those engaged in the business of selling property at auction, and that it would not contemplate the sale by an individual of his own property or the sale by a trustee under a deed of trust which specifically authorized him to make the sale. Authorities from other jurisdictions hold uniformly that the failure of the trustee to obtain an auctioneer's license does not vitiate the sale. 6 Corp. Jur. p. 835; 4 Cyc. p. 1048; 2 R. C. L. 1119. In the absence of authority to the contrary, we would not hold that the sale here was invalid, particularly where it was conducted in accordance with the common practice accepted generally throughout the state.

[7] It is argued that the court erred in striking out appellants' third defense which pleaded that the sale was fraudulently made because personal notice thereof had not been served upon the appellants. The trial court found that notice was given in full compliance with the terms of the deed of trust and with the provisions of section 692, Code of Civil Procedure. It was not at any time necessary that personal notice be served upon the appellants; it is sufficient if the statute and the terms of the trust deed are followed. Witter v. Bank of Milpitas, 204 Cal. 570, 573, 269 P. 614, and cases cited.

[8] When the cause was called for oral argument on November 12th of this year, the appellants, for the first time, raised the point that the notice of sale was insufficient because the notice of sale was not posted in "three public places of the township or city where the property is to be sold." Section 692, Code Civ. Proc. The trustee's deed recites that one notice was posted "at the Broadway entrance to the Court House in said city. One at the Temple Street entrance to the Court House in said city. One at the entrance to the office of the County Clerk," etc. As the point was not raised in the court below, no evidence was taken as to the sufficiency of the posting. On the evidence before it, the court found that the sale was conducted "in full compliance of the terms and provisions of the deed of trust and with the provisions of section 692 of the Code of Civil Procedure." The appellants now argue that we should disregard this finding and hold as matter of law that the posting was insufficient. They cite Standley v. Knapp (Cal. App.) 298 P. 109. The case is not in point, because the rule of it is that the finding of the trial court in that case that the postings were all in one public place was conclusive upon the appellate court. By the same rule we should hold that the trial court's finding here is conclusive. The authorities cited in the Standley Case follow this general principle—that the question of what is a "public place" is one of fact depending upon the circumstances of each case.

It will be noted that the Code section does not require the posting to be upon "three separate public buildings," or upon "three separate pieces of public property." It would hardly be contended that all the public buildings constituting the Civic Center of San Francisco are but one "public place," and there seems no reason in holding, as matter of law, that every part of any public building is the same public place within the meaning of the Code.

The question loses much of its interest because of the amendment to section 692, effective in August of this year. The result of an adverse decision would therefore cast a cloud upon existing property rights which have been acquired under a long-established interpretation of the former section. For this reason we should not brush aside the findings of the trial court particularly when they were based upon the prima facie case made by the respondent upon the only issues which were tendered for trial.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

118 Cal.App. 432

RAMOS v. SERVICE BROS. et al.

Civ. 4361.

District Court of Appeal, Third District, California.

Nov. 20, 1931.

As Modified on Denial of Rehearing Dec. 19, 1931. Hearing Denied by Supreme Court Jan. 18, 1932.

1. Trial 🔑241.

Instruction respecting number of witnesses whose testimony does not "produce conviction," following Code language without defining preponderance of evidence, *held* not erroneous (Code Civ. Proc. § 2061).

2. Appeal and error 🔑928(1).

That instruction was served on plaintiff prior to testimony is presumed (Code Civ. Proc. § 607a).

3. Negligence 🔑140.

Instruction that negligent act or omission must contribute "directly" to injury *held* not erroneous as not using "proximately," especially where court elsewhere used "proximately."

4. Negligence 🔑141(6).

Instruction that one at dangerous vocation injured through momentarily forgetting known danger cannot recover *held* not erroneous.

5. Trial 🔑296(4, 5).

Instruction that contributory negligence at or just prior to accident precludes recovery *held* not erroneous, notwithstanding omitting proximate causal connection elsewhere instructed.

6. Trial 🔑296(3).

Instruction that one using dangerous instrumentality might rely on others using their faculties and exercising ordinary care *held* not erroneous, in view of another instruction (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

> The instruction was criticized as to informing jury that the driver of a truck which backed on plaintiff need not use ordinary care. Another instruction, however, informed the jury that, unless truck driver complied with California Vehicle Act requiring him before starting to see that such movement could be safely made, he was negligent.

7. Trial 🔑296(12).

Instruction that plaintiff, whose negligent act concurred with defendant's was contributorily negligent, *held* not erroneous as not defining negligence elsewhere defined.

8. Trial 🔑191(7), 253(4).

Instruction that, if accident was caused by negligence of stranger's employee, verdict should favor defendant, *held* not erroneous as assuming employee's negligence or not mentioning defendant's negligence.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by G. Ramos against Service Bros. and another. From adverse judgment, plaintiff appeals.

Affirmed.

Cooley & Crowley, of San Francisco, Hugh K. Landram, of Merced, and Lasher B. Gallagher, of Los Angeles, for appellant.

Hawkins & Hawkins, of Modesto, for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover damages on account of personal injuries alleged to have been inflicted upon plaintiff through the negligence of defendants. After trial by jury, a verdict was returned in favor of defendants. This appeal is taken from the judgment entered upon the verdict.

Respondent Clendenen was the driver of a truck belonging to respondent Service Bros. Upon the day of the accident, the latter were engaged in hauling material to be used in road construction in Stanislaus county. The driver had procured a load of material, and had hauled it to the scene of the occurrence, where it was his duty to unload it by dumping. The said driver stopped about fifty feet from the place of deposit, and waited for a signal to back and unload. This signal was given him, and he proceeded to back, at the rate of about a mile an hour. He heard a cry, and stopped immediately. Upon investigation, he found plaintiff lying upon the ground near the rear of the truck, with his foot crushed. According to plaintiff, there was some oil on the road, under a disabled truck, which was standing in the highway. "I was trying to clean up under the truck," he testified. "I put the broom underneath the truck and pulled the stuff out toward me. I was in the act of doing that when the truck backed into me." The exhaust of the truck made a loud noise when it started back. Plaintiff was an experienced road worker, and knew that this truck would back to dump its load. The driver was unable to see Ramos from his cab, and he did not see him working under his truck, or around it. He kept his eyes upon the signal man, who stood some distance to his rear.

A reversal is sought upon error in giving the following instructions:

"I. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number. The direct evidence of any witness who is entitled to full credit is sufficient for proof of any fact in a civil case.

"II. One of the questions for you to determine is the question of negligence, and this question you are to resolve upon a consideration of all the facts and evidence in the case. Negligence is the omission to do something which an ordinarily prudent person would have done under the circumstances; or doing something which such a person would not have done in the same situation. It is not absolute or intrinsic but always relates to some circumstance of time, place or person. A negligent act or omission must have contributed directly to the injury, otherwise no action for damages can be founded upon it.

"III. One who works at a dangerous vocation, or one who voluntarily places himself in a position of danger, cannot close his eyes to such danger or momentarily forget a known danger, but is required to exercise a quantum of care that is commensurate with such danger as may be known to him. And if he momentarily forgets such known danger or closes his eyes to such danger, and is thereby injured, and the proximate cause of his injury is his forgetfulness of such danger, or his failure to make reasonable use of his faculties under such circumstances, he cannot recover for the injury.

"IV. If you believe from the evidence in this case that plaintiff Ramos was negligent at or just prior to the accident in question, and his negligence contributed to his injuries, then he cannot recover from defendants.

"V. And one who uses an instrumentality which is likely to cause injury to others is entitled to rely upon such other persons making a reasonable use of their faculties of sight and hearing in order to avoid danger, until it is apparent that they are not doing so. He may rely upon the presumption that others will exercise ordinary care, and that they will see things which might be seen by the exercise of ordinary care.

"VI. A party is said to be contributorily negligent when a negligent act on his part concurs with a negligent act upon the part of the defendant in producing the injury.

"VII. If you believe from the evidence that the accident here in question and the resultant injuries to the plaintiff were caused by reason of the negligence on the part of the flagman in the employ of the Valley Paving Company, then your verdict should be in favor of the defendant.

"VIII. If you believe from the evidence that at the time of the accident in question and the resultant injuries to plaintiff therefrom, the plaintiff was the servant of the Valley Paving Company and the Valley Paving Company had on said work at said time and place a flagman whose duty it was to direct the driver of the trucks hauling material when to back and when to stop, and if you further believe from the evidence that the Valley Paving Company hired from the defendant Service Brothers the truck in question, together with a driver and at the time and place in question the driver was under the orders and control of the Valley Paving Company as to where and when to go and what to do, and the flagman gave orders to the driver of the truck to back and the driver of the truck carried out those orders; and if you further believe from the evidence that the flagman was in a position to observe and see the plaintiff and that the plaintiff was in a position of peril and it was his duty to give orders to the truck driver to stop the truck and he did not do so, and if you further believe that it was the want of ordinary care on the part of the flagman that proximately caused the accident and the resultant injuries to the plaintiff, then I charge you that your verdict must be in favor of the defendant."

[1, 2] As to the first instruction, it is claimed that no instruction was given which defined "preponderance of evidence," and therefore the language "produce conviction" was misleading. The instruction follows literally the language of section 2061, Code of Civil Procedure. It does not purport to define "preponderance of evidence." If such a definition was desired by plaintiff, he should have submitted it to the court in an instruction. It must be presumed that, prior to the giving of any testimony, this instruction was served upon plaintiff. Section 607a, Code Civ. Proc.

[3] The second instruction is attacked because of the use of the word "directly" in the last sentence thereof, instead of "proximately." It has been decided that these words are almost identical, and that it was not reasonable to suppose that the jury would perceive any difference between them. Olsen v. Standard Oil Company, 188 Cal. 20, 204 P. 393. Furthermore, the court instructed the jury elsewhere that, if the plaintiff was injured as a proximate result of the carelessness and negligence of the driver, he was entitled to a verdict.

[4] It is next contended that the third instruction is erroneous, in that momentary forgetfulness of the danger, if found by the jury to have been the proximate cause of the injury, would preclude recovery by plaintiff. In support of this contention, appellant cites Smith v. Southern Pacific Company, 201 Cal. 57, 255 P. 500, 505. In that case it was held that it was not negligence, as a matter of law, for plaintiff to fail to recollect the practice of the defendant in stopping its trains at a certain place. As authority the court quotes the following from Meindersee v.

Meyers, 188 Cal. 498, 205 P. 1078: "Forgetfulness of a known danger will not always operate to prevent such recovery, for to forget is not negligence unless it shows a want of ordinary care." This statement was taken from Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 110, 28 L. R. A. 596, 48 Am. St. Rep. 114, where the rule was first laid down upon this subject. The court there used the following language: "It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction." Then follows the statement which was used by the court in Smith v. Southern Pacific Company, supra. We believe that, under certain circumstances, to forget is negligence as a matter of law. These are cases where the danger from the act momentarily forgotten is at once obvious and apparent. One cannot lie deliberately down upon a railroad track, and plead that he momentarily forgot the danger of such an act. Neither can he, as in this case, deliberately remain in or step into the path of a truck, which he knew was about to move, and plead momentary forgetfulness of the danger. In these cases, there is no legal excuse for forgetting. The instruction attacked, under the circumstances of the case, was a proper one.

[5] The fourth instruction is questioned because it omits the question of proximate causal connection between negligence and injury. An examination of the record discloses that this question was fully covered in other instructions.

[6] The fifth instruction is attacked upon the ground that the jury are told that the driver was not required to use ordinary care and vigilance. We do not so construe it. It simply states that the driver had the right to assume that plaintiff would use ordinary care. The jury were elsewhere instructed in the language of California Vehicle Act, § 130 (as amended by St. 1925, p. 412, § 15a) that it was the duty of the driver before starting the truck to himself see that such movement could be made in safety, and that, if he did not comply with this provision, he was guilty of negligence. We cannot see how the jury could have been misled by this instruction.

[7] Instruction 6 is attacked because negligence is not there defined. We find it was fully defined elsewhere.

[8] Instruction 7 is questioned because it assumes, as a fact, that a flagman was guilty of negligence. There is absolutely no ground for that assumption. It is complained that the instruction does not mention negligence upon the part of the driver. There is no reason why it should. If the negligence of a third party caused the injury, certainly defendant could not be held responsible. It is true that the instruction does not state that the negligence must be the proximate cause of the injury, but the jury were elsewhere told that a negligent act must have contributed directly to the injury; otherwise no action for damages could be founded upon it.

Objections to the last instructions do not require any extended discussion. They are specious in character.

An examination of the entire record discloses that the jury were fairly and fully instructed upon all the issues of the case. If appellant had read the instructions as a whole, instead of taking them piecemeal, it is very doubtful if the appeal would have been prosecuted at all.

The record is free from error, and accordingly the judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

118 Cal.App. 694

JONES v. TUFTS.

Civ. 6844.

District Court of Appeal, Second District,
Division 1, California.
Nov. 30, 1931.

1. Appeal and error 🔑1010(1).

Findings of fact supported by evidence are conclusive on appellate court.

2. Trial 🔑98.

Rulings excluding evidence *held* proper, where questions were propounded in such manner as to justify court in sustaining objections without attempt to reframe questions.

3. Licenses 🔑39.

Law regulating practice of architecture *held* inapplicable in action to recover on contract to pay for materials and labor in constructing building (St. 1901, p. 641).

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Fred Nowell Jones against Maria C. Tufts wherein defendant filed a cross-complaint. Judgment for plaintiff and cross-defendant, and defendant and cross-complainant appeal.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellant.

Arthur A. Weber and J. C. Dunn, both of Santa Monica, for respondent.

YORK, J.

This is a case which shows the typical dispute between an owner and a building contractor, wherein oral testimony was introduced in an attempt to explain, but not to change or vary, the terms of the written contract or agreement.

[1] There was sufficient evidence upon which to make the findings of the trial court, and, although in the court's instructions to the attorneys to prepare their findings, there is some variance between these instructions and the findings themselves, the findings of fact (as there is evidence to support each of them) are conclusive upon this court. The findings are sufficient to support the judgment.

[2] Appellant objects that the court did not allow her to introduce certain evidence, which was ruled out by the trial court. These rulings were proper, as the questions were propounded in such a manner as to justify the trial court in sustaining the objections made thereto. No attempt was made to reframe the questions to make them proper, and therefore the questions raised by appellant's counsel as to appellant's right to prove the facts which she sought to elicit are not pertinent to the case presented by the record.

[3] The reference in the contract to plaintiff as an architect does not specify that the plaintiff was to be paid anything for his services as an architect. The action is one to recover upon a contract to pay for materials and labor in constructing the building. It is not an action to recover for services rendered by plaintiff as an architect. It follows that the provisions of the statute (Deering's 1923 Ed. of Gen. Laws, Act 486, Stats. 1901, p. 641), "An Act to regulate the practice of architecture," are not applicable to the case.

The judgment is affirmed.

CONREY, P. J. (concurring).

For several reasons, I concur in the judgment. (a) The plaintiff was entitled to recover as upon a building contract. If any part of the contract price was intended to cover architect's fees, for which the plaintiff would not be entitled to recover, the defendant should have pleaded and proved the facts constituting such defense. (b) From the pleadings and the evidence contained in the contract itself, it may be taken as established that the plaintiff represented to defendant that he was an architect, that in truth he was not a "certified architect," but that he did draw the plans and specifications referred to in the contract. But the damages which defendant claimed were limited (by her answer) to the amount shown by the "bill of particulars" contained in the answer. The items thereof all relate to alleged failures to perform the contract. None of them cover any element of damage caused by false representations which deceived the defendant and caused her to enter into the contract. The court did not err in refusing to receive evidence of a defense on the ground of fraud. (c) In regard to the numerous other assignments of error in rulings upon objections to evidence, I have not found that there are any errors of such importance as to have caused any change in the result of the action.

I concur: HOUSER, J.

117 Cal.App. 701

WESTERGARD v. BAKER et al.

Civ. 6980.

District Court of Appeal, Second District, Division 2, California.

Nov. 25, 1931.

Hearing Denied by Supreme Court Dec. 24, 1931.

1. Appeal and error ⟹1010(1).

Finding of fact supported by evidence at trial is conclusive on appeal.

2. Trial ⟹404(1).

Trial court's findings must be considered as a whole, and separate portions thereof must be construed in light of context.

3. Brokers ⟹75.

Where commission to broker became due on delivery of lease, it was immaterial, in broker's action for commissions, whether there was a trust or escrow subsequent to delivery of lease.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

On petition for rehearing.

Petition denied.

For original opinion, see 4 P.(2d) 545.

Davis & Thorne, of Los Angeles, for appellant.

Armand H. Blum and Gail Selig, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1] The petitioner suggests that there may be a misapprehension as to the fact as to whether the lease or the agreement for commission was executed first. We again call attention to the conflict in the evidence on this point, the failure of appellant's counsel to adopt the suggestion of the court to introduce the lease itself in evidence, and the

rule that a finding of fact supported by the evidence at the trial is conclusive on appeal.

Petitioner cites Alison v. Chapman, 36 Cal. App. 759, 173 P. 389, 390, in support of his contention that the plaintiff would not be entitled to a commission until the lease was signed and the property financed to carry out the project of Whittier Pools, Inc. In the cited case the broker had secured a purchaser who offered a price less by $500 than that asked by the vendor, and, *after* entering into an agreement of sale and the taking of a $500 deposit, the broker took up the matter with the vendor, who accepted the deal as thus far made and agreed to pay the broker a flat commission "when the sale is consummated." The purchaser failed to further perform his part of the contract of sale. It was there properly held that the words "when the sale is consummated" related to and "must have referred to some future event and not to the time of signing the contract of sale." In the cited case the agreement of sale preceded the commission agreement, while in the case at bar the lease (corresponding to the sales agreement in the cited case) was not delivered or executed until after the commission agreement. This material difference in the facts renders the cited case inapplicable.

[2] Petitioner's contention that the word "procured" in the court's finding, "that prior to the signing of said agreement as aforesaid plaintiff procured and induced the Whittier Boulevard Pools, Inc., a corporation, to lease the property," means that the lease was executed prior to the commission agreement, is untenable. The court in the finding preceding the one from which counsel quotes found that the commission agreement was entered into and executed "on the 7th day of September, 1926," and immediately following the portion of the finding relied upon and quoted by counsel it appears that the trial court found that "on or about September 8, 1926, * * * (the parties) did enter into a lease contract." In the face of this express finding that the lease was executed on the day following that on which the agreement was executed, it is clear that the word "procured" was not used in the sense contended for by petitioner. It is elementary that findings must be considered as a whole and that the separate portions thereof must be construed in the light of the context.

Petitioner has chosen to state that the second point of the opinion is based upon the fact that the commission agreement was drafted by appellant's codefendant Baker, and urges that the evidence "does not show that Mr. Baker dictated it." A reading of the opinion will disclose that there is no statement therein to the effect that Mr. Baker "dictated" the agreement. The record does show, however, that the plaintiff testified that Mr. Baker "had a little statement written on a piece of paper which he said if I would draw it up on a typewriter he would sign it," and the witness followed this by testimony that the agreement introduced in evidence, signed by the parties, was a correct copy of the slip of paper that was given him by Mr. Baker. Petitioner must have been familiar with this testimony, since the petition contains a correct reference thereto in the reporter's transcript.

[3] Petitioner further chooses to distort the language of the opinion, "As the lease was executed by defendants, the lessors without the formality of a *preceding* escrow" (italics ours), by urging that there was an escrow, and, to support this contention, refers to evidence of an alleged escrow relative to the lease with the Bank of Commerce *after* the lease was executed and delivered. Had counsel read the testimony of the banker, they would have discovered that he testified as follows: "Q. Was there ever any escrow created in your bank relative to that lease? A. No sir." There is evidence, supported by a stipulation at the trial, that the lease and a check for $2,700 were deposited with the banker "as trustee" by the lessee, Whittier Pools, Inc., to finance and negotiate a loan on the property to provide funds for the project of the lessee, and that later the commission agreement and a mortgage and some notes were handed to the banker. The facts as to the nature of the deposit with the bank cannot be the subject of dispute, for the record shows that the parties stipulated at the trial that the deposit of the lease with the banker was "as trustee * * * to finance this property," and it also appears that this was subsequent to the execution and delivery of the lease since the depositor of the lease was Whittier Pools, Inc., the lessee. It would seem that the deposit was not an escrow, but a trust to finance the project, not involving in any way the delivery of the lease. But, whether escrow or trust, it was subsequent to the delivery and execution of the lease, and, under the law of the case, subsequent to the time when the commission became due. The evidence offered to prove such trust or escrow was therefore immaterial, and its exclusion was not erroneous.

The petition is denied.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

118 Cal.App. 503

MONSON et al. v. FISCHER.

Civ. 7457.

District Court of Appeal, First District,
Division 1, California.

Nov. 24, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Denied by Supreme Court Jan. 22, 1932.

1. Contracts 🔑284(4), 287(2).

In absence of fraud, bad faith, or mistake, architect's decision or certificate as to performance is conclusive, where contract either expressly or impliedly so provides.

2. Contracts 🔑284(4).

Typewritten specifications providing that architect's decision shall be final *held* to control printed portion of construction contract providing for arbitration of differences (Civ. Code, § 1651).

> Evidence disclosed that specifications were written under the special direction of the parties and with a special view to their intention, while the printed portions to which the specifications were annexed were prepared without special reference either to the parties or to their contract.

3. Contracts 🔑284(4).

Building contract *held* to provide that contractors must obey architect's decision first and arbitrate afterwards, in absence of fraud or mistake (Civ. Code, § 1641; Code Civ. Proc. § 1858).

4. Principal and agent 🔑23(1).

In action on building contract, evidence *held* to show that engineer employed by tenant to test concrete had no power to bind owner.

5. Contracts 🔑167.

Where city building ordinance specified stresses per square inch of concrete at age of 28 days, parties to building contract *held* presumed to have contracted with ordinance in view.

6. Contracts 🔑198(2).

Building contract provision that architect should exercise reasonable diligence to discover defects in materials must be construed in light of usual 28-day test for determining strength of concrete.

7. Contracts 🔑303(5).

That architect's demand for removal of defective concrete was coupled with unauthorized demand that removal be at contractors' expense *held* not to excuse contractors' breach.

> Contractors' breach was not excused, since demand of architect, not authorized by the contract, was not binding on the parties, in that architect has no implied power to change the terms of the contract, and, in addition, the contractors' refusal was based only upon claim that work which they were required to remove was not defective.

8. Contracts 🔑322(4).

Finding that architect's certificate, stating that concrete did not conform to standard fixed by contract, was not issued through mistake *held* sustained by evidence.

9. Contracts 🔑287(2).

Issuance of architect's certificate based on periodical estimate entitled contractors to payment, although contract was entire and uncompleted.

10. Contracts 🔑319(2).

Work and labor 🔑14(2).

Owner's failure to pay installment under building contract does not, unless payment is condition precedent, justify abandonment of work and recovery for full performance, but only rescission and recovery for work performed.

11. Contracts 🔑346(2).

Where notice and demand are made condition precedent to obligation to perform duty under building contract, they must be pleaded and proved.

12. Contracts 🔑277(1).

While notice and demand of performance of building contract may be waived by party's refusal to perform, such refusal must be unequivocal and accepted as such by other party (Civ. Code § 1440).

13. Contracts 🔑303(5).

Owner *held* not in default where, although architect had notified her not to pay, she had not refused to pay contractors, and latter had not treated her as in default.

14. Contracts 🔑261(2).

Where contractors wrongfully refused to remove concrete work on architect's order, and persisted in refusal for time specified in contract, owner had right, upon notice, to terminate contract.

15. Contracts 🔑306(1).

Where contractors fail to complete contract, owner may, where contract so provides, complete work at contractors' cost, without further payment until completion.

16. Contracts 🔑329.

Action by contractors on building contract rightfully canceled by owner *held* prematurely brought, where owner had not completed building.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Olof Monson and Herman E. Rahlmann, copartners doing business as Monson Brothers, against Martha W. Fischer. From judgment for plaintiffs, defendant appeals.

Reversed.

Superseding opinion in 300 P. 843.

Percy E. Towne, Richard tum Suden and Peter A. Breen, all of San Francisco, for appellant.

Leicester & Leicester and Norman A. Eisner, all of San Francisco, for respondents.

PER CURIAM.

Respondents, herein called the contractors, recovered judgment against appellant in the sum of $45,544.69 as damages for the alleged breach of a contract for the construction of a four-story concrete building. It was alleged that the contractors were prevented from completing the structure, and the judgment included the value of its partial construction with interest thereon, and the estimated loss of profits. Reversal is sought on the ground that the judgment and findings are unsupported.

The contract price was $124,175. The structure was designed to carry two additional stories, and had been leased in advance for factory purposes. The contract required the contractors to furnish the materials and perform the work in accordance with certain plans and specifications which were prepared by appellant's architect. The contract consisted of two documents, one entitled "Articles of Agreement," which was a printed form containing certain typewritten stipulations; the other, designated as the "Specifications," was entirely typewritten, was annexed to the article of agreement, and by reference made a part thereof.

The specifications with respect to the concrete, so far as the same are material, provided as follows: "The concrete for plain work shall be composed of one part of cement to three parts of sand and five parts of gravel and crushed rock, mixed. Re-inforced concrete shall be composed of one part cement to six parts of sand and crushed rock or gravel, except for all interior and/or free standing columns, where the mix will be a one to four and one-half (1:4½) as noted on the structural plans. * * * The ultimate strength of 1 to 6 concrete shall not be less than 2,000 lbs per square inch, and the 1 to 4½ concrete not less than 2500 lbs per square inch. The owner reserves the right to have samples taken. * * *"

The articles of agreement provided that the work should be done and the materials furnished under the direction and supervision of the architect or the superintendent selected by the owner; that the same should be paid for in monthly installments of 75 per cent. of the value of the completed work done during the previous month as estimated by the architect; that when each installment became due, a certificate should be obtained from the architect stating the same to be due, and the amount thereof; that progress payments by the owner should not be construed as an absolute acceptance of the work done up to the time of such payments, except as to such matters as were open and obvious, but that the architect or superintendent should exercise reasonable diligence to discover and report to the contractors unsatisfactory materials and workmanship so as to avoid unnecessary trouble and cost to the contractors in making good the defects; otherwise any objection thereto should be deemed waived; and that if the owner should fail to make within seven days of its maturity and presentment any payment provided in the contract, then after three days' notice the contractors might terminate the contract and recover for any work done, any loss on plant, material, or workmanship, and the reasonable anticipated profit on the uncompleted portion of the work.

The specifications further stipulated that "the architect or his representative, as agent of the owner, shall have general supervision and direction of the work. He has authority to stop work whenever necessary to ensure proper execution of the contract, and is authorized and empowered to reject or refuse all labor and materials, or methods of application, or any part thereof, that do not comply in kind, quality and quantity with the drawings and specifications.

"To prevent all disputes and litigation the architect shall in all cases determine the amount and the quality of the several kinds of work which are to be paid for under this contract, and he shall determine all questions in relation to said work and the construction thereof, and he shall in all cases decide every question which may arise relative to the execution of this contract on the part of the contractor, and his estimate and decision shall be final and conclusive;" also that "any and all work or material that does not conform to the plans and specifications shall be immediately removed from the premises or made good by the contractor when directed to do so by the architect; * * *" and that "neither the final certificate nor payment shall relieve the contractor from responsibility for omissions and faulty materials or workmanship, and he shall remedy any defects therein or make good any omissions, and pay for any damage to the other work resulting therefrom which shall appear within a period of one year from the completion and acceptance of the work."

Certain of the printed portions of the articles of agreement were as follows: "Should dispute arise as to the true meaning of the plans and specifications, or respecting the manner or sufficiency of the performance of any work thereunder * * * the questions in dispute shall in the first instance be decided by the architect; but should either owner or contractor be dissatisfied with his decision the question shall, on written demand of either delivered to the other at his last-known residence or place of business, be submitted for decision to a board of arbitration, consisted of three disinterested men experienced in the business of building, one to be named in the demand of the party making the demand, one by the other party within five days thereafter, the third by these two, these arbitrators to have plenary power, and the decision of any two of them to be conclusive and binding upon both parties to this agreement. No dispute shall interfere with the progress of the general construction, but necessary work shall proceed under the direction of the architect, and the decision of the arbitrators shall award adequate compensation therefor as due." Further, that "* * * No portions of the specifications that are in conflict with this agreement, or that are not actually descriptive of the work to be done hereunder or the manner in which it is to be done, are to be considered as part hereof, but such portions, if any, are null and void."

Excavations preliminary to the erection of the building were completed before the execution of the contract on November 7, 1927. The pouring of the concrete commenced on that date, and work on the structure continued until December 2, 1927.

As stated, appellant had leased the structure. By the lease, the tenant assumed responsibility for its maintenance during the term, and agreed that its occupancy should be deemed an admission that it was sound and constructed in compliance with the above plans and specifications, which were made a part of the lease. Because of this provision, the tenant consulted the engineering firm of Smith, Emery & Co. regarding the best method of securing information as to the materials and workmanship used in the construction of the building, and persons employed by Smith, Emery & Co. were present on each day that the mixing and pouring of concrete continued, and took samples thereof.

The work progressed to a point where the footings and basement columns upon which the building was to rest were poured. These footings consisted of solid rectangular masses of concrete approximately eight feet square and three feet in height. The basement walls were also poured up to the same level around the entire excavation, except at the point where the concrete mixer was operating. It also appears that several of the sidewalk slabs were constructed.

Under the contract, the contractors, upon obtaining the architect's certificate, would be entitled on December 1, 1927, to a progress payment for work done previous to that date; and on December 5, 1927, the architect delivered to them his certificate stating that there was due the sum of $21,504.75. On the same date, a duplicate of the certificate was delivered to the appellant, but the installment was not paid. On December 2, 1927, the architect notified the contractors in writing that he had received a report from Smith, Emery & Co. covering two 14-day tests of the concrete, which indicated a crushing strength of 685 and 809 pounds per square inch, and that the test of the "1 to 6" mix should show at least a strength of 1,100 pounds per square inch at the end of seven days. By the same notice, the contractors were instructed "not to proceed further with the concrete work that we may determine what is at fault with the materials." On December 5, 1927, the contractors were further notified by the architect "to remove the present concrete material from the premises and submit new samples of the material for the work to Smith, Emery & Co. for analysis and approval before proceeding further with the work"; also "to remove all the concrete in the first floor slabs and beams that was placed this morning contrary to written instructions." On December 6, 1927, the architect wrote to the contractors stating as follows: "You are required to remove forthwith the concrete columns heretofore installed by you on the job down to the footing levels, and this at your own expense. This will require that the sidewalk construction must either be removed to the center line of the span, or a special beam constructed at the building line to support the end of the present sidewalk slab, a detail of which will be furnished you. This demand is made upon the ground that the concrete work as now installed and the whole thereof is defective as to materials, mix and workmanship, and does not comply in any particular nor in any degree with the specifications forming part of the contract. * * *" To this the contractors replied by letter dated December 9, 1927, denying the above statements, and contending that the concrete was mixed and placed in accordance with instructions given them from Smith, Emery & Co.; further, that the architect had failed to report any defect in the materials or workmanship during the progress of the work, and that the same had been approved as it progressed by Smith, Emery & Co.

After the last-mentioned date, several meetings were had between the parties and their representatives, at which, according to the contractors, they informally offered to submit the matters in dispute to the decision of engineers, two to be appointed by the parties, and the third to be selected by the two appointees, but their offer was refused.

The architect on December 24, 1927, by letter addressed to appellant, stated that the contractors had failed to perform the work or furnish materials in accordance with the contract and the specifications; further, that the contractors were notified on December 6, 1927, to remove the defective work and materials, but had neglected for more than ten days to proceed pursuant to the plans and specifications; also that such neglect was sufficient ground for the termination of the contract after notice as provided therein, and the subsequent failure by the contractors to proceed within the time limited thereby.

Further correspondence passed, the contractors contending that there were no defects in the work, and offering to proceed, and appellant demanding that they remove the concrete claimed to be defective, and replace the same according to the specifications.

On January 14, 1928, appellant gave notice to the contractors that she was still willing that they proceed with the work in accordance with the plans and specifications, but demanded that the concrete objected to by the architect be removed; that they had discontinued and abandoned the work for more than ten days, and, if they failed to proceed within five days, she would terminate their employment and herself finish the work by whatever method she deemed expedient; further, that the notice was given pursuant to the terms of the contract.

Following this, the contractors formally offered to submit the dispute to arbitration, and nominated one of the arbitrators. Appellant refused to arbitrate; and, after notice of the hearing, the arbitrator appointed by the contractors rendered and served his decision, in which he found the quality of the concrete to be in accordance with the specifications, and that the same would develop the ultimate strength as therein provided.

The court found, contrary to the allegations of appellant's answer, "that it was not true that the work done and the materials furnished by plaintiffs (the contractors) were not in accordance with the plans and specifications * * *; nor was it true that the concrete placed by the plaintiffs in the structure did not have the strength required by the specifications." It also found that the concrete was mixed, poured, and made in accordance with the contract and specifications, and was of the required quality and strength.

Appellant's contention that the above findings are not supported and that the same do not support the judgment is based upon the typewritten provision in the specifications that the architect "shall in all cases decide every question which may arise relative to the execution of this contract, and his estimate and decision shall be final and conclusive"; and it is urged that the trial court having found that such a question did arise, which the architect decided adversely to the contractors, his decision was final and conclusive and not subject to re-examination by the trial court, and that consequently these findings are not supported by competent evidence.

[1-3] The rule appears to be well settled that the decision, estimate, or certificate of an architect in approving or disapproving the work as a performance of the contract, or in passing upon questions relating thereto, is, in the absence of fraud, bad faith, or mistake, conclusive and binding on the parties where the contract either expressly or impliedly shows that it was the intention that the person to whom the question is submitted should be the final arbiter thereof. Brown v. Aguilar, 202 Cal. 143, 259 P. 735. Here there was no allegation by the contractors or any finding of fraud, mistake, or bad faith on the part of the architect in deciding that the work was not in accordance with the specifications. But the contractors, nevertheless, claim that, in view of the printed provision in the articles of agreement, the portions of the specifications in conflict therewith, or not actually descriptive of the work to be done, should be void, the stipulation in the latter document that the architect should in all cases determine the quality of the work and all questions in relation thereto and the construction thereof, and making his decision final and conclusive, conflicts with the further provision in the articles of agreement that should a dispute arise respecting the manner or sufficiency of any work, the same should first be decided by the architect, but in case of dissatisfaction by either party the question should then be submitted to arbitration, and that the latter controls.

Appellant concedes that under the contract the contractors were given the right to have the correctness of the architect's decision determined by arbitration; but it is claimed that his decision in the first instance was final and conclusive, and that it was therefore incumbent upon the contractors to remove the work to which he objected and proceed according to his directions; that, having removed the work, they might then upon timely demand have had the question determined by arbitration, and any damage caused by an erroneous decision of the architect would have been chargeable to appellant.

Section 1651 of the Civil Code provides that where a contract is partly written and partly printed, or where part of it is written or printed under the special direction of the parties and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form.

It is clear from the evidence that the specifications were written under the special direction of the parties and with a special view to their intention, while the printed articles of agreement to which the specifications were annexed were prepared without special reference either to the parties or their contract. We must therefore hold that the section applies in the present case, and that it was the intention that the typewritten provisions mentioned should control.

Contracts should be construed, if possible, so as to give force and effect to every part (Civ. Code, § 1641; Code Civ. Proc. § 1858), and we are satisfied that appellant's position as stated above is correct. Therefore, no fraud or mistake on the part of the architect having been alleged or found, it was the duty of the contractors to remove the work claimed to be defective, and then call for an arbitration of the dispute.

[4] But notwithstanding the controlling force of the specifications in cases of conflict, the contractors urge that effect should be given to another clause of the articles of agreement not in conflict therewith; namely, the provision that as the work progressed the architect should exercise reasonable diligence to discover and report to the contractors any material or workmanship not satisfactory, and that otherwise any objection thereto should be deemed waived.

In this connection the court found, contrary to the allegations of appellant's answer, that it was not true that on December 5, 1927, nor immediately after the issuance of the certificate which the architect issued on that day, he for the first time ascertained that plaintiffs had been using in the composition of the concrete work improper and defective materials, or materials which were not in accordance with the specifications, or that he also ascertained that the concrete work would not comply with the requirements of the contract or specifications under the usual crushing tests; further, that before any concrete work was done, the tenants notified the contractors that they desired to inspect and test the work as it progressed, and for that purpose had employed Smith, Emery & Co.; that appellant, after learning of this arrangement, did not herself employ an inspector, but notified the contractors that there would be an inspector on the work, and that they would be required to do the concrete work under such inspection. The articles stipulated that the contractors should have general control of the work, but the owner or her employees or representatives, and the architect or superintendent and his representatives, should have access thereto at all times. It was also found that some concrete was poured on November 7, 1927, but that from and including November 8, 1927, a representative of Smith, Emery & Co. was present during the performance of all the concrete work, and that except as above stated none was poured during his absence; that the architect at all times recognized said firm as the testing engineers of the work, and, in addition to his own supervision, relied on them for samples and reports of their inspection and tests, and that the contractors at all times followed the directions and instructions of the firm's inspector; that prior to the mixing and pouring of the concrete the contractors submitted samples of the materials used, and at no time during the progress of the work did appellant or her architect or the inspector report to the contractors any objection to the materials or the work done; that all materials used were as required by the plans and specifications; also "that the defects, if any, which existed in the materials or workmanship used or furnished by the contractors in and about the concrete work were open and obvious during the progress of the work, and that it was not true, as alleged by defendant (appellant) that her objections were made as soon as such defects were ascertained by her or by any person employed by or representing her"; and that "it is true that on and before November 29, 1927, and at all times from and after the commencement of the concrete work done by plaintiffs (the contractors), appellant and her architect had knowledge and notice of the kind and quality of the material which plaintiffs were using and did use in all of said concrete. * * *" It was further found, however, "that the ultimate strength and quality of said concrete or any part thereof could not be accurately estimated until twenty-eight days had elapsed after the pouring thereof, but the strength and quality of said concrete could have been approximately estimated at the expiration of seven days after the pouring thereof. * * *"

We think it clear that neither the firm of Smith, Emery & Co. nor its employees were empowered to approve the completed work, or to bind the parties on the question whether it complied with the requirements of the contract, these being matters for the architect's determination; and while the superintendent and foreman of the contractors testified that representatives of the engineering firm were present while the work was in progress, and made objections from time to time to the manner in which the concrete was being mixed and to some of the materials used, and that the contractors agreed to meet these objections, nevertheless the record discloses no evidence of an agreement that the parties should be concluded by their suggestions or determination, or the powers of the architect thereby limited.

[5, 6] Section 109 of the San Francisco Building Law and Ordinance, regulating the construction of buildings therein, provided that a stress of 2,000 lbs. per square inch at the age of twenty-eight days should be considered the ultimate compressive strength of concrete composed of one part cement to six parts of sand and gravel; and that 2,500 lbs. per square inch at the age of twenty-eight days should be considered the ultimate compressive strength of concrete composed of one part cement to four and one-half parts of sand and gravel. The parties are presumed to have had the law in view in making their contract (Brown v. Kling, 101 Cal. 295, 35 P. 995; Maguire v. Reardon, 41 Cal. App. 596, 183 P. 303); and contractor Monson testified that it was his understanding that the strength of the concrete was to be determined by the 28-day test. While the testimony shows, as the court found, that an approximate estimate of the strength and quality of the concrete could be made by testing after the expiration of seven days, there is nothing in the contract or the testimony which supports the contractors' contention that the architect, at the expiration of any period less than twenty-eight days, was bound at his peril to determine the question; and it is our conclusion that the provision that he should exercise reasonable diligence to discover and report to the contractor, as the work progressed, defects in materials and workmanship which were not satisfactory, should be construed in the light of the usual method of ascertaining with certainty the strength and quality of concrete; namely, the 28-day test. Nor does the testimony of certain witnesses that they could determine with a fair degree of certainty by inspecting the materials, and observing the manner in which they were mixed, the strength and quality of the concrete they would produce, change the above conclusion; nor under the evidence does a reasonable construction of the contract support the inference that concrete wanting in the requisite strength, a fact which could be accurately determined only by the 28-day test, was an open and obvious defect within the meaning of the instrument.

[7] The point is made by the contractors that the demand for the removal of the concrete was coupled with a further demand, which was contrary to the contract; namely, that the removal be at their expense. As to this we think it sufficient to say that such a demand was not binding on the parties, it being the rule that the architect has no implied power to change the terms of the contract (Brown v. Coffee, 17 Cal. App. 381, 121 P. 309, 311); nor was the contractors' refusal based upon this ground, but upon the claim that the work which they were required to remove was not defective.

As stated, the architect on December 5, 1927, issued his certificate that the contractors were entitled to a progress payment of $21,504.75. On the following day, appellant was notified by the architect to withhold payment, but the contractors were not advised of such notice. On December 29, 1927, a second certificate was issued to appellant, and a copy sent to the contractors, certifying that the latter had failed to perform, in that the concrete work was defective as to materials and workmanship. The first certificate was presented to appellant on December 27, 1927, with a letter demanding payment, but the same remains unpaid. Appellant contends that the first certificate was issued by mistake; and that in any event the rule that the decision of the architect is conclusive does not apply to progress payment certificates; while the contractors insist that the rule applies equally in such cases; and further, that even though there was a neglect of the architect's duty to the owner, the certificate was not issued by mistake, and therefore could not be recalled.

On December 2, 1927, the architect wrote to appellant the letter hereinbefore referred to, but notwithstanding this the certificate was issued. In explanation of his action, the architect testified that on November 29, 1927, he was advised by Smith, a member of the engineering firm, that the tests of the concrete "were not running very good"; and on December 5th, before the certificate was issued, at a conference between the witness, the contractors, and Smith, the latter advised in substance that the concrete was of poor quality, and the gravel used in the mixture was poor material. The witness claimed that he had no definite reports at the time the certificate was issued, further stating "I never thought there would be anything serious outside of a few hundred pounds difference in strength, which often happens and that you can regulate right on the job. I never expected anything so bad as the actual reports turned out to be; so, under the conditions I issued the certificate"; further, that the certificate was based on the written statement of the contractors as to the amounts expended. In this connection, he said that he was satisfied from his inspection of the work that the statement was approximately correct; that in such cases he never went into close details until nearing the final payment, when he made sure that sufficient money was withheld to finish the job. Appellant alleged that immediately after the issuance of the certificate the architect for the first time ascertained that the contractors were using improper and defective materials, and that the concrete would not comply with the requirements of the contract. She also claims that the evidence shows that the contractors obtained the certificate by misrepresenting the cost of the excavation work. But no mistake other than the above was alleged, and the court found the allegations to be untrue.

[8] It is clear, we think, that when the certificate was issued the architect believed the concrete did not conform to the standard fixed by the contract, but assumed that any defects might be satisfactorily corrected. This question has been held to be one for the jury (Rialto Construction Co. v. Reed, 17 Cal. App. 29, 118 P. 473), and the court's finding that there was no mistake is fairly sustained by the evidence. It has also been held that where the contract calls for periodical estimates as the work progresses, and payments based thereon, and for a final estimate after the work is complete, the periodical estimates are not conclusive as a rule on either party; but where the contract expressly or by necessary implication so provides, such estimates, in the absence of fraud or mistake, are binding on the parties, both the owner and builder. 9 Cor. Jur., Building and Construction Contracts, §§ 165–6, pp. 826–8; Dingley v. Greene, 54 Cal. 333. As urged by appellant, the articles of agreement provided that the making of progress estimates should not be considered as an absolute acceptance of the work done up to that time, except as to such matters as were open and obvious; but, with that exception, the entire work should be subject to the inspection and approval of the architect. Nevertheless, as stated, the specifications also provided that the architect should determine all questions in relation to the work, and that his estimate and decision should be final and conclusive. The latter clause, as urged by appellant, bound the contractor; and it is also clear from its provisions that the same was also intended to bind the owner, and that the issuance of the certificate should, in the absence of fraud or mistake, be conclusive of the contractors' right to the progress payment, subject to the provision that such payment should not, except as to matters open and obvious, constitute a final acceptance of the work done up to that date.

[9, 10] Under this construction of the contract, and in view of the findings the contractors became entitled to demand the payment mentioned in the certificate; and it has been held that the owner's obligation to pay such installment becomes fixed; and although the contract is entire and has not been fully performed an action therefor can be maintained. 9 Cor. Jur., Building and Construction Contracts, § 170, p. 832; Milske v. Steiner Mantel Co., 103 Md. 235, 63 A. 471, 5 L. R. A. (N. S.) 1105, 115 Am. St. Rep. 354. In the case of building contracts it has long been the general rule in this state that the mere failure to pay an installment as it becomes due, unless such payment is under the contract a condition precedent, does not amount to prevention which will authorize a contractor to abandon the work and sue for all the benefits he would have received from full performance; but it nevertheless constitutes a breach which will justify a rescission and recovery for the work already done. Cox v. McLaughlin, 52 Cal. 590; Id., 54 Cal. 605; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146; Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 264, 274, 110 P. 951.

[11-14] In this connection, however, the articles of agreement provided that if the owner failed to pay the contractor within seven days of its maturity and presentation any payment provided for therein then the contractor might upon three days' written notice terminate the contract and recover compensation for work done, profits, and damages. Parties may provide in their contracts for notice and demand as conditions precedent to the obligation to perform; and, where this is done, compliance with the condition must be alleged and proved (13 Cor. Jur., Contracts, § 741, p. 660; Danielson v. Neal, 164 Cal. 748, 130 P. 716), although the requirement that such condition be performed will be waived by a refusal to perform by the other party to the contract (Civ. Code, § 1440); but to have that effect the refusal must be unequivocal, and be treated and acted upon as such by the party to whom the promise was made. 6 Cal. Jur. Contracts, § 246, p. 413; 6 R. C. L. Contracts, § 385, p. 1025. In the present case, while the testimony shows that the architect notified appellant not to pay, there was no refusal on her part prior to the presentation of the certificate and demand of December 27, 1927; nor was any act by her or the architect treated as such by the contractors previous to that date. Consequently appellant was not in default under the contract by reason of the nonpayment of the amount called for by the certificate before the same was presented. In the meantime the architect, after receiving further information from Smith, Emery & Co., determined that the work done was not in accordance with the specifications, and demanded its removal. This under the contract he had the right to require, subject of course to the contractors' right to have the correctness of his decision subsequently determined by arbitration. The contractors, however, refused, it being their contention that they were entitled to have the question settled by arbitration before removing the work. In view of our construction of the contract, the contractors' position was not tenable; and their refusal, if continued as provided by the contract, constituted a breach on their part, giving appellant the right upon notice to terminate the employment, take possession of the premises, and finish the work. The contract provided that in the latter event the contractor should not be entitled to any further payment until the work was finished, when, if the unpaid balance of the contract

price exceeded the expense of finishing the work, such excess should be paid to the contractors, or, if the expense exceeded such balance, the contractors should pay the difference to the owner.

[15] When a contractor fails to complete his contract after partial performance the owner may require full performance as a condition to any recovery thereon, or payment for the work and material furnished thereunder; or, where the contract so provides, he may complete the work at the cost of the contractor; and, where the right of completion is given by the contract after notice, the completion of the work by the owner after such notice must be deemed a completion of the work under the contract (Dahlberg v. Girsch, 157 Cal. 324, 107 P. 616); and in such case the contractor is entitled to receive only the balance of the contract price that may remain over and above the cost of completion. 6 Cal. Jur., Contracts, § 256, p. 429; Hughes Brothers v. Hoover, 3 Cal. App. 145, 84 P. 681; O'Brien v. Garibaldi, 15 Cal. App. 518, 115 P. 249. The final notice by appellant stated that it was given pursuant to the terms of the contract; and, although the record shows no express allegation or finding as to the fact, we assume that the appellant proceeded thereunder to complete the work. As to when the same was completed the record is silent, but from certain testimony by the architect as to the cost thereof the fact is sufficiently shown. It also appears from the testimony that the appellant availed herself of certain of the work done by the contractors previous to the notice. Appellant also alleged in a cross-complaint that she was obliged to remove a portion of this work, and, due to the expense of such removal and the delay, suffered damage in the sum of $20,000. The court found that she was not obliged to remove the work, and suffered no damage by reason of anything done or omitted by the contractor; but no findings as to the cost or date of the completion or the value of the work done by the contractors which appellant used were made; nor, in view of the court's conclusion, would such findings be necessary to its decision.

We are of the opinion that under the contract and the evidence the contractors would have been entitled to recover the progress payment according to the certificate; but that such recovery or payment of the amount would not have constituted an absolute acceptance by appellant of the work done up to that time. They having, however, breached the contract by failing to remove the work objected to by the architect, and having persisted in such refusal, appellant was entitled after notice, which was given, to take possession and finish the work. This step having been taken, the contractors, as was expressly stipulated, were not entitled to receive any payment before the work was finished, and then only subject to the further rights of appellant under the contract.

[16] It would seem from the record that the building had not been completed when the complaint was filed. It was, of course, plaintiffs' theory that full performance by them was prevented, and, on this assumption, their action was properly commenced; but under our view of the case nothing would become payable until the completion of the building, and an action before that time would be premature. 1 Cal. Jur., Actions, § 54, p. 377.

For the foregoing reasons, the judgment is reversed.

118 Cal.App. 659

In re EASTON'S ESTATE.

DIXON et al. v. HARTNETT et al.

Civ. 7893.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1931.

Rehearing Denied Dec. 28, 1931. Hearing Denied by Supreme Court Jan. 25, 1932.

1. Judgment 🔑199(1).

Motion for directed verdict during trial *held* necessary prerequisite to rendition of judgment notwithstanding verdict (Code Civ. Proc. § 629).

2. Trial 🔑168.

Motion for directed verdict is same in nature as motion for nonsuit or demurrer to evidence.

3. Judgment 🔑199(1).

Presentation to court of paper containing requested instructions directing answers to questions and return of verdict for proponents of will *held* not equivalent to motion for directed verdict so as to authorize judgment notwithstanding verdict (Code Civ. Proc. § 629).

The submission of the paper did not amount to a motion for directed verdict, since no motion whatever oral or written was made by proponents of the will against whom verdict was rendered, and it did not appear that contestants knew of the contents of the paper submitted, and they were afforded no opportunity to supply additional testimony.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Will contest by Samuel Dixon and others opposed by Sarah Hartnett and others, proponents, to set aside the will of Mary Easton, deceased. From a judgment for proponents entered by the court, notwithstanding the verdict of jury, contestants appeal.

Reversed, with directions.

Edwin L. Forster, of Sonora, and Walker Peddicord, of San Francisco, for appellants.

Robert McMahon, John P. Doran, and Andrew F. Burke, all of San Francisco, for respondents.

PER CURIAM.

This is an appeal by the contestants of decedent's will from a judgment in favor of the proponents, rendered by the court notwithstanding a verdict of a jury finding that the will was procured by undue influence.

[1] Section 629 of the Code of Civil Procedure, authorizing the rendition of a judgment non obstante veredicto, reads as follows: "*When a motion for a directed verdict, which should have been granted, has been denied* and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict. * * *" (Italics ours.) And in construing said section, it has been definitely held that the making of the motion for a directed verdict during the trial of the action is a necessary prerequisite to the rendition of such a judgment. Cushman v. Cliff House, 79 Cal. App. 572, 250 P. 575; Estate of Yale (Cal. Sup.) 4 P.(2d) 153. As pointed out in the Cushman Case, the Legislature in enacting said section adopted in substance the provisions of similar statutes of Minnesota and North Dakota, and in those states, too, it has been held that judgment non obstante veredicto can be granted only when a motion for a directed verdict was made at the trial. Knight v. Martin (In re Martin's Estate) 124 Minn. 191, 144 N. W. 941; Landis Mach. Co. v. Konantz Saddlery Co., 17 N. D. 310, 116 N. W. 333.

[2, 3] In the present case, no such motion was made or presented. All that respondents did was to hand to the court, at the conclusion of the evidence, a paper reading as follows:

"Instructions.

"I. Were Robert McMahon and Marie Cunningham present at the time Mary Easton's name was subscribed to said will?

"You are instructed to answer this question in the affirmative.

"II. Did Mary Easton by words or conduct indicate to Robert McMahon and Marie Cunningham that said instrument was her will and that she wished them to sign the same as witnesses?

"You are instructed to answer this question in the affirmative.

"III. Did Robert McMahon and Marie Cunningham sign said will in the presence of Mary Easton and in the presence of each other?

"You are instructed to answer this question in the affirmative.

"IV. Was Mary Easton procured to make said will by undue influence of Lucy Hartnett or Margaret Eckenroth or Sarah Hartnett or either or one of them or by undue influence of any other person whomsoever?

"You are instructed to answer this question in the negative.

"V. Was Mary Easton at the time this will was made of sound mind?

"You are instructed to answer this question in the affirmative.

"VI. You are hereby instructed to return a verdict in this case in favor of proponents."

The court read the contents of the paper to the jury, except that it refused to direct a verdict on question IV (relating to undue influence) and left that issue open, to be determined by the jury. It also refused to give the general instruction at the end (paragraph VI).

Respondents contend that the submission of said paper to the court under the circumstances above stated was sufficient to meet the demands of the first clause of section 629, which requires that a motion for a directed verdict shall be made. We are unable to sustain this contention. In its nature, a motion for a directed verdict is the same as a motion for nonsuit, a demurrer to the evidence (Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184), the right of the court to direct a verdict, touching the condition of the evidence, being absolutely the same. Estate of Caspar, 172 Cal. 147, 155 P. 631; Newson v. Hawley, 205 Cal. 188, 270 P. 364; Card v. Boms, 210 Cal. 200, 291 P. 190. Evidently, therefore, the main purpose of the statute in requiring such a motion to be made as a condition precedent to the exercise of the court's power to render judgment non obstante veredicto is to give the party against whom the motion is directed an opportunity to introduce whatever further and additional evidence he may have at hand to overcome the grounds of the motion. Such is the apparent interpretation given the section by the decision in the Estate of Fleming, 199 Cal. 750, 251 P. 637, 638, wherein the court was considering the effect of the denial of a motion for a directed verdict based on insufficient grounds; and it was said: "Had the motion for a directed verdict been granted on an assignment of grounds which was insufficient, and the contestant thereby deprived of the opportunity to meet objections, which should have been more precisely stated, by introducing other evidence, she would be in position to complain." Here, as stated, no motion whatever, oral or written, was made by respondents; nor does it appear that appellants knew of the contents of the paper submitted by respondents to the court; therefore, appellants were afforded no opportunity to supply additional testimony to meet, if they could, the grounds of respondents' objections to the sufficiency of the evidence. It follows, therefore, that since respondents failed to comply with the provisions of said Code section by omitting to present a motion for a directed verdict, and the verdict was against them, the court was without authority to render judgment in their favor contrary to the verdict. All that it could do under the circumstances was to grant a new trial after the entry of judgment in conformity with the verdict.

In view of the conclusion we have reached on this branch of the appeal, the question of the sufficiency of the evidence which appellants also urge as a ground of appeal becomes immaterial. The judgment is reversed, with directions to enter judgment in accordance with the verdict, and thereafter to hear and determine such other and further proceedings as may be necessary to a final disposition of the cause.

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118 Cal.App. 756

ALTIERI v. F. B. McKEVITT CO. et al.

Civ. 4405.

District Court of Appeal, Third District, California.

Dec. 2, 1931.

Appeal and error ⚷1015(2).

Order granting new trial for insufficiency of evidence to support verdict will not be disturbed; evidence being conflicting and not insufficient to support verdict for moving party.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Francisco Altieri against the F. B. McKevitt Company and others. From an order granting a new trial, plaintiff appeals. Affirmed.

Vincent W. Hallinan, Michael Riordan, and W. Earl Shafer, all of San Francisco, and T. B. Hart, for appellant.

William M. Malone, of San Francisco, and W. U. Goodman, of Fairfield, for respondent.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover damages in the sum of $50,000 on account of the alleged destruction of a vineyard growing upon the lands of plaintiff. It was tried before a jury, and a verdict rendered for plaintiff in the sum of $10,000. The court granted a new trial, based upon the insufficiency of the evidence, and this appeal is taken from the order granting the new trial.

While in possession of the land of plaintiff, under a crop mortgage, defendant uprooted and removed a number of grape vines. Among these vines a number of young fruit trees had been planted. The entire controversy arose over the question as to whether or not it was good husbandry to remove these vines, and whether or not the vines had any value. Upon this matter the evidence is in absolute conflict. For illustration, one witness testified that the vines were old and valueless. On the other hand, plaintiff testified that the 6,000 vines were worth some $6 each.

We have no power to disturb the order appealed from, as there was a conflict upon material issues. We cannot say that a verdict in favor of the moving party would not have sufficient legal support in the evidence adduced at the trial. Empire Investment Co. v. Mort, 169 Cal. 736, 147 P. 960.

The appeal has no semblance of merit. The rule upon appeal in such cases has been reiterated so many times that it seems almost a waste of time and money for the losing party to proceed beyond the trial court, to which a broad discretion has been committed. A more strict adherence to this rule would go a long way toward relieving the congestion of our appellate courts.

The order is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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118 Cal.App. 625

BINNS v. STANDEN.

Civ. 7879.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1931.

Rehearing Denied Dec. 26, 1931.

1. **Automobiles** ⚷181(7).

In guest's action for injuries, motorist running into left embankment while rounding left curve on slight upgrade at 35 miles per hour, being momentarily blinded by sun, *held* not grossly negligent.

2. **Automobiles** ⚷242(2).

Res ipsa loquitur *held* unavailable to guest suing motorist for injuries from automobile accident caused by motorist being momentarily blinded by sun.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Marie Binns against E. E. Standen. From a judgment for defendant, plaintiff appeals.

Affirmed.

Edmund J. Holl, of San Francisco, for appellant.

B. P. Gibbs, of Los Angeles, and Theodore Hale, of San Francisco, for defendant in superior court.

KNIGHT, J.

Appellant while riding in an automobile as the guest of respondent was injured when the automobile ran into an embankment along the side of the highway and overturned, and thereafter she brought this action against respondent for damages. A motion for nonsuit was granted, and the appeal is taken from the judgment entered thereon.

The accident happened in June, 1930, and therefore is subject to the provisions of section 141¾ of the California Vehicle Act (Stats. 1929, p. 1580), which declares, among other things, that any person who as a guest accepts a ride in a vehicle operated on a public highway shall have no right of action against the driver of the vehicle on account of injuries sustained while riding as such guest, unless it be established that such injury resulted from the intoxication, willful misconduct, or gross negligence of the driver. Appellant makes no claim that respondent was intoxicated or guilty of willful misconduct, and consequently under the requirements of said section, before she was entitled to damages, it was essential for her to establish that her injuries were the result of respondent's gross negligence.

[1] The evidence relating to the circumstances of the accident was without conflict. It consisted only of the respondent's deposition, which appellant introduced in evidence as part of her case, and her own oral testimony. It appears therefrom that earlier in the day the parties drove from San Francisco to Santa Cruz and that the accident occurred on the return trip to San Francisco, late in the afternoon, on the Skyline boulevard, in San Mateo county. They had just passed over a straight stretch of highway and were rounding a left curve on a slight upgrade, when, according to the testimony of respondent, he was suddenly and momentarily blinded by the sun, and before he could stop the automobile or recover his vision the automobile drew over to the left side of the curve and into the embankment. There is nothing in appellant's testimony which conflicts with that given by respondent. In fact, she frankly admitted that she knew very little about the cause of the accident, that it all "happened like the snapping of fingers." She was unable to say whether it "was a sharp turn or a wide turn, or what sort of a turn" it was, and she finally stated: "To tell the truth I was riding and was not looking." Counsel for appellant calls attention to a statement made by her to the effect that, upon approaching the curve respondent did not "cut down his speed," but she admits that he was traveling less than 35 miles an hour, which was well within the statutory limit; and the evidence shows without dispute that he was keeping to the right-hand side of the highway, which was paved and smooth, 60 feet wide, and clear of traffic. Moreover, the fact that the automobile ran into an embankment on the left side of a left curve is in itself proof that the accident was not caused by excessive speed, because if the automobile were unable to negotiate the curve on account of excessive speed necessarily it would have swerved toward and into the right embankment. In view of the foregoing undisputed facts, the trial court was fully justified, in our opinion, in holding as a matter of law that appellant's claim of gross negligence was unsupported.

[2] Appellant seeks to invoke the benefit of the inference of negligence arising from the doctrine of res ipsa loquitur; but obviously she is precluded from doing so because even assuming that such doctrine is available in cases such as this, where it is essential to establish "gross" negligence, as distinguished from "ordinary" negligence, the record discloses, as already pointed out, that in support of and as part of her case she introduced in evidence respondent's deposition from which it appears without contradiction that the accident was caused by a sudden condition which he could not have foreseen, and over which he had no control; therefore, under such circumstances, whatever inference of negligence may have arisen from the mere fact of the happening of the accident, disappeared. Smellie v. Southern Pacific Co. (Cal. Sup.) 299 P. 529.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

118 Cal.App. 727

GLADDING, McBEAN & CO. v. SOUTHERN SECURITIES CO. et al.

Civ. 6881.

District Court of Appeal, Second District, Division 1, California.

Dec. 1, 1931.

Rehearing Denied Dec. 30, 1931. Hearing Denied by Supreme Court Jan. 28, 1932.

1. Appeal and error ⚷1170(3).

In materialman's action on accepted order for money, defective pleading of alleged fraud, whereby defendant's action prevented materialman from taking proper proceedings to recover on contractor's bond, *held* not to require reversal (Const. art. 6, § 4½).

Reversal was not required under Const. art. 6, § 4½, where it was manifest that defendant was not deceived or misled by the allegations with reference to the fraud, in addition to which it appeared that defendant had ample notice, not only of the nature of the evidence upon which plaintiff would rely to establish a case against defendant, but in part was informed of what such evidence would consist and other facts showing that real issue in action was thoroughly understood and acted upon not only by each of parties thereto but as well by trial court.

2. Mechanics' liens ⚷113(2).

Where plaintiff did not protect its claim against contractor because of defendant's promise to unconditionally accept contractor's order to pay claim, defendant *held* estopped to deny liability.

Contractor agreed to improve street and filed contractor's bond. Defendant agreed to furnish contractor money to finance job. Contractor became indebted to plaintiff for materials furnished. Defendant agreed to accept order from contractor to pay plaintiff's claim and, relying on agreement, plaintiff failed to file "stop notice" to insure payment of debt under contractor's bond. Plaintiff having procured order from contractor, defendant agreed to pay debt "out of any funds that may be due in accordance with our contract with contractor." On trial, defendant contended that no liability ever existed against it and in favor of plaintiff because no funds were due contractor.

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action by Gladding McBean & Company against the Southern Securities Company and another. From a judgment in favor of plaintiff, the Southern Securities Company appeals.

Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

G. C. DeGarmo and H. B. Cornell, both of Los Angeles, for respondent.

HOUSER, J.

Prior to the happening of the particular incidents upon which the action which forms the foundation of the appeal herein depends, a corporation known as Fry Bros. Contracting Company entered into a contract with the street superintendent of the city of Venice for the improvement of a street located in said city, known as Venice boulevard. Thereupon the contractor filed the required bond for the benefit and protection of persons who might perform labor for, or furnish materials to, the contractor, to be used in the performance of the work in question. Thereafter the contractor entered into an agreement with the appellant Southern Securities Company by which, for certain consideration moving to it, the latter corporation agreed to furnish directly to the contractor certain moneys to be used by him in financing the job. In the course of the performance of the work incident to the contemplated improvement, the contractor became indebted to the plaintiff Gladding, McBean & Company on account of certain materials furnished by said plaintiff to the contractor and which materials were used in the construction of the said improvement. The said debt not having been paid, and the time being about to expire within which, by the filing of a "stop notice," the plaintiff might protect its interests in the premises and probably insure the payment of the debt under the provisions of the contractor's bond, the plaintiff approached the defendant Southern Securities Company with a view to having the latter pay the debt for the contractor in accordance with the authorization so to do under the provisions of the financing agreement to which reference has been had; in pursuance of which, at defendant's request, at a time preceding by thirteen days the date of expiration of the time within which the plaintiff might have filed its said "stop notice," the plaintiff procured from the contractor an order expressed in the following words:

"Please pay to Gladding, McBean & Co., the sum of $1353.35, this being in full of their account for material furnished on our Venice Job;" and which order, on at least two occasions prior to the expiration of the time allowed by law within which a "stop notice" might have been filed by the plaintiff, the defendant agreed to accept. The evidence adduced on the trial of the action warrants the conclusion reached by the trial court that in violation thereof, both as to the date of its execution, and as to the contents of the acceptance, the defendant failed to execute its acceptance of the order until after four days had expired following the last day upon which said "stop notice" effectively might have been filed; at which time, in the language hereinafter quoted, the defendant executed its acceptance of the said order, to-wit:

"We accept the above order, payable out of any funds that may be due Fry Brothers Contracting Company upon the issuance of the bonds in payment of the above job, in accordance with our contract with Fry Bros. Contracting Company."

Thereafter the defendant failed and refused to pay the said debt which was owing by the contractor to the plaintiff; with the result that an action was brought on said acceptance by the plaintiff against the defendant, which eventuated in a judgment in favor of the plaintiff, and from which judgment this appeal is prosecuted.

The foundation of the defense to the action, as well as the basis for this appeal, depends upon the construction which should be placed upon the language of the acceptance of the order, and especially upon that part thereof wherein, in effect, the defendant agrees that it will pay the debt of the contractor owing to the plaintiff "out of any funds that may be due * * * in accordance with our contract with Fry Bros. Contracting Company."

Referring to the contract in question, it is noted that by one of its provisions "said contractor hereby guarantees the repayment to said second party of all money advanced by second party to said contractor under and pursuant to this agreement, and any other money that may be due from said contractor to said second party, and said contractor hereby agrees to hold and save harmless the said second party from any loss, damage or expense which second party may suffer or incur by reason of this agreement."

And it is particularly by reason of such provision, together with the asserted fact that, after deducting "other money * * * due from said contractor to said second party" from the amount that was due to the contractor on account of the Venice job, nothing belonging to the contractor remained in the possession of the defendant, the said defendant claimed at the trial of the action, and here contends, that no liability ever existed against it and in favor of the plaintiff.

[1, 2] As offsetting and overcoming the provision of the financing contract to which attention has been directed, the plaintiff points not only to the fact that, in accordance with the provisions of said contract, moneys were furnished by the defendant directly to the contractor, but also to various other provisions thereof, which indicate that the clause "other money due from said contractor to said second party" had reference to such "other money" only as was disbursed by the defendant to persons who had unpaid claims against the contractor on account of labor performed upon, or materials furnished to, the Venice job. So that, even viewed from the standpoint of the defendant, it could not be relieved from the consequences of its acceptance of the order in question. But by the findings of fact made by the trial court it plainly appears that the basis of its conclusion was that because at a time when the plaintiff might have protected its claim against the contractor by filing its stop notice, it was prevented from doing so by reason of the promise of the defendant that it would unconditionally accept an order from the contractor to pay the claim of the plaintiff, in effect the defendant thereafter was estopped from denying its liability on its acceptance, without reference to whether the contractor either then or at any other time was or would be entitled to a credit either for the amount of money represented by the claim of the plaintiff, or for any other amount of money whatsoever. However, in that connection the appellant contends that neither fraud of the defendant nor mistake of any kind was properly pleaded by the plaintiff, and in consequence that the plaintiff should be precluded from a recovery which rests upon either of such grounds. An examination of the complaint in the action discloses the fact that, relative to the alleged fraud of the defendant, it contains allegations in substance that after the time had expired within which a "stop notice" might have been filed by the plaintiff, "said Southern Securities Company, contrary to and in violation of its promises theretofore made to said plaintiff in that behalf, refused to accept said order, except conditionally," and thereupon signed a conditional acceptance. Furthermore, "that by reason of the fraud and misrepresentation of said Southern Securities Company hereinbefore set out said plaintiff has lost its right to recover the amount due it as aforesaid from the surety on said contractor's bond. * * *"

Notwithstanding the general criticism made by the appellant of the pleading of the plaintiff, the statement in the brief of the appellant that "it will be realized that the complaint charges fraud and misrepresentation," constitutes a frank admission on the part of the appellant that on the trial of the action it was not deceived or misled by the allegations with reference to fraud that were contained in the plaintiff's complaint. In addition thereto, it appears that a great part of the evidence upon which the proof of fraud or misrepresentation of the defendant depended was contained in a deposition of a witness for the plaintiff which, in his absence at the trial of the action, was read in evidence; from which it would seem that the defendant had ample notice not only of the nature of the evidence upon which the plaintiff would rely to establish its case against the defendant, but as well in part was informed of what such evidence would consist. In any event, the action was tried on the theory that the defendant was liable as for an unconditional acceptance by it of the order in question; and in that connection, on substantial evidence in its support, the trial court found: "That believing and relying upon said statements, promises and agreement of said Southern Securities Company that it would unconditionally accept said order in writing, as aforesaid, this plaintiff did not file any notice as provided in said section 19 of said Street Improvement Act for the purpose of recovering from said Southern Surety Company as surety on the contractor's bond. * * *"

Although it is manifest that the pleading of the plaintiff to which the appellant here objects should not be considered as a model for the object sought to be attained, nevertheless it is equally plain that the real issue in the action was thoroughly understood and acted upon not only by each of the parties thereto, but as well by the trial court.

Since it appears that the evidence was sufficient to support the findings of fact made by the trial court; also that no miscarriage of justice resulted from the defective pleading (section 4½, art. 6, Const.); furthermore, because after careful examination of the brief filed by the appellant, it is concluded that no other alleged error merits discussion by this court—it is ordered that the judgment be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

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118 Cal.App. 631

PEOPLE v. FINK.

Cr. 2096.

District Court of Appeal, Second District,
Division 2, California.
Nov. 27, 1931.

Rehearing Denied Dec. 11, 1931.

1. Criminal law ⚷321.

Presumptions are resolved in favor of judgment until set aside or reversed on appeal.

2. Perjury ⚷19(1).

Information charging perjury by reason of false affidavits filed in opposition to motion for new trial in civil action *held* not demurrable (Pen. Code, § 118).

3. Judgment ⚷559.

Acquittal of defendant in criminal action is no bar to civil action against him for act involved in criminal case.

4. Criminal law ⚷43.

State not being party to civil action was not bound by verdict therein, and could thereafter prosecute party for perjury in connection with affidavits opposing motion for new trial (Pen. Code, § 118).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Prosecution for perjury against Benjamin Fink. From a judgment sustaining a demurrer to the information, the people appeal.

Reversed.

U. S. Webb, Atty. Gen., and John L. Flynn, Dep. Atty. Gen., for the People.

Wheeler & Wackerbarth and Henry E. Carter, all of Los Angeles, for respondent.

CRAIG, J.

The respondent was charged by information with the crime of perjury, to which information he interposed a demurrer, which was sustained, and the people appealed from the judgment rendered in accordance with such ruling.

The information recites that in December, 1929, respondent commenced a civil action against William Weisman, Mary Weisman, and Joseph Toplitzky upon the ground of fraud claimed to have been committed during the years 1920 and 1921, and that he alleged in substance that he first learned of such fraud during the month of May, 1927; that the defendants by their answers denied that the plaintiff first learned of the alleged fraud during the month of May, 1927; that said suit was tried in the superior court, and that a verdict and judgment were entered in favor of the plaintiff; that thereafter and upon receipt of a notice of the entry of said judgment, the defendants served and filed a notice of intention to move for a new trial. The information alleges that in support of their motion for a new trial the defendants filed and served various affidavits of persons who therein averred that more than three years prior to the commencement of the civil action Benjamin Fink had made statements to the effect that he then knew that he had been defrauded by the defendants; "that it then and there became and was material to know whether the said Benjamin Fink did, in fact, first learn during the month of May, 1927, * * * that he had been so as aforesaid defrauded by the defendants." Incorporated in the information is a copy of a counteraffidavit of respondent, specifically denying each averment contained in the movants' affidavits that he had made such statements, or that he had knowledge that he had been defrauded prior to the date first alleged. The conclusion of the pleader is that "in truth and in fact, as the said Benjamin Fink then and thero well knew, each and every of said denials so made by him in his said affidavit were false, and each and every of the matters so as aforesaid denied by him in his said affidavit were true. That thereby the said Benjamin Fink did then and there, as aforesaid, wilfully, knowingly, and corruptly swear falsely and commit willful perjury."

[1, 2] The briefs are devoted to extensive arguments upon the necessity and effect of affidavits on motions for new trials, and upon technical questions of pleading in criminal cases; but the inevitable result from a conceded previous adjudication dispels the necessity for their discussion. We are not to presume that the verdict and judgment in the civil action were erroneous, or that the motion for a new trial should have been granted. It affirmatively appears that the time of discovery of the fraud was a material, indeed a vital, issue in the former trial, and that a verdict and judgment having been entered in favor of respondent, the parties again joined issue upon the same question by affidavits filed in a motion for a new trial. It is a familiar rule that, until set aside or reversed upon appeal, presumptions are resolved in favor of the judgment. It is likewise ordained by the Legislature that one who may be charged with perjury is he only who "having taken an oath that he will testify, declare, depose, or certify truly * * * willfully and contrary to such oath, states as true any material matter which he knows to be false." Pen. Code, § 118. Yet the information before us charges that the respondent alleged in a civil action that he discovered fraud in May, 1927, that a verdict and judgment were entered in his favor, and that in opposition to a motion for a new trial he again asserted the truthfulness of such averment and denied that he had made statements to the contrary.

[3, 4] One contention advanced by the respondent is that the information not only charges that Fink's statement in his affidavit on the motion for a new trial as to when he first learned that he had been defrauded was false, but that it goes further and alleges facts from which it must be presumed that it was true; that the information itself in declaring that the verdict and judgment were entered in favor of the plaintiff, impliedly alleged that it was judicially determined that the plaintiff's sworn statement was true, and that since the pleader has seen fit to set forth these matters, he is bound by them, and as against a demurrer the information is insufficient. However, there is abundant authority that an acquittal of a defendant in a criminal action is no bar to a civil action against him for the act involved in the criminal case. The reason usually assigned for this conclusion is that the parties are not the same, and that the determination of any issue as to one is not conclusive or binding upon the other. By this logic, we must here conclude that, regardless of the verdict and judgment in the civil suit, the people of the state of California, not having been a party thereto, are in no way bound thereby, and can still be heard to assert the falsity of Fink's statements made in that action or in connection with the motion for a new trial after judgment.

The statement contained in the affidavits of the moving parties on the motion that Fink had at previous times made certain statements inconsistent with those contained in his complaint, was legally pertinent to the question of time as to when he first had knowledge that he had been defrauded. This being true, it was the statement of a fact which was material to the issue before the court for determination, to wit, the granting of the motion for a new trial. People v. Patterson, 64 Cal. App. 223, 221 P. 394.

The order and judgment from which the plaintiff appealed are reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

118 Cal.App. 547

HOOK v. CITY OF SACRAMENTO.

Civ. 4408.

District Court of Appeal, Third District, California.

Nov. 24, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Denied by Supreme Court Jan. 21, 1932.

1. Appeal and error ⚷1002.

Findings upon conflicting evidence are conclusive on appeal, and all reasonable inferences are indulged in support thereof.

2. Municipal corporations ⚷768(1).

Public should be protected against small, as well as large, defects in sidewalk which are liable to cause injury (St. 1923, p. 675, § 2).

3. Municipal corporations ⚷821(6).

Whether depressions in apron of sidewalk constituted dangerous or defective condition *held* question for jury, in action for injuries to pedestrian (St. 1923, p. 675, § 2).

Evidence tended to show that there were chucked places in incline of sidewalk about half an inch in depth, and that plaintiff's foot slipped while walking thereon, with resulting fall and injury.

4. Municipal corporations ⚷817(2).

That pedestrian's foot slipped and was caught in apron of sidewalk is some evidence of defective and dangerous condition (St. 1923, p. 675, § 2).

5. Municipal corporations ⚷821(25).

Contributory negligence of pedestrian in walking along defective apron constituting approach to sidewalk *held* question for jury, in action for injuries (St. 1923, p. 675, § 2).

6. Municipal corporations ⚷819(6).

City's actual and constructive knowledge of defective condition of approach to sidewalk *held* sufficiently shown in action for injuries to pedestrian (St. 1923, p. 675, § 2).

The foreman of maintenance of streets, acting under superintendent of streets, testified that inspections were made of all streets and approaches to sidewalks practically every month, and, from other evidence, it appeared that the hole or depression had existed for two or three months.

7. Municipal corporations ⚷817(1).

Existence of conspicuous defect in sidewalk for considerable length of time will create presumption of city's constructive notice thereof (St. 1923, p. 675, § 2).

8. Municipal corporations ⚷819(1).

Finding of city's negligence in failing to repair defective condition in apron of sidewalk, which condition had existed for several months and was known to city, *held* justified, in action for injuries to pedestrian (St. 1923, p. 675, § 2).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Zayda Hook against the City of Sacramento. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; SHENK and LANGDON, JJ., dissenting.

Hugh B. Bradford, City Atty., Jos. L. Knowles, Asst. City Atty., and Irving D. Gibson, all of Sacramento, for appellant.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for respondent.

PRESTON, P. J.

This is an appeal by defendant city of Sacramento, a municipal corporation, from a judgment entered against it upon a verdict of a jury in the sum of $5,000.

The plaintiff and respondent Zayda Hook brought this action to recover damages for personal injuries sustained by her as the result of a fall, which occurred while she was walking from the sidewalk on the north side of K street, in the city of Sacramento, down the incline or apron leading to the roadway of Sixth street. The accident occurred about 12:30 p. m. on December 6, 1929.

The action is based upon the act of 1923, section 2, Stats. 1923, page 675, Deering's General Laws 1923, Act 5619, which provides: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, school district, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, building, grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Many contentions are made for a reversal of the judgment. Appellant's first contention is "that the evidence is insufficient to show that plaintiff was injured as a result of any negligence of defendant causing the injuries or defective condition but, that at most, it shows only a trifling irregularity without negligence."

We are unable to agree with this contention. The evidence, while not as strong or convincing as in some cases of this character, we think it legally sufficient to support the implied finding of the jury that a dangerous condition existed in the apron or approach to said sidewalk, and that respondent was injured as a result of such condition.

[1] The evidence upon all the vital issues in the case is conflicting, and, as has been said in many cases, the findings of the court or jury upon conflicting evidence are conclusive on appeal, and all reasonable inferences are to be indulged in support of such findings. In the case of Treadwell v. Nickel, 194 Cal. 243–260, 228 P. 25, 32, the rule to be followed under such circumstances by an Appellate Court is stated as follows: "When a verdict is attacked for insufficiency of evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. If, on any material point, the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party."

Therefore, we will only epitomize enough of the record to show that the verdict has substantial support in the evidence. The jury undoubtedly accepted the testimony of respondent and her witness Clara Meredith as giving the true facts as to the condition of said apron or approach to the sidewalk at the time of said accident, etc.

Plaintiff testified that, as she was walking down said incline or apron, the heel of her left shoe was caught in a hole or depression (the shape of the letter L or C), which turned her ankle and threw her violently upon the paved street, breaking her leg. She described the hole as being between 18 inches and 2 feet long, and as wide as her foot and an inch to an inch and one-half deep.

Another witness, by the name of Clara Meredith, testified that on the day of the accident, she was walking behind respondent on K street, and saw "the hole or depression" in which plaintiff caught her foot and fell. This witness described the accident and the condition of the apron or incline as follows:

"Q. Where did you first see Miss Hook on that occasion? A. I should judge she was walking right ahead of me.

"Q. Was she walking slowly? A. She was walking just an ordinary gait, yes, slowly, was not walking fast; she was not walking very slowly, just walking a natural gait, what I would call ordinary, yes.

"Q. How was she clad as to shoes? A. Her shoes were walking shoes.

"Q. You just tell the jury, just describe the conditions, what happened at that corner that you saw. A. Well, she was just walking along. Walking just a little floor incline at the curb, walking down the street. Her foot slipped and she fell.

"Q. Would you describe to the jury the surface of the street,—that apron where she fell. Now, I mean by that, was it even or smooth or how was it? A. No, it was not even smooth. * * * I would say there were a lot of, you know, big impressions, lots of chucks taken out of the curb, little projecting rocks sticking up.

"Q. You had been over that street prior to that time? A. A number of times.

"Q. You have observed the condition before that time? A. I have.

"Q. Now, I am asking you how long that particular condition existed before the accident? A. Well, I should judge several months.

"Q. That would be as much as 4 or 5 months? A. Maybe, that I cannot say * * * for several months."

The witness was also asked to state to the jury where the holes were and her reply was: "Well, they are located all just through, little niches, I should say, little chips at places.

"Q. Chucked places about half an inch in depth? A. I should judge about half an inch.

"Q. You knew there were a number of these on the apron? A. Yes.

"Q. I suppose 8 or 10 of them were there, you think there were several? A. Yes, I do.

"Q. Just an estimate of the depth, that is merely your judgment? A. Yes, merely my judgment. Yes, just merely my judgment, that is all."

[2, 3] The defect in the apron was small, it is true, but the public is entitled to be protected against small defects, which are liable to cause injury, as well as large ones, and it was a question of fact for the jury to determine whether the holes or depressions constituted a dangerous or defective condition in said sidewalk. In Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118, 121, in considering a similar case, the Supreme Court said: "A misjudgment by the fraction of an inch is sufficient to disturb the physical equilibrium." Again, in 13 R. C. L. 386, we find this statement: "And the question whether a particular thing constitutes a defect or obstruction or is dangerous to travel, does not depend altogether upon its size, since small objects, as well as large ones, may render a street unsafe."

[4, 5] The fact that respondent's foot slipped and was caught in said apron, and she fell and was injured, is some evidence tending to show that a defective and dangerous condition existed in the approach to said sidewalk. Sharpless v. Pantages, 178 Cal. 122, 124, 172 P. 384; Brown v. Holzwasser, 108 Cal. App. 483, 291 P. 661.

No hard and fast rule can be laid down in cases of this kind, as to the size or character of the hole or depression in a sidewalk or street that would constitute a dangerous or defective condition within the meaning of the statute, but each case must stand upon its own particular facts, and in the case at bar, under the evidence above set forth, we are not justified in holding as a matter of law that the hole or depression in said apron did not constitute a dangerous and defective condition in the sidewalk, or that respondent, by the exercise of ordinary care for her own safety, should have seen said depression and avoided the accident.

As above stated, all these questions whether the apron or sidewalk were or were not in a reasonably safe condition, whether the respondent was or was not exercising due care in walking down said incline, were questions, under the conflicting evidence, addressed to the jury, and its verdict here on these questions is final. Heath v. Manson, 147 Cal. 694, 82 P. 331; Wile v. Los Angeles, etc., Co., 2 Cal. App. 190–192, 83 P. 271; Taylor v. Manson, 9 Cal. App. 382, 99 P. 410; Sharpless v. Pantages, supra; Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A. L. R. 435.

[6, 7] Appellant also contends that there is no evidence that any board or officer of appellant corporation, having authority to remedy such condition, had knowledge or notice, either actual or constructive, of the dangerous and defective condition of said approach to said sidewalk. We are likewise unable to agree with this contention.

Defendant called as a witness John F. Hageman, who testified that he was foreman of maintenance of streets, acting under the superintendent of streets, and that his duties included inspecting and maintaining streets. A portion of his testimony is as follows:

"We were making inspections of all the streets and approaches to sidewalks practically every month.

"Q. Was that or was it not the practice prior to December, 1929; did that condition exist prior to December, 1929, the date this accident occurred? A. Yes, sir.

"Q. Your answer includes reference to the approach, we are speaking about at the southwest corner of Sixth and K—did you also inspect that? A. Yes, sir.

"Q. About once a month? A. Absolutely go over them all."

Mrs. Meredith testified that the hole or depression had existed in the same condition since September or October, 1929. The accident happened on December 6, 1929. Having made inspections each month, Hageman must have seen the hole. It is inconceivable that a man engaged in examining and inspecting streets and sidewalks would overlook a defect 18 inches to 2 feet long. Therefore, sufficient evidence was shown that appellant had actual knowledge of the existence of the dangerous and defective condition of said apron for at least two months prior to the accident.

Furthermore, the statute does not provide that actual notice or actual knowledge is a prerequisite to recovery in such a case. The existence of a conspicuous defect or dangerous condition in a sidewalk or street, which had existed for a considerable length of time, will create a presumption of constructive notice thereof. Dawson v. Tulare Union High School Dist., 98 Cal. App. 138, 276 P. 424, 426; Wurzburger v. Nellis, 165 Cal. 48, 130 P. 1052; Rafferty v. Marysville, supra; Roberts v. Pac. Gas & Elec. Co., 102 Cal. App. 422–428, 283 P. 353.

In Dawson v. Tulare Union High School Dist., supra, this court said: "The statute does not provide that actual notice is a prerequisite to recovery in such a case. The long-continued existence of a defective condition may establish constructive notice thereof. Wurzburger v. Nellis, 165 Cal. 48, 53, 130 P. 1052; 43 C. J. 1043 to 1057. It may be inferred from the circumstances in evidence that the principal had constructive notice of the defective condition and he certainly had 'authority to remedy such condition.' To hold that actual notice is required in such a case would be to place a premium on indifference and neglect of duty. 'Neglect of duty cannot be made the basis of exemption from liability.' Kramer v. City of L. A., 147 Cal. 668, 681, 82 P. 334, 339."

Therefore, the record is sufficient to show that appellant had both actual knowledge and constructive notice of a defective and dangerous condition existing in said approach or apron to the sidewalk.

[8] We think it was also a question for the jury to say whether appellant through the persons "having authority to remedy such condition," failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy the dangerous and defective condition complained of.

The jury found that this dangerous and defective condition in said apron had existed from September or October, 1929, to December 6, 1929. Appellant was not only bound to take notice of it, but, it seems to us, had ample time between these dates to make the proper repairs thereto, and, failing to do so, the jury was well warranted in finding that such failure or neglect constituted negligence.

Other points presented have been carefully examined and found without merit. A further discussion seems unnecessary.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

SECHES v. BARD et al. *

Civ. 6966.

District Court of Appeal, 2d District, Division 2, California.

Nov. 18, 1931.

Hearing Granted by Supreme Court Dec. 13, 1931.

1. Action ⚷28.

Where an action for conversion will lie, plaintiff may waive tort and sue for money had and received.

2. Trover and conversion ⚷9(1).

Refusal of demand for money of plaintiff entitled to interest in notes and money received by defendants under settlement *held* not to show "conversion."

Evidence disclosed that defendants lawfully came into possession of money and notes under terms of settlement agreement with consent of plaintiff's assignors who were entitled to approximately a one-third interest therein; that there was no affirmative act of conversion, but plaintiff relied on a demand and refusal; that the demand, if any, was for "money," while funds were in form of money and notes.

[Ed. Note.—For other definitions of "Conversion," see Words and Phrases.]

CRAIG, J., dissenting.

Appeal from Superior Court, Los Angeles County; Vaughn N. Thompson, Judge.

On petition for rehearing.

Petition denied.

For original opinion, see 4 P.(2d) 167.

Philip Cohen, of Los Angeles, for appellants.

H. H. Harris and David E. Field, both of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Respondent petitions for a rehearing as to that part of the cause of action relating to the five notes which were due and unpaid at the time of the trial. It is contended that, while the action is for money had and received, the gist of the action is conversion, that an action for money had and received is a proper remedy for conversion, and that therefore respondent was entitled to recover in this action a sum of money equal to his assignor's interest in the five notes in question.

The theory upon which the rehearing is asked, that where an action of conversion will lie the plaintiff may waive the tort and sue for money had and received, is, as counsel state, well recognized in California but the application of the rule rests upon the major premise that the facts show a conversion.

[1] The defendants came into possession of $30,000 in money and twelve notes of $4,000 each, of which notes seven had been paid and five were neither due nor paid at the time of the trial. The notes and cash came into defendants' possession under the terms of a settlement agreement with the consent of respondent's assignors, and, under the law of the case, the latter were entitled to approximately a one-third interest therein. This possession of the notes and cash was undoubtedly lawful, and gave rise to no action for conversion. There is no proof of any affirmative act of conversion, but respondent relies upon proof of a demand and refusal. This proof consists of the testimony of Arthur Bard that he told L. L. Bard he had "additional moneys coming on this settlement with the Far West and he said I did not," and some further testimony from Arthur Bard that he told L. L. Bard that certain items representing "cash investment" were to be divided "fifty-fifty" between them, and that some $1,300 of rentals were to be taken out of the balance in the same proportion, and that the "balance of the *money*" (italics ours) was to be divided in proportion to the stock held by each of them. The demand, if any, therefore, was for "money," while the funds were in the form of money *and notes*, and included the foreign item of rentals. The burden being upon petitioner, we must assume that the only evidence of a demand is that to which we are referred in the "Addenda" to the petition.

[2] It is elementary that a demand for that to which a party is not entitled justifies a noncompliance therewith, and that a demand for "money" is not a demand for promissory notes. Even had Arthur Bard demanded his pro rata share of the money *and notes*, the refusal of L. L. Bard to turn the notes over to him would not have been a conversion. Arthur Bard was not entitled to the possession of the notes or to the entire notes, but only to an interest therein with his co-owner of the notes in the proportion of 413 to 1,357. All he could demand was that to which he was entitled, and his right to his share of the *money* realized from the notes could not arise until the notes were paid. The defendants were justified in refusing to pay a sum of money equal to the interest of respondent's assignors in the notes until the same were paid by the makers. At the time of the trial the five notes here involved had not been paid. As there was no conversion, the rule relied upon by petitioner has no application, and the action is one which can apply only to the "money" received by defendants and appellants up to the time of the trial.

The petition for a rehearing is denied.

I concur: WORKS, P. J.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 8 P.2d 835.

CRAIG, J.

I dissent from the order denying the petition for a rehearing. The action is one for assumpsit based upon the conversion of promissory notes. The evidence showed such conversion, and the trial court gave judgment upon that theory, after making appropriate findings. To my mind, this court is not permitted to regard the transaction or cause of action differently, and therefore may not give consideration to the question of the maturity of the notes. I am now of opinion that the judgment should have been affirmed, and under any circumstances that the status of the matter is such that the petition for a rehearing should be granted. Bechtel v. Chase, 156 Cal. 707, 106 P. 81; Pacific Fruit Exchange v. Booth, 103 Cal. App. 54, 283 P. 944; Dodge v. Meyer, 61 Cal. 405.

118 Cal.App. 485

PEOPLE v. UNIPEG et al.

Cr. 1642.

District Court of Appeal, First District, Division 2, California.

Nov. 23, 1931.

1. Robbery 🔑26.

Evidence as to whether accused, convicted of first degree robbery, put complaining witness in fear, *held* sufficient to go to jury.

There was evidence that accused used revolver and compelled complaining witness to go through form of losing money at gambling with accused, also that accused was compelled to withdraw money from bank and "lose" it in the same way.

2. Criminal law 🔑1159(3).

Court of Appeals cannot interfere with jury's verdict based on conflicting evidence.

Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Eddie Unipeg and others were convicted of robbery in the first degree, and appeal.

Affirmed.

Philip M. Zwerin, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

STURTEVANT, J.

The defendants were convicted of robbery in the first degree. They made a motion for a new trial. The motion was denied, and they appealed from the judgment and from the order denying them a new trial.

[1, 2] They claim the evidence was insufficient, and, as we understand them, they admit nearly all of the story told by Leon Miguel, the complaining witness, except that they deny that they used any force or put him to fear. As to those elements the complaining witness testified fully and the defendants took the stand and contradicted him. There was thus created a conflict in the evidence, but the power to determine the conflict rested with trier of the facts and not with a court of review.

On January 26, 1931, Leon Miguel, a Filipino, was walking on Market street in San Francisco. When near Fourth street one of the defendants, Unipeg, also a Filipino, approached him and asked for directions to go to the Presidio. Miguel answered and then Unipeg stated he had an automobile and asked Miguel to accompany him. When they approached the automobile there were two other Filipinos in it. Miguel took a seat in front by the side of Manicap, the driver. Unipeg took a seat by the side of Aradoza behind him. When near Van Ness and Pacific avenues Unipeg pressed a revolver to Miguel's back and told him not to talk. The car was driven to Point Lobos avenue near the Cliff House. At that place Unipeg again pressed the revolver to Miguel's back and told him to write an agreement. He thereupon wrote as directed a paper as follows:

"Jan. 8, 1931, San Francisco

"We the undersigned to pay dice game. If other lose there money there will be no trouble.

"1. M. Villiamox
"2. G. Vilasco
"3. E. M. Lampitoe
"Leon Miguel."

All names, except the last one, were assumed names. Thereupon they played a dice game. Miguel was not allowed to handle the dice. He lost $36, all of the money which he had in his pocket. The defendants then searched his pockets and found that he had a bank book. When the defendants learned that fact all four returned to town and Unipeg, holding his pistol in his pocket, went with Miguel to the bank. The latter wrote out a check for $400 and after some talk between him and Unipeg, asked for cash. All four returned to Point Lobos avenue and another game was played. The defendant Aradoza won the $400 also. The party then drove to a point near Miguel's apartment and stopped. Unipeg went with Miguel to his room. As they approached the room Miguel cried for help. His room mate came out and, as he did so, Unipeg fled. Miguel and his friend followed. Unipeg was overtaken by a police officer and when searched the officer found in his pocket the loaded revolver.

The other two defendants were arrested near Los Angeles. On being questioned Manicap stated that they had won $300 from Miguel and that Unipeg had used a revolver.

Under such a set of facts it may not be said as a matter of law that the evidence was insufficient.

The judgment and order are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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118 Cal.App. 495

HILTON v. FEDERAL INS. CO.

Civ. 502.

District Court of Appeal, Fourth District, California.

Nov. 23, 1931.

1. Insurance 🔑668(15).

Whether provision voiding marine policy for assignment without insurer's written consent was waived *held* fact question.

2. Insurance 🔑376(1).

Marine policy providing that insurer's acts in saving property shall not be considered waiver or acceptance of abandonment does not provide that no acts of insurer shall be considered waiver.

3. Insurance 🔑394.

Promise of payment and salvaging operations, after knowledge of violation of clause against assigning policy, justified finding that insurer waived clause, and that assignee relied on its acts.

> The marine policy provided that it became void if assigned without the written consent of the insurer, and that no acts of the insurer in saving the property should be deemed a waiver or acceptance of abandonment. The day after the wreck, the insurer was informed that the policy had been assigned. Nevertheless, the insurer's agent informed the assignee that he would take up payment of the policy with the insurer, asked for and received the policy, and made other statements intimating prospective payment, and did not inform assignee that insurer refused payment for about six weeks after the wreck. The insurer's engineer remained in charge of the salvaging operations, and instructed the salvors to sell salvage and apply the proceeds on their bill. The evidence further showed that the assignee made no effort to save the boat himself, although it might have been saved if properly handled.

4. Insurance 🔑665(4).

Evidence did not justify finding that wreck was abandoned to insurer, nor that explicit notice thereof was given to insurer (Civ. Code, § 2716).

> The insured testified that he abandoned the wreck to insurer, and that the insurer took charge of it; but he also testified that he could not tell and did not investigate to ascertain whether the boat would be a total loss. Further, he took away the ship's engine without permission, and emphasized that suit was only for insurance on the hull.

5. Insurance 🔑470.

Condition precedent to abandonment is that insured investigate sufficiently to be reasonably satisfied that amount of loss is sufficient to justify abandonment.

6. Insurance 🔑646(8).

Insured under marine policy must prove damages suffered, abandonment with its constructive total loss not being established.

7. Insurance 🔑665(4).

In action on marine policy, evidence *held* not to authorize judgment for full amount of loss, in absence of proof of abandonment by insured of ship insured.

8. Insurance 🔑476.

Where value of insured's interest in property insured under marine policy exceeds amount thereof, insured is coinsurer as to such uninsured part, and underwriter is only liable for such proportion of loss as amount of insurance bears to value of insured's interest.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Norris H. Hilton against the Federal Insurance Company. From a judgment against defendant, it appeals.

Reversed and cause remanded solely on issue of amount of loss sustained by plaintiff, with directions.

O'Melveny, Tuller & Myers and H. R. Snyder, all of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

BARNARD, P. J.

On or about June 1, 1927, the defendant insurance company issued to one Farwell, as owner of the sloop California, a policy of insurance covering that ship. On or before November 13, 1927, Farwell sold the ship to this plaintiff, a bill of sale being executed to the plaintiff's wife, and the testimony showing that the purchase price was paid out of their community funds. At the same time, the policy of insurance was assigned by Farwell to the plaintiff. The policy in question contained the following clause: "It is also agreed that this insurance shall be void in case this policy or the interest insured thereby shall be sold, assigned, transferred or pledged without the previous consent in writing of the insurer."

It is conceded that the written consent of the defendant to the transfer in question was never obtained. On March 4, 1928, while in the possession of the plaintiff, the sloop was run aground in the middle of the entrance to Newport bay. The day after the ship went on the rocks, the defendant's agent in Los Angeles instructed a firm of marine engineers to "proceed to the scene of the loss and to do the necessary." At that time, the engineers informed the defendant's agent that they had already heard from a firm of salvors, and that they were already on the job. The agent asked if these parties were satisfactory to the engineers, and, upon being told that they were, instructed them to have the salvors continue with the work. It is conceded that at that time neither the defendant nor its agents had knowledge of the fact that the ship had been sold or the policy assigned. On the following day, the plaintiff called upon the defendant's agent in Los Angeles, and, after telling him of the loss, told him that he had purchased the boat. At that time the plaintiff left with the agent the policy of insurance with the assignment thereof, and the bill of sale which he had received from Farwell. The record shows the following conversation:

"Q. Did any other conversation take place that day? A. Except he asked me for all the papers I had and I gave them to him, and that he would take it up with the Insurance Company and try to settle it as soon as possible, the way I understood it.

"Q. To settle it as soon as possible? A. Yes, and I abandoned the boat to them at that time, that is they took charge of it.

"Q. They took charge of the boat? A. Yes."

The plaintiff testified that in the same conversation, when he asked the defendant's agent for the payment of the insurance money, the agent replied that "he would see, he would take it up." He also testified as follows:

"Q. Did you see Mr. Hutchinson (the agent) after that to demand your insurance again? A. Yes, several times.

"Q. About how long was the next time? A. I was there several times. Once he was sure he was going to have it all right, and I remember one time he thought if I would come back in about a week he would have it all fixed up. Mr. Snyder: We object to the answer unless the time is more definitely fixed.

"By Mr. Reinhaus:

"Q. Well, about how long was this after the first conversation when he said he thought he would have it for you in about a week? A. It must have been a good month.

"Q. A good month after that? A. Yes.

"Q. Did he ever refuse to pay the insurance? A. The last time I was in there.

"Q. About when was that, if you remember? A. I would say that was six weeks.

"Q. About six weeks after the wreck? A. I imagine so.

"Q. What did he say at that time? A. He said they had just turned me down."

One of the firm of marine engineers, who had been instructed by defendant's agent to take charge of the boat the day after it went aground, testified that a few days later the defendant's agent told him that he was not interested in the vessel, but that when he asked him whether they should "lay off," he replied: "Not until I instruct you." He further testified that he was not instructed to lay off until March 28, at which time he advised the salvors that they had been called off. However, the salvors continued the work, the reason therefor being testified to as follows: "Q. And why did you continue to work after the 28th when he called you off? A. About March 28th or 29th we had the 'California' on a derrick barge as she had gotten so badly damaged she wouldn't float, and under Mr. Young's instruction we hired a derrick barge from another boat concern to lift the 'California' and we were towing her to our ways on the 28th or 29th and another boat came alongside making a wave and turned the barge over letting the California go down in the channel again, but we were well up in the channel near our ways and immediately that it happened I called Mr. Young and notified him and at that time he says, 'Gee Rodgers, I got a telephone and they have called us off the job and we have nothing more to do,' and I says, 'What are we going to do with it?' and he says, 'If I were you I would get her on the ways anyway and get her out of the channel.'"

The evidence then shows that the boat was gotten to the shipyard; that it was a complete wreck; that, under instructions from the marine engineer, the salvors burned the frame; and that under instructions from the defendant's agent they sold such salvage as they could, it being testified that this agent told them to "sell the lead keel and what other salvage you have and credit it on the bill." It also appears that among the salvage was the ship's engine, and that the plaintiff removed the engine and sold it for his own benefit. About six weeks after the vessel went on the rocks, the defendant's agent notified the plaintiff that the company would not pay the amount of the insurance. This action followed, resulting in a judgment for $2,000, being the amount named in the policy, and, from that judgment, the defendant has appealed.

[1-3] The first question presented is whether the provision in the policy, that the same should not be assigned without the written consent of the insurance company, was waived by the appellant. This is a question of fact. Wheaton v. Insurance Company, 76 Cal. 415, 18 P. 758, 9 Am. St. Rep. 216; Benninger v. Phœnix, 57 Cal. 644. The trial court found that this provision of the policy had been waived. Our first consideration then is as to whether this finding is supported by the evidence. The appellant relies in part upon a clause in the policy, reading as follows: "And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

It will be noted that while it is thus provided that no acts of the insurer in saving or preserving the property shall be considered as an acceptance of an abandonment, a subject which will hereafter be considered, it is not thereby provided that no acts of the insurer shall be considered as a waiver of the provision of the policy which is here under consideration. Even assuming that in such an emergency as the grounding of a ship an insurer would have the right to take emergency steps to save the property for the benefit of all concerned without waiving any provision of the policy, and bearing in mind that the first act of this insurer on the day after the boat went on the rocks was taken before it had knowledge that the policy had been assigned, the facts here present a somewhat different situation. While there was evidence to the contrary, which we are asked to accept as conclusive, we think there is sufficient evidence to sustain the court's finding. It is undisputed that the appellant had notice of the violation of this provision on the second day after the ship went aground. There was evidence that at that time the plaintiff demanded payment under the policy, and that the defendant's agent told him he "would see, he would take it up"; that he stated he would take it up with the company and try to settle it as soon as possible; that he asked for and received the insurance policy and the bill of sale of the boat; that on one occasion he told the respondent that he was sure he was going to have it all right, and on another occasion, which was fixed as about a month after the injury to the boat, he told the respondent to come back in about a week when he thought he would have it fixed up; and that about six weeks after the accident he informed the respondent that the company refused payment. The evidence is uncontradicted that, for about three weeks after the injury to the boat, the appellant's agents were in charge of it and trying to get it to shore, and that during this period the boat was moved part way to shore, where it was sunk. The evidence is also undisputed that during the succeeding three weeks' period the salvors, under the suggestion of the agent of the appellant, continued to work upon the boat, finally getting it to shore where the framework was burned and certain salvage taken out, and there is evidence that some time during these last three weeks the appellant's agent in Los Angeles instructed the salvors to sell the salvage and apply it upon their bill.

It is urged by appellant that the respondent did not change his position to his damage, since he testified that there was nothing he could have done himself to save the property. It is true that in reply to a question on cross-examination as to whether there was anything that he could have done that he did not do, if the agent had told him at their first interview that the company would not pay the insurance, the respondent replied: "Not that I know of." It is apparent from the record that the respondent was talking about what he could do to collect his insurance, and not whether he could have done anything to save the boat. There was evidence that the respondent went to the scene of the accident two or three times during the six weeks' period and watched the efforts of the salvors. It is also apparent that he made no effort himself to save the boat. There is a reasonable inference from the evidence that he made no such effort because he believed the insurance company had taken charge of the boat, and because he thought his interest was protected under the policy. There was independent evidence to the effect that the boat could have been saved if properly handled. It appears from the evidence that it took six weeks to get the boat to shore, and that its condition constantly grew worse. The question before us is not one of the preponderance of the evidence but it is whether there is any evidence at all to sustain the finding of the trial court. In our opinion, the continued activity of the appellant, after knowledge of the transfer and assignment, for a period of six weeks before liability was denied, with the other acts shown, especially in view of the testimony that the agent at least twice held out the hope of a prompt settlement, was sufficient to cause the respondent reasonably to believe that the provision of the policy had been waived, and the evidence is sufficient to indicate that the respondent changed his position in reliance upon the acts of the appellant, and is sufficient to support the finding complained of.

[4, 5] The trial court found that on March 6, 1928, the respondent abandoned the boat in question to the defendant. It is urged by the appellant that this finding is not supported by the evidence. We think this contention

must be sustained. Section 2716 of the Civil Code defines an abandonment as follows: "Abandonment is the act by which, after a constructive total loss, a person insured by contract of marine insurance declares to the insurer that he relinquishes to him his interest in the thing insured."

Under the other provisions of this Code, not only must a notice of such an abandonment be explicit, but the abandonment must neither be partial nor conditional, and the thing insured may not be abandoned unless more than half of the value thereof is actually lost. As one of the conditions precedent to an abandonment, the duty rests upon the insured to make enough investigation to reasonably satisfy himself that the amount of the loss is sufficient to justify an abandonment. Klein v. Globe & Rutgers Fire Insurance Co. (C. C. A.) 2 F.(2d) 137; Chicago S. S. Lines v. U. S. Lloyds (D. C.) 2 F.(2d) 767. In the case before us, the respondent's own evidence shows that an abandonment, in the sense contemplated by the statute, did not take place. The only evidence given by the respondent to indicate an abandonment and notice thereof, was the following: "Yes, and I abandoned the boat to them at that time, that is they took charge of it." Not only does this fail to show, with the definiteness required, notice of an abandonment with the reason therefor, but on cross-examination the respondent testified that on the day he claimed to have made the abandonment he could not tell whether the boat would be a total loss or not, that he made no investigation along that line and none as to the cost of repair or the amount of salvage. He himself summed up what he did, as follows: "I didn't do anything. I just gave it to Mr. Hutchinson." As further indication of the fact that the ship in question was not totally abandoned to the insurer, it fully appears that the respondent took away the ship's engine without permission, sold the same, and appropriated the proceeds thereof to his own use. In addition, it may be observed that during the trial counsel for respondent particularly emphasized that "We are only suing for insurance upon the hull." Under these circumstances, we think that a technical abandonment is not shown, and that this finding of the court is not sustained by the evidence.

[6-8] Appellant contends that the trial court erred in the amount of the judgment given. The judgment was for $2,000, the full amount named in the policy. Since the proof did not establish an abandonment with its constructive total loss, it was incumbent upon the respondent to prove the amount of damage suffered. By the terms of the policy, insurance in the amount of $2,000 was placed upon "the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture of and in the good Sloop Yacht called the 'California.'" The policy also contained this provision:

"The said yacht, for so much as concerns the assured, by agreement between the assured and assurers in this Policy, is and shall be valued at as follows: Hull, Tackle, Apparel and Furniture, $———; Machinery and Boilers, $3,500, Thirty-five Hundred Dollars."

The rule applying to such a valued policy of marine insurance is thus stated in Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co. (D. C.) 185 F. 172, 175: "'It is a general rule peculiar to contracts of marine insurance that, where the value of the insured's interest in the property insured exceeds the amount of the insurance, the insured is deemed a co-insurer as to such uninsured part, and the underwriter is only liable for such proportion of the loss as the amount of the insurance bears to the value of the insured's interest.' 26 Cyc. 672(f), and many cases stated in the notes. See, also, 19 Am. & Eng. Ency. (2d Ed.) 1061, 5a; Richards, Insurance (3d Ed.) § 50; Western Assur. Co. v. Transportation Co., 68 F. 923, 16 C. C. A. 65."

In the policy before us, the entire ship, including the hull, tackle, machinery, and boiler, was valued at $3,500. Not only did the respondent take away the engine, but his counsel stated during the trial that he was only seeking to recover the value of the hull. The record contains no evidence as to what was the value of the engine taken out, nor what was the value of the hull alone. While the appellant is liable for a pro rata proportion of the loss, there is no evidence upon which the amount of such liability may be based, with the engine removed and its value not shown, and the allowance of the full amount of $2,000 has no evidence to support it, in the absence of proof of an abandonment. For this reason, the case should be sent back for a new trial upon the one issue of the amount of the loss sustained. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073.

The judgment is reversed and the cause remanded for a new trial solely upon the issue of the amount of loss sustained by the respondent, with directions to the trial court to render judgment in favor of the respondent for the amount of loss sustained and covered by the policy, upon the determination of that issue.

We concur: MARKS, J.; JENNINGS, J.

118 Cal.App. 691

McKELVY v. MARTIN et al.

Civ. 6724.

District Court of Appeal, Second District,
Division 1, California.

Nov. 30, 1931.

1. Judges ⚷51(4).

Petition that hearing on motion for new trial be reassigned was not required to be granted when affidavit showing bias and prejudice was filed; it being sufficient if judge heard matter in accordance with statute.

2. Pleading ⚷254.

Defendant had no right to demur to amended complaint filed to conform to proof.

3. Pleading ⚷253.

Amendments to complaint to conform to proof are taken as denied without pleading.

4. Fraud ⚷66.

Finding warranted conclusion that purchaser of insurance agency was damaged in sum which defendants negotiating sale received in excess of actual sale price of agency.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by James K. McKelvy against A. L. Martin and another. From the judgment, defendant named appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Loraine Swope, of Los Angeles (Robert F. Shippee, of Los Angeles, of counsel), for respondent McKelvy.

YORK, J.

This is an appeal by defendant Martin from a judgment of $10,000 in favor of plaintiff.

The court found that the plaintiff and the defendant Martin entered into a written agreement with defendant Engelhart, who was the agent of the owner of an insurance agency, for the purchase of said agency for the sum of $30,000, that the price which the owner of the business was willing to take was the sum of $20,000, and that the said owner did in fact receive said sum of $20,000. The court further found that defendant Martin, in order to cheat, wrong, and defraud the said plaintiff, made arrangements with defendant Engelhart whereby the latter was to represent to plaintiff that the actual price of the insurance business was $30,000, and to divide the difference between the represented price and the actual price, to wit, $10,000—$7,500 to defendant Martin and $2,500 to defendant Engelhart. As a conclusion of law from the foregoing facts, the court found that the plaintiff was damaged in the sum of $10,000, and judgment was entered for that amount against the defendant Martin. Before the introduction of any evidence, the cause was dismissed as to defendant Engelhart.

No evidence was introduced on behalf of defendant Martin, and the plaintiff was allowed by the court to file a (second) amended complaint to conform to proof, to which defendant Martin made a motion to strike and interposed a demurrer, neither of which was ever finally determined by the court. However, defendant Martin proceeded with his motion for a new trial, and, when this matter came on for hearing, counsel for plaintiff urged that the matter be transferred for hearing and determination to Judge Bogue, who presided at the trial of the case, and who was no longer sitting in the Superior Court. Defendant Martin thereupon filed a petition for reassignment of his motion for a new trial, on the ground that the trial judge was biased and prejudiced of and concerning defendant Martin. Judge McLucas, to whom such petition of reassignment was referred, denied the motion.

Appellant now contends: First, that the court erred in denying his petition that hearing on motion for a new trial be reassigned; second, that the court erred in signing and filing findings of fact and conclusions of law based upon the amended complaint to conform to proof, while there remained undetermined appellant's demurrer to and motion to strike from such amended complaint; third, that the second amended complaint to conform to proof stated a different cause of action from that alleged in the complaint upon which the parties went to trial; and, fourth, that the evidence is insufficient to justify the findings and conclusions of law, and that therefore the judgment is unsupported by the evidence.

[1] As to the first point, it is sufficient if the matter was properly heard by a judge in accordance with the provisions of the statute, when an affidavit showing bias and prejudice is filed. The stipulation that the statement of the judge need not be verified makes it unnecessary that the statement be sworn to. There is nothing appearing in the record of this cause which shows any abuse of discretion or error in the order made by Judge McLucas.

[2, 3] The second point is not well taken, for the reason that the amended complaint was filed to conform to proof. An examination of the record bears out the fact that the complaint did conform to proof, and no case is cited to us by appellant to sustain his contention that he has a right to demur to a complaint filed upon an order of the court for amendment to conform to proof had at the

time of trial. Such amendments "are not made for the purpose of framing issues for the trial." They "are taken as denied without pleading." Glougie v. Glougie, 174 Cal. 126, 132, 162 P. 118, 121; McDougald v. Argonaut Land, etc., Co., 117 Cal. 87, 48 P. 1021.

The third point is not well taken, for the reason that the transaction complained of is the identical transaction set forth in the original complaint.

[4] There is no merit in the fourth contention of appellant, for the reason that there is sufficient evidence to support each finding made by the trial court; the findings of fact are sufficient to justify the conclusions of law drawn by the trial court therefrom; and the findings of fact are sufficient to support the judgment.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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118 Cal.App. 165

PEOPLE v. SAMENIEGO et al.

Cr. 2128.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1931.

1. Homicide 🔑294(½).

In homicide prosecution, evidence supporting defense of unconsciousness due to dope not having been introduced, instruction on that question was not required.

2. Homicide 🔑332(2).

In homicide prosecution, contention that without confession evidence does not support verdict cannot be sustained, since that question is determined by review of all evidence.

3. Stipulations 🔑13.

Notwithstanding stipulation concerning evidence, court may relieve prosecution therefrom, where defendant's testimony subsequent thereto would make enforcement inequitable.

4. Criminal law 🔑369(3).

Defendant testifying that he was under influence of drug when confessing to murder, evidence of entire conversation *held* competent, to show mental condition of defendant, though also showing other crimes.

> Such evidence was competent, where defendant made effort to show addiction to drug during period between murder and time of arrest, to show what effect the drug had on defendant and that the description of past conduct was correct and accurate, thereby tending to show that at time of confession defendant was not unconscious from use of drug, as he contended.

5. Criminal law 🔑1144(15).

Trial court having instructed jury concerning limited purpose of evidence, appellate court will assume jury followed instruction.

6. Criminal law 🔑525.

Drug intoxication of defendant while making confession goes only to its weight as evidence, but does not render it inadmissible.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

On application for rehearing.

Denied.

For former opinion, see 4 P.(2d) 809.

W. E. Lady, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and John Barnes, Deputy Dist. Atty., of Los Angeles, for the People.

FRICKE, Justice pro tem

The first two points in the petition present nothing not covered by the opinion filed herein, 4 P.(2d) 809, and are merely a restatement of points previously argued.

[1] Reference is made to the statement of defendant Mossberg in his confession that his only explanation of the killing was that he was "doped with dial ciba that I didn't know what I was doing," as indicating that the homicide was only murder of the second degree. Counsel has allowed his enthusiasm to stampede his logic, for the sworn testimony of the defendants and their witnesses was as to a detailed alibi, and to now urge the statement of Mossberg in his confession as true or worthy of credence is to argue that the defense of alibi was fabricated and supported by perjured testimony. However, had the defendants desired to urge the defense of unconsciousness at the time of the crime, they should have introduced evidence thereof at the trial. In the absence of evidence to support it, the question was not in the case, and hence did not require an instruction from the court.

[2] The contention that independent of the evidence of the confession the record is devoid of evidence to support the verdict as to Sameniego is wholly without merit. The question as to whether a verdict is supported by the evidence is determined by an examination of all the evidence, and not by an examination of the evidence after excluding the confession of the accused.

[3-6] As a final point, petitioner assigns error predicated upon the admission of evidence over objection. Petitioner also asserts that this was "in violation of a stipulation made between counsel and the court at the inception of the trial," but in the very same sentence petitioner states that "the trial court permitted the District Attorney to be relieved from the stipulation." The trial court was entirely within its rights in relieving the prosecutor from the stipulation when it became evident that testimony introduced by the defense subsequent to the stipulation was of such a character that it would have been inequitable to enforce it. Conwell v. Varain, 20 Cal. App. 521, 130 P. 23; Moffitt v. Jordan, 127 Cal. 628, 60 P. 175. The stipulation was to the effect that testimony as to the declarations of the defendants should be limited to the subject of the murder charged, and should not include declarations concerning certain other crimes committed by the defendants after the homicide. In presenting their defense, although no proof was offered of unconsciousness at the time of the crime, evidence was introduced by the defendants tending to show that, at the time of making their confessions and statements to the police, they were under the influence of an intoxicating narcotic drug. In view of this evidence, the court relieved the prosecution from the stipulation, and permitted the entire conversation, including the reference to the other crimes, to be given in rebuttal, as tending to show the state of mind of the defendants at the time of the conversations. Since the mental condition of the defendants would be reflected and evidenced by their acts, declarations, and conduct, it was competent here, as in cases where insanity is urged, to permit evidence of the entire conversation for the limited purpose of showing the mental condition of the defendants. See People v. Harris, 169 Cal. 53, 145 P. 520; People v. Vukich, 201 Cal. 290, 257 P. 46. In view of the fact that defendant Mossberg particularly made an effort to show his addiction to the drug in question during the period subsequent to the homicide and up to the time of his arrest, similar claims being made by appellant, and the further fact that the other crimes were referred to and described by the defendants in the confessions, evidence of the conduct of defendants on occasions during the interim were admissible to show what, if any, effect the drug had upon the defendants, and that the descriptions of their past conduct as given by them in their confessions were correct and accurate, and therefore as tending to show that, at the time of the confessions, the defendants were not unconscious as they contended. The fact that such evidence tended to show that the accused had committed other crimes than the murder for which they were on trial would not, of course, exclude evidence which was otherwise admissible. Furthermore, the court fully instructed the jury of the limited purpose for which the evidence was received, and we must presume that the jury followed the court's instructions. Petitioner ties the last point in with the point that the confessions were inadmissible because the declarants were not conscious. The evidence supporting the view that the defendants were conscious and competent to make confessions is so overwhelming that there can be no question of the correctness of the court's ruling receiving the confessions in evidence. Even if there were credible evidence sustaining the conclusion that the defendants were under the influence of the intoxicating drug at the time, this would not have rendered their declarations inadmissible (People v. Ramirez, 56 Cal. 533, 535, 38 Am. Rep. 73), but would go only to the weight of the evidence.

The petition is denied.

I concur: IRA F. THOMPSON, J.

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118 Cal.App. 582

SOUTHERN COUNTIES GAS CO. OF CALIFORNIA v. EDEN et al.

Civ. 4450.

District Court of Appeal, Third District, California.

Nov. 25, 1931.

1. Boundaries 🔑46(1).

Mere construction and maintenance of intervening fence is insufficient basis for claim of title by agreement.

2. Boundaries 🔑48(1).

Agreement fixing boundary may be inferred from conduct, especially from long acquiescence.

3. Boundaries 🔑33.

Presumption that agreement was formerly made respecting location of boundary may arise from fact that one or both of adjoining owners have erected fence, and from long acquiescence.

> Such presumption may arise from fact that one or both of adjoining owners have definitely defined boundary line by erecting fence or other monument on it, and that both have treated it as fixing boundary between them for such a length of time that neither ought to be allowed to deny correctness of its location.

4. Boundaries 🔑48(3).

Plaintiff in action to quiet title, whose grantor had acquiesced for over 15 years in adjoining owner's adverse claim to strip of land, *held* barred by laches, although not expressly pleaded.

> Defendant did not expressly plead laches, but he did set forth in answer that his predecessors had been owners of strip of land in controversy, and had been in actual possession thereof since 1871, and that neither plaintiff nor its grantors had ever owned or possessed such strip.

Appeal from Superior Court, Santa Barbara County; Edward W. Engs, Judge.

Action by the Southern Counties Gas Company of California against Edward Samuel Eden and others. Judgment for plaintiff, and defendant named appeals.

Reversed.

Edward Samuel Eden, in pro. per.

Le Roy M. Edwards and Oscar C. Sattinger, both of Los Angeles, for respondent.

JAMISON, Justice pro tem.

Plaintiff brought this action to quiet title to a certain tract of land described as follows:

That portion of block No. 140 in the city of Santa Barbara, county of Santa Barbara, state of California, according to the official map thereof, described as follows:

Beginning at the most westerly corner of said block at the intersection of the southeasterly line of Figueroa street, according to said map, with the northeasterly line of Anacapa street, according to said map; thence along said line of Figueroa street northeasterly 111 feet to a point; thence at right angles southeasterly parallel with Anacapa street 100 feet to a point; thence at right angles southwesterly, parallel with Figueroa street 111 feet to a point on said line of Anacapa street; thence at right angles along said last-mentioned line, northwesterly 100 feet to the place of beginning.

Plaintiff sets forth in the second count of his complaint that he is the owner of said tract of land and that while the predecessors in interest thereof were the owners and in possession thereof, defendants wrongfully and unlawfully entered into and upon the same and occupied a strip of said land approximately two feet in width along the northeasterly side thereof and constructed a building thereon, and ever since said date have wrongfully withheld said strip from plaintiff.

Defendant Edward Samuel Eden answered, denying the ownership of said strip of land by plaintiff, and alleging that he is the owner thereof and that he and his predecessors in interest have been in the possession of said strip of land ever since the year 1871.

Judgment was rendered for plaintiff. Defendant moved for a new trial, and, the same being denied, he prosecutes this appeal.

The contention in this case is over a strip of land two feet wide along the easterly side of said tract of land, known as lot 8, which plaintiff claims is embraced within the boundaries of said lot and upon which defendant's grantors constructed a building which extended two feet over and upon said lot 8.

The evidence is to the effect that a fence existed across the easterly side of said lot 8 and separating it from said defendant's tract of land, known as lot 7 of said block. Just when the said building and fence were constructed is not definitely shown, but they were known to be there in 1903, and at that date had the appearance of being old structures; the said fence standing about one foot westerly from said building.

There is no evidence that plaintiff or its grantors were ever in the actual possession of the said strip of land. Defendant has been in the actual possession and occupation of the said building and ground upon which it stands since 1911.

Fred L. Johnston, a witness for respondent, testified that he was an engineer and surveyor, and that he had made a survey of the said lots 7 and 8; that about 18 years ago, he was connected with the engineering department of the city of Santa Barbara for a period of two years; that he made a survey of the property which lies between Anacapa street and Santa Barbara street and that faces on Figueroa street in the year 1928; that he found by said survey that the building occupied by appellant extends two feet over and upon the said land of respondent; that he started that survey from monuments on Anacapa, Santa Barbara, and Figueroa streets; that these monuments were supposed to have been set by Anthony Dozier about 25 years ago while he was the city surveyor. What he used to guide him in resetting the monuments witness could not say. These monuments have been in use and accepted by the city and licensed surveyors for more than 18 years. While the records of said city show an official survey thereof, they are difficult to establish; that the location of the streets is a matter more nearly of common usage than exact location; that the original survey of said city was made by one Haley about the year 1850, but the witness could not say whether or not the subsequent surveys made were from points designated by the Haley survey; that another survey was made by one Norway some twenty years after the Haley survey, but that a great discrepancy existed between it and the one made by Haley. Witness could not say whether or not Anacapa street running north and south in front of appellant's property was changed by the Norway survey from that made by Haley.

In the year 1869, Charles Bowen was the owner of said block 140, and in 1871 he executed deeds to the grantors of appellant and respondent for the respective tracts now owned by them.

According to the testimony of witnesses on behalf of defendant, which was not disputed, defendant and his grantors have been in possession of the two-foot strip since 1903, and at that date the said building that respondent claims projects over and upon his said lot and the fence which separated the two tracts were old structures.

[1] It is true that the mere construction and maintenance of an intervening fence is not sufficient upon which to base a claim of title by agreement. Ross v. Burkhard Inv. Co., 90 Cal. App. 201–205, 265 P. 982, 985; Staniford v. Trombly, 181 Cal. 372, 186 P. 599; Dauberman v. Grant, 198 Cal. 586, 246 P. 319, 48 A. L. R. 1244.

In Ross v. Burkhard Investment Co., supra, the court said: "It is only when the owners of contiguous tracts of lands * * * are uncertain as to the real boundary line which separates their respective properties, by mutual agreement, either express or implied, consent to accept a specified line as the true boundary, and thenceforth occupy and use their respective properties in accordance therewith for a considerable length of time that the contracting parties and their privies in title will be estopped from repudiating the agreed boundary."

[2] An agreement fixing a boundary line need not be shown by direct evidence, but may be inferred from conduct, and especially from long acquiescence. 9 C. J. 232; 5 Cyc. 922.

[3] A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both of the adjoining owners have definitely defined such line by erecting a fence or other monument on it, and that both have treated the same as fixing the boundary between them for such a length of time that neither ought to be allowed to deny the correctness of its location. Board of Trustees v. Miller, 54 Cal. App. 102, 201 P. 952; 4 R. C. L. 129.

[4] Appellant's motion for a new trial was supported by the affidavit of Alfonso Den, wherein Den states that he was the owner of said lot 7, now owned by appellant, and upon which he resided during the two years preceding July, 1908; that one Foulks during that period was the owner of said lot 8, now owned by respondent, and resided thereon; that upon one occasion said Foulks and affiant had a conversation in which said Foulks claimed that the building of said affiant extended a foot and a half over and upon said Foulks' property; that affiant disputed this, and stated to Foulks that he owned all the land up to the fence which separated the two tracts, and that said fence had been there for more than thirty years; that thereupon Foulks said it was all right and thereafter made no claim to the disputed strip up to the time he ceased to be the owner of said lot 8 in 1923. Affiant also stated that he first saw the fence separating the said lots and the building owned by appellant in the year 1872, and that said fence and building are in the same position now that they were at that date; that prior to the trial he had not informed appellant nor any other person of the facts set forth in his affidavit. There is no evidence indicating that the monument at the intersection of Anacapa and Figueroa streets, from which Johnston made his measurements, was the true starting point for such measurements.

How or from what source he determined that said monument so placed by him actually marked the point at which said streets intersected in 1871 does not appear. He stated that the location of the streets was a matter more nearly of common usage than exact location. What the location of the two streets by common usage was in 1871 is not shown. It thus appears that respondent has failed to establish, with any degree of certainty, the initial point from which Johnston made his survey of lots 7 and 8.

In the case of Garrity v. Miller, 204 Cal. 454, 268 P. 622, 623, the court said: "It is well settled that from considerations of public policy equity will not lend its aid in the enforcement of stale demands. The peace and convenience of society require that such demands be not encouraged," and in that case, the court further said: "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible."

In the case under consideration, according to the affidavit of Den on motion for a new trial, respondent's grantor had knowledge of appellant's adverse claim to said two-foot strip, and, for a period of more than 15 years, acquiesced in said claim and made no effort to dispute it. It is true that, in so many words, appellant did not plead laches in his answer, but he did set forth therein that the predecessors of appellant had been the owners of said strip of land and had been in the actual possession thereof since 1871, and that neither respondent nor its grantors had ever owned or possessed said strip.

In the case of Akley v. Bassett, 189 Cal.

625-648, 209 P. 576, 585, the Supreme Court said: "It is well settled that the defense of laches need not be pleaded, but, where it appears from the evidence that the seeker of relief in equity has been guilty of laches, the court will deny such relief sua sponte." Suhr v. Lauterbach, 164 Cal. 591, 130 P. 2.

It appears from the affidavit of Frank H. Doan in support of the motion for a new trial that the general result of the judgment for respondent would be the removal of four houses from their present location, entailing considerable cost.

We are of the opinion that the court erred in denying appellant's motion for a new trial; furthermore, that the evidence produced upon the part of respondent fails to show that the initial point from which the witness Johnston surveyed lots 7 and 8 was the starting point set forth in the deed to respondent and his grantors as conveyed to them by Bowen in 1871. We are also of the opinion that the respondent and his grantors have been guilty of such laches that recovery should be denied.

The judgment is reversed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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118 Cal.App. 630

PEOPLE v. JORDAN et al.

Cr. 2136.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1931.

Intoxicating liquors 🔑236(19).

Evidence *held* sufficient to support conviction for owning, operating, and possessing a still.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Thomas Jordan and others were prosecuted for an offense, and Harry Cohen was convicted of owning, operating, and possessing a still, and he appeals.

Affirmed.

C. B. Conlin, of Los Angeles, and S. Jack Cohen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and George Johnson, Deputy Dist. Atty., both of Los Angeles, for the People.

BISHOP, Justice pro tem.

Appellant Cohen was convicted by the court, sitting without a jury, on the charge of owning, operating, and having in his possession a still, designed and intended to be used in the manufacture of intoxicating liquor. In addition to arguing that certain witnesses are not entitled to credence, a question not for us to decide, appellant claims that the evidence is insufficient to support the judgment. We find that it is ample.

The owner of the premises where the still was found testified that he rented the place to appellant under an assumed name. Appellant had him supply lumber for an outbuilding in which the still was found. A codefendant of appellant's testified that he put in the still at appellant's request, and that appellant assisted him in setting it up. A truck found on the premises near the still had previously been seen frequently at appellant's residence, and had been used to transport "Argo Sugar," such as was found at appellant's residence and at the still. This evidence seems to us to be sufficient to support the judgment.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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119 Cal.App. 11

SOUTHSIDE SPIRITUALIST CHURCH et al. v. NATIONAL FEDERATION OF SPIRITUAL AND PSYCHIC SCIENCE CHURCH et al.

Civ. 8046.

District Court of Appeal, First District, Division 2, California.

Dec. 4, 1931.

1. Appeal and error 🔑194(2).

Objection to form of denial should be made in trial court.

2. Appeal and error 🔑544(1).

Use of conjunctive rather than disjunctive in denial, "for want of information, knowledge 'and' belief" *held* sufficient in appeal on judgment roll alone.

> The court cannot in such case assume that denial, based on "lack of knowledge, information 'and' belief," was not considered as sufficient to raise the issues.

3. Pleading 🔑20.

Denial in conjunctive form of allegation that plaintiffs "and" their numerous unnamed associates were a religious society, and that plaintiffs "and" their associates owned certain property, raised issues (Code Civ. Proc. § 382).

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by the Southside Spiritualist Church and others against the National Federation of Spiritual and Psychic Science Church and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Albert G. Payne, of Los Angeles, for appellants.

J. C. Craig, of Los Angeles, for respondents.

SPENCE, J.

From a judgment in favor of defendants, plaintiffs appeal upon the judgment roll.

The cause was tried upon plaintiffs' second amended complaint and the answer thereto. The main controversy appears to have been over the ownership and right to possession of certain property described in the complaint, the legal title to which real property stood in the name of the Southside Spiritualist Church, a religious corporation. This corporation was not made party to the action. The Southside Spiritualist Church, an alleged unincorporated religious society, was originally named as one of plaintiffs, but by the second amended complaint was "withdrawn as a separate and independent plaintiff in this action," leaving three individual plaintiffs, who alleged that they brought the action on their own behalf and for the benefit of other unnamed persons constituting a religious society known as the Southside Spiritualist Church. They further alleged among other things that "The said Southside Spiritualist Church, said plaintiffs and those with whom they are associated, are the owners and entitled to the immediate possession of said property." From the prayer of the complaint, it appears that plaintiffs sought to quiet title to, and obtain possession of, the property. They also prayed for a decree to the effect that plaintiffs were entitled to the exclusive use of the name Southside Spiritualist Church, for an accounting of the rents and profits of the premises, and for an injunction. In the answer, the foregoing as well as other allegations of the complaint were denied, and the trial court found against plaintiffs upon the issues thus raised.

As above indicated, the record on appeal consists solely of the judgment roll, and the only contention made by appellants is that the findings do not support the judgment denying the relief prayed for in the complaint. We find no merit in this contention. Appellants' claims were based upon the theory that the property held in the name of the Southside Spiritualist Church, a religious corporation, was held by said corporation as the agent and trustee for an unincorporated religious society known as the Southside Spiritualist Church, consisting of appellants and their associates, and that respondents and their associates had formed a new society teaching different doctrines, and had taken possession of the property and deprived appellants of the use thereof. Appellants elected to proceed against respondents without making the corporation a defendant, and brought the action on behalf of themselves and their alleged associates under the provisions of section 382 of the Code of Civil Procedure. The trial court found, among other things, that it was not true that appellants and their associates were a religious society known as the Southside Spiritualist Church, and that it was not true that appellants or their associates were the owners or entitled to possession of the property or to the use of the name Southside Spiritualist Church. These findings support the judgment, unless appellants' objections to the sufficiency of the denials made by the answer are sustainable.

[1-3] Certain denials were made "for want of information, knowledge and belief." Any objection to the use of the conjunctive rather than the disjunctive in this connection should have been made in the trial court, but certainly on this appeal on the judgment roll alone we cannot assume that such denials based upon "lack of knowledge, information and belief" were not treated by all parties and by the trial court as sufficient to raise the issues. Appellants further call attention to the fact that it was denied in the answer that "plaintiffs and those with whom they claim to be associated" were a religious society. Appellants claim that such denial raised no issue, citing Duckworth v. Watsonville, etc., Co., 150 Cal. 520, 89 P. 338. A reading of the answer shows that the denials of the allegations of the complaint relating to plaintiffs and their alleged associates were in some instances made in the conjunctive and in some instances in the disjunctive. We do not believe, however, that the rule referred to in the authority cited is applicable under the circumstances in the present case. A complaint filed by certain named plaintiffs on behalf of themselves and numerous unnamed persons alleged to have a common or general interest in the litigation as permitted by section 382 of the Code of Civil Procedure differs from the ordinary complaint where all parties interested are before the court as named parties to the action. The Code section permits an informal type of pleading on behalf of an alleged group consisting of numerous named and unnamed persons, but it is the rights of the group as such rather than the rights of any named or unnamed individual or individuals upon which such complaint is based. We are of the opinion that, where it is alleged in such complaint that plaintiffs and their unnamed associates are a religious society, and that plaintiffs and their unnamed associates are the owners and enti-

tled to possession to certain property, a denial that plaintiffs and their associates are such religious society and a further denial that plaintiffs and their associates are owners of or entitled to possession of the property would be sufficient to raise the issues. However, the denials of the answer in the present case relating to the alleged ownership and right to possession of the property by plaintiffs and their associates were made in the disjunctive, and the findings of the trial court on these issues were likewise in the disjunctive. The judgment finds ample support in these findings.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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119 Cal.App. 5

BROCK et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8180.

District Court of Appeal, Second District, Division 1, California.

Dec. 3, 1931.

Rehearing Denied Dec. 31, 1931.

Mandamus 🔑**42.**

Court's refusal to award temporary attorney's fees, costs, or support on ground it did not have authority *held* not to warrant mandamus (Civ. Code, § 137).

> The court in proceeding to determine matter of application for attorney's fees, costs, and temporary support of minor child denied relief on account of court not having jurisdiction on two grounds; one being that child was not within jurisdiction of court, and that the provisions in Civ. Code, § 137, in respect to attorney's fees, costs, and support money, did not apply in respect to child not residing in state and not present within state in action to compel father to support child, so that any error in conclusion was only an error made by court in the exercise of its jurisdiction, and not a refusal to act on merits on matter presented.

Original application for writ of mandate by Helen Starr Brock and another against the Superior Court in and for the County of Los Angeles, and another.

Petition denied.

Leon B. Brown, of Los Angeles, for petitioners.

PER CURIAM.

On petition for writ of mandate to require of respondent court that in a pending action it proceed to hear and determine the matter of an application for attorney fees, costs, and temporary support of minor child.

Petitioner claims that the court has refused to exercise its jurisdiction in the matter, but the facts stated in the petition show the contrary. When the order to show cause came before the court, the matter was submitted upon a stipulation of facts. Thereupon the court entered an order denying the requested relief, "on account of this Court not having jurisdiction to award temporary attorney fees, costs, or support on two grounds; that the child is not within the jurisdiction of this Court, also that provisions in section 137, Civ. Code, in re Attorney's fees, costs and support money do not apply in this case."

It thus appears that the court did not deny its jurisdiction to pass upon the application. It did pass upon and determine said application, but refused the requested allowance, because the court was of the opinion that it did not have authority to make such allowance to a child not residing in this state and not present in this state, in an action to compel a father to support his child. If the court erred in this conclusion (which we do not decide), it was only an error made by the court in the exercise of its jurisdiction. It was not a refusal to act upon the merits of the matter presented.

The petition for writ of mandate is denied.

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118 Cal.App. 555

NICHOLSON v. PORTER et al.

Civ. 504.

District Court of Appeal, Fourth District, California.

Nov. 24, 1931.

1. Carriers 🔑**305(6).**

Negligence of driver following bus *held* proximate cause of collision, as regards bus company's liability to passenger, where driver behind looked around just before bus stopped at intersection.

2. Appeal and error 🔑**909(1).**

Reviewing court should presume, in favor of judgment denying injured passenger recovery, that bus driver gave hand signal to automobile in rear when bus stopped (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

3. Carriers 🔑**280(1).**

In California, carriers for hire are not insurers of absolute safety of passengers.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Ada Nicholson against J. M. Porter and E. Schilling, doing business under the name of Gate City Bus Company. Judgment for defendants, and plaintiff appeals.

Affirmed.

Bertrand J. Wellman, of Los Angeles, for appellant.

B. P. Gibbs, of Los Angeles, for respondents.

JENNINGS, J.

Plaintiff appeals from a judgment in favor of respondents. After appellant had presented the evidence upon which she based her claim for recovery and had rested, respondents moved the court for a nonsuit. The motion was granted, judgment in favor of respondents was duly entered, and the appeal therefrom was taken.

From the record the following facts appear: On April 7, 1928, respondents were copartners operating an automobile stage business under the fictitious name of Gate City Bus Company. Appellant was a passenger for hire on a bus operated by respondents on said date. At 9:30 in the evening of said day the bus on which appellant was traveling as a passenger was proceeding north on Mt. Vernon street in the city of San Bernardino and was approaching the intersection of Mt. Vernon street and Tenth street in said city. As the bus approached the intersection of the two streets, its speed was diminished preparatory to its coming to a complete stop for the purpose of permitting passengers to alight. As the bus was thus slowing down and moving at a speed of from 5 to 6 miles per hour, it was struck in the rear by an automobile operated by one Floyd M. Sousa. As a result of the collision appellant received certain personal injuries. At the time the collision occurred it was dark. The bus was not equipped with a stop light.

Appellant's sole contention is that the bus in which she was riding as a passenger was not equipped with a stop light which would illuminate the word "Stop" and indicate to any one approaching from the rear that the bus was about to come to a complete stop. The failure by respondents thus to have equipped the bus is said to constitute negligence in its maintenance entitling appellant to recover for her injuries. Section 2101 of the Civil Code is cited as imposing upon respondents a duty in this regard. The statute reads as follows: "A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care."

[1-3] Unfortunately for appellant, the record herein shows that as a part of her case, under stipulation of counsel, a written statement of Floyd M. Sousa, the operator of the automobile which collided with respondents' bus, was admitted in evidence. In the statement thus introduced, the witness stated that he had been following the bus for about a block and a half; that he could see the bus by the lights of his automobile; that he looked around; that he did not think the bus would stop at the intersection; that when he looked back he was, as he expressed it, "right onto the bus"; that he applied the brakes but was unable to stop his automobile before it collided with the bus. From this statement read into evidence, it conclusively appears that the efficient, proximate cause of the collision which resulted in appellant's injuries was the negligence of the operator of the automobile which was following the bus. Appellant has cited no statute which imposed upon respondents the duty to equip the bus with a stop light. Section 130 of the California Vehicle Act (as amended by St. 1925, p. 412, § 15a) as it read at the time the collision occurred provides that the driver of any vehicle upon a public highway before stopping such vehicle shall first see that the movement can be safely made and, if the operation of any other vehicle may reasonably be affected by the movement, shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement. It is further provided in said section that the signal may be given in a specified manner by the use of the hand and arm or by means of a mechanical or electrical device which must first be approved by the division of motor vehicles. The record does not disclose that appellant made any showing that the driver of the bus failed to give a hand and arm signal of his intention to stop the bus, or that such signal, if given, was not plainly visible to the driver of the automobile following the bus. In the absence of such showing and in support of the judgment herein, we are entitled to presume that the bus driver gave a proper hand and arm signal which was visible to the driver of the automobile which collided with the bus. It is to be remembered that in California carriers of passengers for hire are not insurers of the absolute safety of passengers. Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 P. 954. No useful purpose would be served in repeating the familiar rule applicable to the court's duty in entertaining a motion for a nonsuit. The state of the record herein indicates that the court's action in granting the motion was amply justified.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

118 Cal.App. 732

MORE et ux. v. CITY OF SAN BERNARDINO et al.

Civ. 511.

District Court of Appeal, Fourth District, California.

Dec. 1, 1931.

1. Municipal corporations 🔑845(1).

Verified claim for damages against city by reason of allowing sewage to flow on certain lands *held* to sufficiently comply with charter requirements.

> Writing filed with city clerk in accordance with requirements of charter set up claim for damages by reason of allowing sewage to flow upon certain lands which were particularly described and itemized damages in a certain amount for loss in selling price of milk; for contamination of domestic water; for depreciation in value of land; for loss of alfalfa; for odors and stenches; and for depreciation in value of certain milk cows.

2. Municipal corporations 🔑845(2).

Complaint in action against city and corporation to recover damages for allowing sewage to flow on land *held* not defective because of alleging joint ownership and operation of sewers.

> Court found that defendant city operated sewers and that corporation defendant owned the same but had nothing to do with sewage until it was delivered by city to their land, so that facts were peculiarly within knowledge of defendants, and complaint was sufficient to put them to their defense.

3. Pleading 🔑52(2).

Failure of complaint in action to recover for allowing sewage to flow on lands, to set up causes of action for breaking of sewer and digging ditches separately, *held* not fatal.

> Complaint alleged that defendants had permitted sewer lines to become broken and clogged at and near lands of plaintiffs and had caused and permitted sewage to overflow, and also alleged that defendants negligently dug ditches to conduct overflow sewage in vicinity of pipe line, thereby causing and permitting large quantities of sewage to be deposited upon lands, both of which acts of negligence related to cause of action attempted to be set up.

4. Trial 🔑395(1).

Finding in action to recover for allowing sewage to flow upon lands in respect to city's ownership of sewer lines *held* sufficient.

> Court found that sewer lines were owned by corporation defendant, but that such corporation had no control over same and had nothing to do with sewage therein until same was delivered by defendant city to their lands and also found that sewer lines were operated by defendant city in connection with city's sewage system and that sewage was carried through plaintiffs' lands by city and delivered by it to lands of defendant corporation.

5. Trial 🔑395(1).

Finding in action to recover for allowing sewage to flow on lands in respect to digging of ditches *held* sufficient.

> The court found that city wrongfully permitted sewage to be deposited on land of plaintiff as alleged in paragraph of complaint, stating that defendants wrongfully dug ditches to conduct overflow of sewage upon lands of plaintiffs, and thereby caused and permitted large quantities of sewage to be deposited upon their lands.

6. Municipal corporations 🔑845(4).

Evidence in action to recover for allowing sewage to flow upon lands *held* sufficient to sustain finding that city operated sewers.

7. Municipal corporations 🔑845(7).

Damages for odors and stenches on account of city's permitting sewage to overflow lands *held* properly awarded landowner (Civ. Code, § 3333).

8. Appeal and error 🔑1010(1).

Findings of trial court sustained by any evidence will not be disturbed.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by H. H. More and wife against the City of San Bernardino and another. Judgment for plaintiffs against defendant named, and such defendant appeals.

Affirmed.

Fred A. Wilson, City Atty., of San Bernardino, for appellant.

Hert, Mussell & Withington, of San Bernardino, for respondents.

BARNARD, P. J.

The plaintiffs, who owned certain land near the city of San Bernardino, brought this action for the purpose of recovering for damages sustained through the overflow of sewage upon their land. Prior to 1906 the defendant city had discharged its sewage in Warm creek, which flowed through said city and also through plaintiffs' lands. This method of sewage disposal having become unsatisfactory, on March 19, 1906, the city entered into a contract with one Gregory, under which it was agreed that he would pay $100 a year for the exclusive use of all sewage from the city, the same to be used by him on certain lands situated below the lands belonging to the plaintiffs. Gregory agreed to take and remove this sewage from the existing city sewers at a point near the city limits, and to convey the same by means of a good and sufficient vitrified pipe line to his own premises. On January 31, 1907, a new agreement was entered into between the city as one party and Gregory and one Langford as the other party, under the terms of which the city was given an easement in an existing pipe line, which was referred to as "the Gregory and Langford pipe line," and the city was to have the perpetual right to convey the sewage of the city through this pipe line and deposit the same upon the same land referred to in the Gregory contract. At the same time Gregory and Langford agreed to construct an extension of the pipe line, and it was agreed that this contract was to supersede the Gregory contract when it was ratified by an ordinance of the city. So far as shown by the evidence, it was never ratified by the city, but it was executed and recorded. On June 21, 1909, the Delta Water Company, to whom the Gregory contract had been assigned, entered into a new contract with the city under which the provisions of the Gregory contract were extended for a period of twenty-five years, and provision was made for the construction of an additional pipe line by the Delta Water Company, to care for an increased amount of sewage. It would seem that the interest of the Delta Water Company in the sewage contracts, and in the lands where the sewage was to be used, later passed to the defendant Finance Investment Corporation, although this is not mentioned in the briefs. This action was brought against both defendants as owners and operators of the two outfall sewer lines, for damages consisting of the pollution of domestic and irrigation water, loss of crops, loss of profits in operating a dairy, offensive odors, and loss or depreciation of the value of lands, all alleged to have been caused by the flooding of the plaintiffs' land with sewage water and offal, caused by the overflow of the outfall sewers owned and operated by the two defendants. After a trial the court found for the plaintiffs and awarded them damages in the sum of $1,000 because of odors and stenches caused between August 27, 1927, and August 27, 1928, and the further sum of $150 by reason of the pollution of their domestic supply of water. The court further found that the defendant city was operating said outfall sewer lines and that while so operating said sewer lines they had permitted large quantities of sewage to flow upon the lands of plaintiffs, and that the injuries complained of were not due in whole or in part to any act or omission on the part of the defendant Finance Investment Corporation. The defendant city has appealed from the judgment entered.

[1] The first point raised is that a demurrer to the complaint should have been sustained for three reasons. It is first urged that the complaint was defective in failing to properly allege the presentation of a claim to the city, as required by the appellant's charter. This charter contains a provision that no claim or demand should be the basis of an action against the city "unless a verified claim in writing, clearly specifying the item or items constituting such claim or demand shall be filed with the city clerk, or with the board or commission having jurisdiction to allow or reject the same, at least thirty days prior to the commencement of such action or proceeding." A verified claim was filed setting up a claim for damages by reason of allowing sewage to flow upon certain lands owned by the plaintiffs which are particularly described, "and on lands in the vicinity of said land held under a lease by the claimants herein." The claim for damages is then itemized as follows: A certain amount for loss in the selling price of milk; an amount for contamination of domestic water; an amount for depreciation in value of the land; an amount for loss of alfalfa; an amount for odors and stenches, it being set forth that the claimants resided upon the lands; and an amount for depreciation in value of certain milk cows. It is argued that this claim, a copy of which was set forth in the complaint, is not one "clearly specifying the item or items constituting such claim or demand," since it does not clearly specify "the act complained of." It is insisted that the claim should have specified "whether the act complained of consists of nonfeasance or misfeasance," and that the appellant was unable to ascertain whether it was charged with improperly maintaining some instrumentality or with improperly doing something, such as constructing ditches or the like. The purpose of such a charter provision is well set forth in 19 Ruling Case Law, at page 1044, where it is said: "A statute requiring the presentation of a claim against a municipal corporation does not require the statement to be drawn with the technical nicety of a declaration; a substantial compliance with the provisions of the statute is sufficient, and an immaterial variance between such a statement and the declaration subsequently filed is not fatal. When the statute which makes the filing of a claim with the municipal authorities a condition precedent to the maintenance of an action thereon contains no specific requirement that the amount of the claim be set out, the requirement of the statute is satisfied by a statement of the facts upon which the claim is based. The addition of the amount is unnecessary, and, if set forth, mere surplusage, and does not bar recovery of a greater sum.

Even when the statute requires the setting forth of the amount claimed, there is authority to the effect that the recovery in the action is not limited to the amount claimed, when notice is required merely in order to furnish the municipal authorities with an opportunity to make a timely investigation of the facts upon which the claim is based."

We think the claim as filed, in which the items of damage are clearly specified, fully complies with the charter provision, and that it was unnecessary to include therein any further description of the acts complained of than the one set forth, to the effect that these items of damage were claimed because of the act of the city in allowing sewage water to flow upon the lands described. Wagner v. City of Seattle, 84 Wash. 275, 146 P. 621, Ann. Cas. 1916E, 720; Coen v. City of Los Angeles, 70 Cal. App. 752, 234 P. 426; McCann v. Sierra Company, 7 Cal. 121.

[2] It is next urged that the complaint was defective in that it alleged joint ownership and operation of the outfall sewers. It is contended that sewers are either private or public, that joint ownership thereof by a city and a private party would be contrary to law, and that the joint ownership and joint operation thereof would be beyond the power of a municipality. It is thus maintained that a city may not be held liable for maintaining a nuisance, if it is maintaining such a nuisance illegally. Under the circumstances shown, this claim is without merit. It was found by the court that the defendant city operated the two outfall sewers, that the corporation defendant owned the same, but had nothing to do with the sewage until it was delivered by the city to their land. The facts were peculiarly within the knowledge of the defendants, and the complaint was sufficient to put them to their defense.

[3] The third attack upon the complaint is that two causes of action were improperly joined, one for the breaking of the sewer and the other for digging ditches. It is alleged in the complaint that the defendants had permitted the sewer lines to become broken and clogged at and near the lands of the plaintiffs, and had caused and permitted the sewage to overflow. It is also alleged that the defendants negligently dug ditches to conduct this overflow sewage from the vicinity of the pipe lines upon and along the lands of the plaintiffs, and thereby caused and permitted large quantities of such sewage to be deposited upon these lands. Both of these acts of negligence related to the cause of action attempted to be set up, and we think the failure to set them up as two separate causes of action was not fatal to the complaint. Razzo v. Varni, 81 Cal. 289, 22 P. 848.

[4, 5] It is next urged that the court failed to find on material issues in two respects. First, that the court failed to make any finding respecting the ownership by the appellant city of the outfall sewer lines. The court found that the two outfall sewer lines were owned by the defendant corporation, but that said corporation had no control over the same and had nothing to do with the sewage therein until the same was delivered by the appellant city to their lands. The court also found that the two sewer lines were operated by the appellant city in connection with their city sewage system and that sewage was carried through said lands by the appellant city and delivered by it to the lands of the defendant corporation. The finding is sufficient to support the judgment in this respect, and that a more definite finding was not made upon the point raised is not material. It is also urged that the court erred in not making a finding respecting the digging of ditches. The court found that the defendant city wrongfully permitted sewage to be deposited upon the lands of the plaintiff, as alleged in paragraph IX of the complaint. Paragraph IX alleged that the defendants wrongfully dug ditches to conduct the overflow sewage upon the lands of the plaintiffs and thereby caused and permitted large quantities of such sewage to be deposited upon said lands. So far as material issues were presented, the finding is sufficient.

[6] It is next urged that the evidence is not sufficient to sustain the court's finding that the defendant city operated the outfall sewers, and that such finding is contrary to the evidence. It is urged that the only evidence presented established that these sewer lines were being used by the Delta Water Company and its successors in interest. In support of this proposition, appellant relies upon the three contracts above referred to. In our opinion, an examination of these contracts shows that they contain some evidentiary support for the finding attacked. In the first contract between the city and Gregory dated March 19, 1906, Gregory agreed to "take and remove" all sewage from the existing sewer system of the city and transport and convey the same out of and beyond the corporate limits of the city by means of a vitrified pipe line placed underground, and the place of taking is fixed as the outfall of the sewer system then constructed and the outfall of such systems as should thereafter be constructed. Nothing is said in this contract about who should make any necessary repairs to the pipe line that was to be constructed, but the inference would be that Gregory must take entire charge of the sewage from the city limits. Gregory furnished a bond to secure the faithful performance of this contract, which bond was signed by one J. D. Langford and another. A few months later the second contract was entered into, which was between Gregory and J. D. Langford as first parties, and the appellant city as second party. The first parties granted to

the second party the right, privilege, and easement of "using, controlling and possessing that certain pipe line belonging to parties of the first part," describing the pipe line which had been constructed under the terms of the first agreement. It also provided that the city should have the right to deposit its sewage upon the lands belonging to the first parties, which were described, and that the first parties were to "receive, distribute and use" said sewage upon the said lands. This contract provided that it should take effect upon its execution by the parties and upon it being ratified by an ordinance of the city. No ordinance ratifying the same appears in the record, but the contract was executed and recorded. On June 21, 1929, a subsequent contract with the Delta Water Company was entered into by the city. This contract, after reciting that Gregory and his assigns have constructed a pipe line for conveying sewage away from the city, and because of the rapid growth of the city "it has become necessary and advisable to either increase the capacity of its present pipe line or to lay another pipe line supplementing the original one laid by them," provides that an additional pipe line shall be constructed, the cost of which is to be paid, one-third by the city, and two-thirds by the other party. It is then provided that the Gregory contract should be extended for twenty-five years and that during that time the second party shall "take and receive" all of the sewage from the sewer system or systems of the city. It is then provided that, when this supplemental sewer between the city limits and the land of the second party is completed, it shall belong to and be owned by the city, subject to the rights of the second party to have the sewage flow through the same. While this contract recites that Gregory had assigned "his interest" in the contract of March 19, 1906, to the Delta Water Company, nothing is said as to what had become of the interest of J. D. Langford, who was a party to the contract of January 31, 1907. That contract recited that the pipe line belonged to Langford and to Gregory, and purported to grant to the city the right to use, control, and possess the same. This Delta Water Company contract is somewhat ambiguous in that it refers only to the Gregory contract, while rights are given to the city which presuppose that the city had acquired the interest of J. D. Langford, which is only shown to have been conveyed to the city by the Gregory and Langford contract. And the language of this contract follows the language used in the Gregory and Langford contract in providing that the other party is to "take and receive" the sewage flowing in any part of the city system, in direct contrast to the language used in the original Gregory contract which provided that Gregory was to "receive and remove" the sewage from the city limits. In view of the uncertainties left by the language of these contracts, the subsequent conduct of the parties, as shown by the evidence, is illuminating. One witness, who was superintendent of streets of the appellant city during the time in which this claim arose, testified that he had men repairing these sewers and fixing leaks therein, and that he cleaned out the ditches along the front of plaintiffs' premises so that the sewer water would continue on down. A former superintendent of streets testified concerning records in his office relative to repairs upon the sewer lines in question, and various bills for repairs were admitted in evidence showing repairs upon these sewer lines in a number of different months. The superintendent of streets testified that he kept records of the work done on these sewers; that he was ordered to make repairs thereon by the mayor; that various amounts of work were done under instructions from the mayor; and that no one, other than himself and his men worked on these sewer lines during the time he was street superintendent. He also testified as to certain obstructions in the sewer that were found and removed, and that upon one occasion he was instructed to move one of these sewer lines where it crossed Warm creek in order to enable a bridge to be put in. Not only does this evidence indicate that the appellant city interpreted this contract as putting the city in charge of these sewer lines, but it furnishes some support for the finding of the court that the city was actually operating and had control of the lines during the period in question. In considering whether the evidence is sufficient to sustain this finding, it must be remembered that the circumstances involved here are somewhat unusual and that from the very nature of the case the amount of evidence of operation and control available is not as great as would be the case in reference to the operation of an ordinary instrumentality. This fact justifies a lesser quantum of proof than would be justified in many cases. In our opinion the facts shown by the evidence, with the reasonable inferences therefrom, sufficiently sustain the finding complained of.

[7] It is finally contended that the court erred in awarding damages for odors and stenches. As we understand appellant's argument, it is that the plaintiffs' cause of action was predicated upon damage to real property, and, since it was found by the court that the plaintiffs' lands were not permanently injured, the only other element of damage that could be considered was diminution in the rental value of the land. The complaint not only set up a claim for damage to the land, but also various other items of damage, including one arising from odors and stenches and one from the pollution of their water supply. The respondents lived upon the land, and the pleadings, evidence, and findings jus-

tify the award. Respondents were entitled to compensation for all detriment proximately caused by the acts of the defendants. Section 3333, Civ. Code.

[8] The situation in which respondents were placed without fault upon their part was a most aggravating one, as is in effect conceded by the defense interposed, which, while most resourceful and technical in "passing the buck" between the defendants, is noticeably silent upon such matters as reflect upon the justice of the claim. The trial judge was in the best position to pass upon the weight of the evidence, and this case well illustrates the wisdom of the rule that the findings of the trial court should not be disturbed if there is any evidence at all to sustain them.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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118 Cal.App. 588

BRYSON v. HARRYMAN et al.

Civ. 599.

District Court of Appeal, Fourth District, California.

Nov. 25, 1931.

1. Dismissal and nonsuit 🔑60(2).

Trial court *held* not to have abused discretion in dismissing action where service of summons was delayed more than year after complaint.

Facts disclosed that summons had not been served on any of defendants named in complaint until more than one year after complaint was filed, and then only after notice of motion to dismiss because of failure to prosecute case with diligence had been served on plaintiff, who, in opposition to the motion, presented affidavit stating that he was old and infirm, had been sick, and that he had not had the means theretofore to prosecute action, in addition to which a certain remaining party defendant had not been located.

2. Dismissal and nonsuit 🔑50.

Acceptance of service of summons by attorney for defendant was not waiver of motion to dismiss for failure to prosecute case with diligence.

3. Dismissal and nonsuit 🔑60(2).

That summons is served on some defendants after notice to dismiss does not necessarily excuse previous delay in serving summons.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Blakely Durant against Katie Viesser Harryman, Katherine McKay, and others. From an order dismissing the action on motion of defendant last named, plaintiff appeals; Frank Bryson, special administrator, being substituted after death of original plaintiff.

Affirmed.

Elon G. Galusha, of Los Angeles, for appellant.

C. W. Benshoof, of Riverside, for respondent.

BARNARD, P. J.

This is an appeal from an order dismissing the action upon the ground that the plaintiff had failed to prosecute the same with diligence, in that the service of the summons was unduly delayed.

The action was originally brought by Blakely Durant as plaintiff; the special administrator of his estate being substituted during the appeal. The complaint, filed on July 7, 1927, in a first cause of action seeks to quiet title to certain land in Riverside county, and in a second cause of action seeks to eject some of the defendants from said land. On December 7, 1928, at which time summons had not been served on any of the defendants, the defendant McKay served notice of a motion to dismiss the action because of the failure of the plaintiff to prosecute the case with diligence, and because of the undue delay of the plaintiff in serving the summons. This motion was noticed for December 24, 1928. On December 19, 1928, all of the defendants except Rose J. Woody and the fictitious defendants were personally served with summons in the county of Riverside. When the motion was heard, it was supported by the affidavit of defendant McKay, sworn to on December 6, 1928, in which it was set forth that she was well acquainted with the plaintiff, and had known him for many years; that the plaintiff at all times knew that she lived in the city of Riverside, and also knew that she could easily be found in said city; that summons had never been served upon her and had never been returned to the court; that she had never been notified in any manner of the existence of the action, and that she knew nothing of the same until her attention was called to the matter on or about November 21, 1928, by the Riverside County Title & Guaranty Company, which company was searching the title in her behalf; that she was the holder of the legal title to the property mentioned in the complaint; and that she had fully stated all of the facts to her attorney, and had been advised by him, and believed, that she had a good and meritorious defense to the action. In opposition to the motion, there was presented the affidavit of the plaintiff consisting of only eight lines, the material parts thereof reading as follows:

"I am the plaintiff in this action; I am old and infirm, and have been sick much of the past year. I am also a poor man and have not the means heretofore to prosecute this action."

"* * * That the remaining party defendant has not yet been located."

The motion was granted by the court, and from that order this appeal is taken.

In support of the appeal, the appellant maintains that the statement of the plaintiff that he was without financial means and that one defendant had not yet been located was such a sufficient showing of excusable delay in serving the summons that the making of the order of dismissal was an abuse of discretion on the part of the trial court. The only authority cited by appellant which is at all relevant to the question before us is Ferris v. Wood, 144 Cal. 426, 77 P. 1037, 1038. In that case it was held that, while such a question is addressed to the sound discretion of the court, this discretion is not to be exercised in a capricious or arbitrary manner. It was then pointed out that the indebtedness which the plaintiff was attempting to collect in that case was fully admitted, that no defense to the claim of the plaintiff had been suggested, and that a good and valid reason for delaying the service of the summons appeared. That case is by no means controlling in the case before us, but, as pointed out therein, "each particular case presents its own features, and no ironclad rule can justly be devised, applicable alike to all." In Marks v. Keenan, 148 Cal. 161, 82 P. 772, the court said: "After the filing of the complaint and the issuing of the summons nothing was done towards serving the summons until more than a year had elapsed. During that time the summons was not given to the sheriff, nor was any other person employed to serve it. The defendant during this time was a resident of San Francisco where the action was commenced, the place of his residence being in the city directory; and there seems to have been no good reason why he was not served. The service was not made on him until a year and four months after the commencement of the action and the issuance of the summons. Under these circumstances we do not feel called upon to disturb the order appealed from."

Lack of funds on the part of the plaintiff has been held not to be conclusive as an excuse for delay in serving the summons, especially where the amount required would be trivial. Overaa v. Kenney, 169 Cal. 628, 147 P. 466.

[1] In the case before us, it appears that the respondent held the legal title to the property described in the complaint, and that the action filed by the plaintiff was a cloud upon her title. It does not appear that summons was handed to any officer for service, and the fact that summons was personally served upon all but one of the defendants within a few days after notice of a motion to dismiss was served, together with the fact that the plaintiff did not deny the statement of the respondent, who was the defendant principally interested, that she was well acquainted with him, and that he knew her place of residence at all times, would strongly indicate that no effort was made to serve the summons until after service of the notice of motion to dismiss. This is practically conceded by the affidavit of the plaintiff, and even his claim of lack of funds, due to illness, relates only to the preceding year, and no reason at all is assigned for the failure to serve the summons during the first five months after the action was filed. In view of the manner in which the respondent's title to real property was clouded, the apparent ease with which service of summons could have been secured, and the nature of the excuse for delay offered by the plaintiff, considerable ground existed for holding that the delay in the service of the summons was an unreasonable one. Under such circumstances, we cannot hold that the trial court abused its discretion in making the order complained of. Witter v. Phelps, 163 Cal. 655, 126 P. 593.

[2, 3] The only other point raised by appellant is that the attorney for the respondent accepted service of the summons, and thereby waived his motion to dismiss the action. The summons as returned was accompanied by an affidavit of personal service on three of the defendants, which service was made on December 19, 1928. There was also an admission of service of the summons and a copy of the complaint for the respondent by her attorney, which acceptance of service is not dated. It appears, however, that such service of summons was thus accepted at some time between the service of the notice of the motion to dismiss and the time that said motion to dismiss came on to be heard. In our opinion, this acceptance of service merely established that service had then been made on the respondent and did not waive the motion which had been noticed for hearing. In thus accepting service this attorney waived the actual service of the summons on his client, at that time, but he did not waive his contention that the service had been too long delayed. The fact that a summons is served on some of the defendants after a notice of motion to dismiss is given does not necessarily excuse a previous delay in serving the summons. The question presented by such a motion to dismiss is, not whether the sum-

mons has been served at the time of the hearing, but whether there has been an unreasonable delay in serving it. In the case of Overaa v. Kenney, above referred to, an order dismissing the action for unreasonable delay in the service of the summons was upheld where the summons was actually served before notice of a motion to dismiss was given.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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118 Cal.App. 628

PEOPLE v. BRANDT et al.

Cr. 2123.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1931.

1. Homicide 🔑**256.**

Robbery 🔑**24(1).**

Evidence *held* sufficient to sustain conviction for attempted robberies and attempt to murder.

2. Criminal law 🔑**1160.**

Reviewing court, after trial judge's denial of motion for new trial, will not consider attack on credibility of witness whose testimony is directly contradicted or is inconsistent within itself.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Henry Brandt and others were convicted of attempted robberies and attempt to murder, and they appeal.

Affirmed.

Orbison & Irwin, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Dep. Atty. Gen., for the People.

BISHOP, Justice pro tem.

Appellants were convicted, by a jury, of two attempted robberies and an attempt to murder; the three offenses growing out of an early morning endeavor to hold up two employees of a grocery store. Appellants place their hope of a reversal on the one plea that the jury must have reached a verdict through passion and prejudice, because the testimony of the prosecution witnesses, at least in so far as it bears upon the identification of the three appellants, is so impossible and improbable that the jury could not have based its verdict on the evidence.

[1, 2] We find no part of the story told by the witnesses impossible or improbable, except in so far as two conflicting accounts of any incident cannot both be true. There is abundant evidence that three men were engaged in a holdup at the time and place charged against appellants. There is, beyond question, sufficient evidence that the three men so engaged were the three appellants. Human witnesses who are involuntary participants in a sudden drama, and those who find themselves unexpectedly an audience, cannot be expected to agree upon the details of the event. It is conceded, by the silence of appellants on the question, that a fair trial was had. The jury, first of all, heard the accounts of what took place, with their inconsistencies as to detail and the sequence of events, and came to the conclusion that appellants were guilty, and their perfect alibi not to be believed. Then the trial judge, who heard the evidence and was in a position to judge of the credibility of the witnesses, denied the motion for a new trial; which it would have been his duty to grant had he not believed that the evidence proved the appellants guilty beyond a reasonable doubt. People v. Chew Wing Gow [1898] 120 Cal. 298, 52 P. 657. We now cannot consider the argument that any one witness' story is not to be believed, because directly contradicted by another's, or because not consistent with previous statements made by the same witness.

The judgments and the order denying a motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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118 Cal.App. 479

REMINGTON v. MULHOLLAND et al.

Civ. 8055.

District Court of Appeal, First District, Division 2, California.

Nov. 21, 1931.

Rehearing Denied Dec. 21, 1931. Hearing Denied by Supreme Court Jan. 18, 1932.

1. Mechanics' liens 🔑**132(7).**

Mortgages 🔑**151(3).**

Cessation of labor for 30 days constituted "completion" within statute; hence mechanic's lien not filed until building was actually completed was inferior to trust deeds recorded before original cessation of labor (Code Civ. Proc. § 1187).

[Ed. Note.—For other definitions of "Complete; Completion," see Words and Phrases.]

2. Mechanics' liens ⚿277(1).

Lien claimant must plead and prove facts showing lien was timely filed (Code Civ. Proc. § 1187).

3. Appeal and error ⚿179(1).

Claimants under trust deeds sufficiently raised point that mechanic's lien was not timely filed by submitting amendments to proposed findings covering lienor's cessation of work (Code Civ. Proc. § 1187).

4. Mechanics' liens ⚿281(5).

As regards question whether mechanic's lien was timely filed, finding mechanic's lienor continued work without interruption until completion *held* unsupported (Code Civ. Proc. § 1187).

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Action by F. K. Remington against Walter E. Mulholland, the Standard Mortgage Corporation, and others. From the adverse portion of the judgment, the Standard Mortgage Corporation and others appeal.

Reversed.

Joe Crider, Jr., John M. Martin, and Frank L. Martin, Jr., all of Los Angeles, for appellants.

Richard J. O. Culver, of Los Angeles, for respondent.

SPENCE, J.

This is an appeal by certain defendants from a portion of the same judgment which we had under consideration in E. K. Wood Lumber Co. v. Mulholland, 5 P.(2d) 669, the opinion in which has been this day filed. The appealing defendants, as holders of the deeds of trust and as purchasers at the foreclosure sale under the second deed of trust, appeal from that portion of the judgment in which it was decreed that plaintiff, Remington, was entitled to enforce a mechanic's lien in the sum of $1,800, and that said lien was "prior and superior to the claims and demands of the other parties to the action."

[1] We will not repeat the facts set forth in the opinion above mentioned, nor do we deem it necessary to discuss all of the grounds here urged for a reversal of the portion of the judgment appealed from. Appellants contend that the uncontradicted testimony of respondent Remington showed that there had been a cessation of labor for more than thirty days, to wit, from about June 1, 1926, until some time in September, 1926, and, as respondent's lien was not filed until February 8, 1927, it did not date back further than the time when work was resumed in September, 1926, which was several months after the deeds of trust had been recorded. In other words, while the building was not actually completed until late in December, 1926, appellants contend that, under section 1187 of the Code of Civil Procedure, the cessation of labor for a period of thirty days starting on or about June 1, 1926, constituted a "completion" within the meaning of that section, and that liens not filed within the time prescribed after such cessation of labor could not in any event have priority over the deeds of trust recorded on March 18, 1926. In our opinion, this contention must be sustained.

The uncontradicted testimony of respondent was as follows:

"The building was stopped at one time, construction on it was stopped at one time, and the building bills were settled before it was started up again.

"Q. How long was the building stopped? A. Oh, probably two months or more; I don't remember just exactly without I could look at my time book.

"Q. Can you give the approximate date that the work was stopped? A. Yes, something along in June, long about the first of June, I think, until about September sometime."

Section 1187 of the Code of Civil Procedure provides in part: "* * * In all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter; * * * cessation from labor for thirty days upon any contract or upon any building, improvement or structure. * * *" Under said section it has been held that such cessation of labor for thirty days is to be treated in the same manner as an actual completion for the purpose of computing the time within which liens must be filed. Sunset Lumber Co. v. Bachelder, 167 Cal. 512, 140 P. 35, Ann. Cas. 1916B, 664; Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648.

[2-4] Respondent's only answer to the foregoing contention is that the point is raised for the first time on this appeal. This does not appear to be the case. The burden was upon respondent to plead and prove facts sufficient to show that his lien was filed within the time allowed by law. In this connection he alleged in his complaint, among other things, that he commenced work on March 6, 1926, and "continued with the performance thereof until about the 21st day of December, 1926, upon which date plaintiff completed all of his said work." These allegations were denied by the answer, and it was therefore necessary for respondent to prove them. This he failed to do, but, on the contrary, gave uncontradicted evidence showing that the work had not been continuous, but had been interrupted by a cessation of all work for a period of three

months. Appellants objected to respondent's proposed findings relating to the above allegations, and submitted amendments to the proposed findings covering the cessation of work as shown by the evidence. The point was therefore definitely raised in the trial court. The trial court, however, adopted respondent's proposed findings based upon the foregoing allegations of respondent's complaint. The appellants' contention that the evidence is insufficient to sustain these findings must be sustained.

From what has been said it follows that the trial court erred in finding and concluding that respondent was entitled to enforce a lien which was prior and superior to the claims of appellants. The portion of the judgment herein appealed from is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 475

E. K. WOOD LUMBER CO. et al. v. MULHOLLAND et al.

Civ. 8071.

District Court of Appeal, First District, Division 2, California.

Nov. 21, 1931.

Rehearing Denied Dec. 21, 1931. Hearing Denied by Supreme Court Jan. 18, 1932.

1. Mechanics' liens ⚷166.

In absence of general contract, liens attach only when lien claimant commences to furnish labor or materials (Code Civ. Proc. § 1186).

2. Mortgages ⚷151(3).

Where there is no general contract, trust deed recorded after work is commenced, but prior to time lien claimant commences to furnish labor or materials, takes priority over lien (Code Civ. Proc. § 1186).

3. Mortgages ⚷151(3).

Where only option given in trust deed securing loan for fixed sum was in time and amount of advancements during construction, priority of trust deed over mechanic's lien *held* not defeated (Code Civ. Proc. § 1186).

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Action by the E. K. Wood Lumber Company and others against Walter E. Mulholland and others. From the adverse portion of the judgment, plaintiffs appeal.

Affirmed.

Richard J. O. Culver, of Los Angeles, for appellants E. K. Wood Lumber Co., Harper and Reynolds Corporation, and F. K. Remington.

Richard J. O. Culver and Black, Hammack & Black, all of Los Angeles, for appellant Blue Diamond Lumber Co. and Ray Evans.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant D. Chernick.

Joe Crider, Jr., John M. Martin, and Frank L. Martin, Jr., all of Los Angeles, for respondents.

SPENCE, J.

Several actions were brought to foreclose mechanic's liens for labor and material furnished in the construction of a three-story brick apartment house on property belonging to the defendant Mulholland. These actions were consolidated for the purpose of trial The judgment of the trial court was to the effect that said lien claimants were entitled to personal judgments, but that none of said claimants, with the exception of plaintiff Remington, was entitled to enforce any lien against the property. Plaintiffs other than plaintiff Remington here appeal from that portion of the judgment denying their right to enforce mechanic's liens against the premises, and plaintiff Remington here appeals from that portion of the judgment denying his right to enforce a mechanic's lien for a larger amount. We also have before us in another proceeding, Remington v. Mulholland, 5 P.(2d) 667, an appeal by defendants from that portion of the same judgment by which it was decreed that plaintiff Remington was entitled to enforce a mechanic's lien upon the premises in the sum of $1,800 with priority over defendants claiming under certain deeds of trust. Both this appeal and the appeal of defendants above mentioned involve the question of priority as between the lien claimants and those claiming under the deeds of trust upon the premises, the second of which deeds of trust had been foreclosed and one of said defendants had become the purchaser at the foreclosure sale.

The deeds of trust were recorded on March 18, 1926; the first being in the sum of $40,000 and the second being in the sum of $13,500. There was no general contract let by the owner for the construction of the building, but on March 12, 1926, defendant Mulholland signed a written agreement to pay to plaintiff Remington the sum of $5,300 for "all carpenter labor and general supervision on the construction of a three story brick apartment house" to be erected on the premises. The only work done before the recording of the deeds of trust consisted of the pulling of certain stumps by C. D. Wheeler & Co., which work was started on March 6, 1926, and was completed prior to the execution of Mulholland's agreement with Remington on March 12, 1926. At the request of Mulholland, Remington had entered into an agreement with C. D. Wheeler & Co. for the preliminary work of pulling the stumps. Apparently that company was paid for its work, and no claim therefor is here involved. As to the plaintiff Remington, we are of the opinion that he was not entitled to priority over the defendants in any amount, for the reasons stated in the opinion in Remington v. Mulholland, 5 P.(2d) 667, and the discussion here will be confined to the other lien claimants, all of whose claims were based upon the fact that they had furnished labor and materials after the deeds of trust had been recorded.

[1, 2] Section 1186 of the Code of Civil Procedure provides in part as follows: "The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished. * * *" It is appellants' contention that under a proper construction of that section their liens should relate back to the time when the improvement was commenced by the pulling of the stumps by C. D. Wheeler & Co., and as so construed their liens should have priority over the deeds of trust and those claiming under said deeds of trust. In our opinion, this contention is without merit. It is immaterial whether the time when the stumps were pulled was the "time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished," within the meaning of that section. Assuming, without deciding, that it was, it is now well settled that, where there is no general contract covering the work to be done, liens for labor and materials furnished attach only when the lien claimant commences to furnish such labor and materials and a deed of trust or mortgage, recorded after the work is commenced, but prior to the time when the lien claimant commences to furnish the labor or materials upon which his lien is based, takes priority over such lien. Powers v. Soule-Martin Lumber Co., 209 Cal. 557, 289 P. 809; McClain v. Hutton, 131 Cal. 132, 61 P. 273, 63 P. 182, 622; American Building Material Co. v. Wallin (Cal. App.) 2 P.(2d) 1007; K & K Brick Co. v. Brooke (Cal. App.) 5 P.(2d) 49; Consolidated Lumber Co. v. Bastien (Cal. App.) 5 P.(2d) 80.

[3] Appellants further contend that the trial court erred in granting priority to the deeds of trust, as the advances made thereunder were optional, citing W. P. Fuller & Co. v. McClure, 48 Cal. App. 185, 191 P. 1027. The authority cited is not in point. The loan of $40,000 was agreed upon under a typical building loan agreement providing that "said sum of $40,000 shall be advanced in such sum or sums as your appraiser or representative shall recommend as the work progresses and not otherwise." The only option given was in the time and amount of each advancement during the progress of the work. In the case cited it was definitely agreed that the mortgagee was in no way bound to make any advances other than the initial advance of $1,600, and the further advances were "mere voluntary advances."

For the reasons stated, as well as those set forth in the opinion in Remington v. Mulholland (Cal. App.) 5 P.(2d) 667, which will be filed herewith, we are of the opinion that neither Remington nor any of the other lien claimants were entitled to priority over those claiming under the deeds of trust. It therefore follows that the portions of the judgment appealed from herein should be affirmed, and it is so ordered.

We concur: NOURSE, P. J.; STURTEVANT, J.

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118 Cal.App. 606

BARRIS v. ATLAS ROCK CO.

Civ. 7630.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1931.

As Modified on Denial of Rehearing Dec. 26, 1931. Hearing Denied by Supreme Court Jan. 25, 1932.

1. **Contracts** ⚷303(4).

Breach of contract by failure to make payments does not constitute "prevention," warranting action on contract for damages.

[Ed. Note.—For other definitions of "Prevent," see Words and Phrases.]

2. **Pleading** ⚷209.

Special demurrer to complaint for damages for breach of contract on ground causes of action were not separately stated sufficiently presented propriety of choice of remedies.

Complaint in one count alleged two distinct breaches of contract by prevention of performance: The first, failure to pay based on written contract; and, second, failure to repair and widen road, based on alleged oral agreement, to which a special demurrer was interposed on the ground that such two causes of action were not separately stated, and, if it had been sustained, the separation would have enabled defendant to test sufficiency of new complaint as to each.

3. **Contracts** 🔑**221(3).**

Written statements of amount of work required in accordance with contract are conditions precedent to obligation to pay.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Frank L. Barris against the Atlas Rock Company. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Marshall Nuckolls, A. S. Glikbarg, and Glikbarg & Wolf, all of San Francisco, for appellant.

George N. Crocker, of San Francisco, for respondent.

PER CURIAM.

This appeal was taken from a judgment upon a verdict of $9,095.49, damages for breach of contract.

On June 27, 1929, the respondent agreed to do certain hauling for the appellant, between Black Oak and the site of the Lyons Dam, in Tuolumne county, which dam was under construction by the Pacific Gas & Electric Company. There was delay in getting the work under way, which was unsatisfactory to the respondent, as it would postpone a considerable part of his hauling until the rainy season, and on September 25th his attorney wrote to the appellant voicing this grievance, as well as complaining that an alleged promise, that certain road repairing and widening would be done, was unfulfilled, threatening to cease work entirely, unless a new arrangement could be made for payment upon a daily rental basis, and, in fact, suggesting a new rate per truck. This letter was followed by another on the 28th, claiming a default for nonpayment of the installments, a subject not mentioned in the first letter. The respondent stopped work on the 25th. He had earned $1,335.49 at contract rates, upon which nothing was paid, and he filed the complaint herein, setting up two distinct breaches, the first based upon failure to pay the $1,335.49, whereby, he alleged, he "was left without the necessary funds to continue the work," and "prevented, entirely by reason of the fault of the defendant, from continuing the work" and fully performing it; and the second, upon the failure to do road work which, it was alleged, the appellant had orally agreed to do, to facilitate respondent's operations. This, too, it was alleged, had prevented full performance. The prayer demanded $1,335.49, plus $1,260 for sixty-three days' waiting time at the contract rate of $20 a day, and $6,500 loss of profits; $9,095.49 in all.

[1] Respecting the first alleged breach, the appellant admits that the $1,335.49 was earned, but nevertheless contends that its obligation to pay had not matured, under the terms of the contract, when respondent stopped work, and, consequently, that it was not in default. The appellant contends, moreover, on the authority of Cox v. McLaughlin, 54 Cal. 605; Id., 63 Cal. 196; Id., 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164 (see, also, the same case at [Cox v. Western Pac. R. Co.] 44 Cal. 18; 47 Cal. 87, and 52 Cal. 590), that, even if such breach be conceded, it did not constitute, in law, a "prevention"; that therefore this action on the contract, for damages, will not lie, but that respondent's remedy is upon a quantum meruit. We are satisfied that this position is well taken, and in this discussion we shall assume (for the purposes of the discussion only) that there was such breach.

The contract binds the respondent "to furnish all trucks, labor, material, machinery and appliances necessary for and to load, unload, haul, transport and deliver * * * all sand, gravel, rock, cement, materials, equipment and supplies" between the points named, the work to start July 1st and to finish December 1, 1929. On its part, the appellant agreed to pay semimonthly for this work, at stated rates per ton, but there was no provision making continued performance of work or hauling conditional or dependent upon punctual payment for past work or hauling. The respondent simply agreed to haul and the appellant to pay; neither covenant being linked to the other, but each quite independent. For example, there was no language such as that found in Woodruff Co. v. Exchange Realty Co., 21 Cal. App. 607, 610, 132 P. 598, 599, where the defendant agreed to "'advance on Saturday of each week * * * the moneys to carry on such work, pay for the material, labor, the accrued commission and other costs.'" Nor was anything said or done by the appellant indicating an intention to renounce or repudiate the contract, to go no further with it, or to prohibit or reject further performance by respondent, within the rule of Hale v. Trout, 35 Cal. 229. There was simply a failure to pay the bills. This being so, we see no distinction between this case and that of Cox v. McLaughlin, supra, where the defendant failed to make progress payments under a construction contract, whereupon plaintiffs stopped work and sued on the contract for damages, persistently and repeatedly seeking, without success (63 Cal. 196, 204), to establish the principle that such nonpayment, in itself, constituted "prevention." There was a finding in that case that the defendant knew that the plaintiffs relied upon the installments to pay for their labor and materials, and that, because of the default, they could not carry on. But the contract contained no condition precedent expressing such dependence, and in that behalf (52 Cal. 590, 595) the court said: "The language that the defendant neglected and refused to pay, 'well knowing that plaintiffs had to rely on the moneys received from him,' adds nothing to its effect." We have dwelt upon this because, while the contract here is similarly silent on the subject, the complaint is not; it alleges that the default left plaintiff without necessary funds to continue the work, and that there was therefore prevention.

The rule laid down in Cox v. McLaughlin, supra, is that, in the absence of outright renunciation (e.g., Hale v. Trout, supra), or contractual language making further and continued performance conditional and dependent upon punctual payment, mere nonpayment of an installment by one party, before the completion of the work, does not constitute prevention of further performance by the other; further, that such failure is a breach justifying an action upon a quantum meruit (for the reasonable value of the work actually done), but it does not give rise to a cause of action on the contract for damages. In such case it is clear that a plaintiff cannot allege and prove either performance or prevention. There has been no departure from this rule in this state. San Francisco Bridge Co. v. Dumbarton, etc., Co., 119 Cal. 272, 51 P. 335; Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146. See, also, MacRae v. Heath, 60 Cal. App. 64, 78, 212 P. 228; Laiblin v. San Joaquin Agr. Corp., 60 Cal. App. 516, 531, 213 P. 529; Beck v. Schmidt, 13 Cal. App. 448, 451, 110 P. 455.

[2] The respondent cites no authority in opposition to the rule of Cox v. McLaughlin, supra, but contends that the appellant cannot now question, for the first time, the propriety of the respondent's choice of remedies, which brings us to a consideration of the demurrer. The complaint in one count alleged two distinct breaches by prevention of performance; the first, failure to pay based upon the written contract; the second, failure to repair and widen the road, based upon an alleged oral agreement. A special demurrer was interposed upon the ground that these two causes of action were not separately stated, and, if it had been sustained, the separation would have enabled the appellant to test the sufficiency of the new complaint as to each. As has been said, the nonpayment breach gave rise only to an action on a quantum meruit. The appellant was entitled to have this separately stated, and, once that was accomplished, a demurrer would have directly raised the issue whether the facts stated showed "prevention." Cox v. McLaughlin, supra.

The only breach upon which respondent could have then relied to support his action for damages would have been the road breach. The demurrer could not have been properly sustained on the general ground, for the complaint, read as a whole, stated a cause of action. But clearly it should have been sustained on the special ground, and, if that had been done, the issues would have been greatly simplified at the trial, if not before.

The answer denied that nonpayment "prevented" performance, and the respondent was not, therefore, taken by surprise when, on appeal, the appellant invoked this rule of substantive law which, because its demurrer was overruled, it had no opportunity to fully invoke at the threshold of the case.

The discussion respecting the first alleged ground of prevention assumes that the nonpayment constituted a breach; but it is not necessary to this decision to determine that, and, in view of the remanding of the case, nothing said herein is to be taken as passing upon that question. There is enough in the record, however, to raise a serious doubt on that score. The agreement in question was a subcontract, and it recites an antecedent contract between the Pacific Gas & Electric Company and appellant, with the terms of which the respondent admits he is "fully conversant." The contract in suit largely adopts the language of the antecedent contract, in that it provides that within five days after the 15th and 1st days of each month the respondent shall submit to the appellant's representative a written statement of the amount of hauling during the preceding half month, "and the company will issue its check therefor in the same manner as provided for payment" in the underlying contract, which was as follows: "The company's representative will thereupon check the same and prepare a written certificate setting forth 92½ per cent. of the estimated value of the sand and gravel delivered, and of work performed hereunder, during said preceding one-half month, and shall deliver the same to the contractor in ample time to permit the contractor to obtain payment thereon as herein provided. The contractor shall thereupon present such certificate to the company and thereupon the company shall pay to the contractor, on or before ten (10) days after the said contractor's submission of its written estimate. * * *"

Eleven bills were introduced in evidence in the sum of $1,335.49. Four are dated September 30, 1929, and aggregate $487.36, as to which, seemingly, there could be no default until October 10th, well after respondent quit work. Two are in August for $105.11. The remainder run from September 16th to 19th, and aggregate $743.02, as to which there could seem to be no default until September 26th at the earliest. If these be taken to be "written statements" within the meaning of the contract, they were subject to a "holdback" or retention of 7½ per cent. under the contract, and a further retention of 7½ per cent. in lieu of a $30,000 bond which the appellant agreed to dispense with.

[3] The testimony is not altogether clear as to just when these bills were delivered to the appellant. That date would set the ten-day period running, and, until that period expired, the appellant could not be in default in its payment. Even if in default, such default, as has been seen, would not constitute "prevention." This much is certain, however, that such provisions in a contract are conditions precedent to the obligation to pay, and performance of them must be alleged and proved. Cox v. McLaughlin, 63 Cal. 196, 206; Loup v. California S. R. Co., 63 Cal. 97; Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Coplew v. Durand, 153 Cal. 278, 95 P. 38, 16 L. R. A. (N. S.) 791; Gray v. Cotton, 166 Cal. 130, 134, 134 P. 1145.

Likewise it is not necessary to pass upon the question of the oral agreement for the widening and repairing of the road. Upon that phase we assume the complaint will be amended, and, whether the respondent will then elect to stand upon the claimed oral agreement itself or will rely upon the promise which, on this appeal, it is claimed may be implied from what is in the written agreement, will determine how that should be disposed of. Nor need anything be said herein with respect to the proof of loss of profits, or whether the claim for delay or waiting time was waived.

Nothing said herein is to be construed as limiting respondent, in his action upon a quantum meruit, to recovery based upon the contract rates. He may recover whatever he proves the services to be reasonably worth. Laiblin v. San Joaquin Agr. Corp., supra.

The judgment is reversed, with directions to the trial court to sustain the demurrer with leave to amend, and thereafter for such proceedings as are not inconsistent herewith. It is so ordered.

118 Cal.App. 388

JOHNSTON v. WOLF et al.

Civ. 4452.

District Court of Appeal, Third District, California.

Nov. 18, 1931.

Rehearing Denied Dec. 18, 1931. Hearing Denied by Supreme Court Jan. 14, 1932.

1. Bills and notes 🔑163.

Trade acceptance containing statement that obligation of acceptor arose out of purchase of goods from drawer *held* "negotiable instrument" (Civ. Code, § 3084, subd. 2).

[Ed. Note.—For other definitions of "Negotiable Instrument," see Words and Phrases.]

2. Bills and notes 🔑362.

Assignment by holder in due course of trade acceptance after maturity for collection did not destroy negotiability of trade acceptance (Civ. Code, §§ 3138, 3139).

3. Lost instruments 🔑16.

One does not lose his right to debt by losing instrument containing statement of his right, since writing does not itself give the right, but is only primary evidence thereof.

4. Bills and notes 🔑362.

Assignment for collection of trade acceptance by holder in due course after its loss did not destroy its negotiability.

5. Bills and notes 🔑443(4).

Where trade acceptance was assigned to plaintiff for collection, he became legal holder sufficient to entitle him to recover, assignor retaining equitable interest in trade acceptance.

6. Bills and notes 🔑497(3).

One to whom trade acceptance was assigned for collection need not prove consideration for assignment.

7. Appeal and error 🔑731(5).

Where there is no specification of particulars in which evidence is insufficient, appellate court cannot review question of sufficiency of evidence to support findings.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by R. G. Johnston against Robert Wolf and another, copartners, doing business under the firm name and style of Wolf Cabinet & Furniture Manufacturing Company. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Andreani, Haines, Bisher & Carrey, of Los Angeles, for appellants.

Goudge, Robinson & Hughes, David A. Sondel, and Francis W. Read, all of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This action was upon a trade acceptance drawn by the Brent Furniture Company in favor of defendant and indorsed by defendant to the Pacific National Bank before maturity, for value, who took the same in good faith and became a holder in due course thereof.

This trade acceptance was drawn on December 8, 1925, for the sum of $680.75, was accepted by defendant, and payment thereon was due on March 8, 1926. While the said bank was the owner of said trade acceptance and holder in due course, and prior to its maturity, it placed said instrument in the mail for transmittal to the Florence National Bank, at which said trade acceptance was payable. Said instrument was lost during its transmission by mail, and never was found. After said loss, the Pacific National Bank assigned its claim arising under and by virtue of said trade acceptance to plaintiff for collection after the maturity thereof; that prior to the maturity of the trade acceptance, but after its transfer to said bank, defendant paid same in full to said Brent's Furniture Company.

Plaintiff had judgment, from which defendant appeals.

Appellant contends that the judgment should be reversed, for the reasons that respondent's cause of action is upon a chose in action, and is therefore subject to all equities in favor of all prior parties; that the action is upon a claim arising under a trade acceptance which was assigned to respondent after maturity and without consideration, and because the original trade acceptance was a nonnegotiable instrument. In support of this last contention, he cites Westlake Merc. Finance Corp. v. Merritt, 204 Cal. 673, 269 P. 620, 61 A. L. R. 811. In that case, the trade acceptance contained the words, "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase." The Supreme Court there held that the words "maturity being in conformity with original terms of purchase" rendered the date of maturity uncertain and dependent upon another contract, and for this reason rendered it nonnegotiable.

[1] In the trade acceptance under consideration, the words which appellants claim render it nonnegotiable are as follows: "The obligation of the acceptor arises out of the purchase of goods from the drawer."

However, in the case of Allenberg v. Rapken & Co., 108 Cal. App. 99, 291 P. 281, the draft recited that the obligation of the acceptor arose out of the purchase of goods from the drawer; the court there held that the recital merely imported that it referred to the origin or consideration of the instrument and not that the interest was subject thereto, and cited many authorities from other jurisdictions holding that the recital was but a statement of the transaction which gave rise to the instrument, and did not render it nonnegotiable.

[2] Section 3084, subd. 2, of the Civil Code, provides that an unqualified promise to pay is unconditional though coupled with a statement of the transaction which gives rise to the instrument.

This trade acceptance is a negotiable instrument similar to an inland bill of exchange, and is governed by the law relating to negotiable instruments. Stafford v. Hill, 53 Cal. App. 337, 200 P. 33. Appellants contend that the assignment to respondent after maturity destroyed the negotiability of the trade acceptance. This contention is without merit. Section 3138 of the Civil Code provides that: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

And section 3139 of said Code further provides that: "A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Havens v. Foskett, 81 Cal. App. 653, 254 P. 642.

[3, 4] Appellant next contends that respondent is not a holder in due course for the reason that, before the assignment to him of said trade acceptance, it was lost and never came into his possession.

It is a well-recognized principle of law that a person does not lose his right to a debt by losing the instrument containing the statement of his right. The writing itself does not give the right; it is only primary evidence thereof, and its loss or destruction in no respect changes the obligation of the parties. 16 Cal. Jur. 690; Bagley v. Eaton, 10 Cal. 126; 38 C. J. 249; Bank of U. S. v. Sill, 5 Conn. 106, 13 Am. Dec. 44.

We are of the opinion that the assignment, for collection, of the trade acceptance by the Pacific National Bank, which was a holder in due course, to respondent after its loss, and after maturity, did not destroy its negotiability nor thereby render it a nonnegotiable chose in action.

[5, 6] The assignment of the trade acceptance was made to respondent for collection. He thereby became the legal holder of the thing assigned, sufficient to entitle him to re-

cover, the assignor retaining an equitable interest in the thing assigned; nor is it necessary to prove a consideration for the assignment. Greig v. Riordan, 99 Cal. 316, 33 P. 913.

[7] Appellant claims that the evidence is insufficient to justify the decision. But in his brief he wholly fails to point out wherein this insufficiency exists. If there is no specification of the particulars in which the evidence is insufficient, the appellate court cannot review the question as to the sufficiency of the evidence to support the findings. Regoli v. Stevenson, 179 Cal. 257, 176 P. 158; Newbury v. Lineberger, 45 Cal. App. 556, 188 P. 72.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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118 Cal.App. 635

SODA v. MARRIOTT et al.

Civ. 4367.

District Court of Appeal, Third District, California.

Nov. 27, 1931.

Rehearing Denied Dec. 26, 1931. Hearing Denied by Supreme Court Jan. 25, 1932.

1. Trial ⚷253(9).

Instruction *held* erroneous as limiting jury, in determining negligence, to consideration merely of evidence of motorist's actual knowledge of danger at time of accident.

Instruction in question stated in effect that circumstances to be considered were those which evidence showed might reasonably be supposed to have been known to motorist and to have influenced his actions at the time, and that those were not necessarily circumstances which afterwards, in the light of the event, it can be seen should have been known to him and should have influenced his conduct.

2. Automobiles ⚷146.

That motorist, although without actual knowledge of danger, failed to exercise vigilance which ordinarily prudent person should have used under similar circumstances, may adequately show negligence (St. 1923, p. 553, § 113).

3. Trial ⚷296(3).

Erroneous instruction making motorist's negligence depend on actual knowledge of danger when accident occurred *held* not cured by correct instruction requiring prudent operation of automobile (St. 1923, p. 553, § 113).

Error in first instruction was not cured by correct instruction in language of California Vehicle Act, § 113 (St. 1923, p. 553), that driver of automobile must regulate speed and operate machine in careful and prudent manner consistent with condition of traffic under surrounding circumstances.

4. Trial ⚷296(4, 5).

Instruction on care required of child and on motorist's liability *held* obscure and misleading, although error was perhaps cured by concluding clause (St. 1923, p. 553, § 113).

Instruction in question, which failed to take into consideration the contention that automobile was traveling at excessive speed in view of California Vehicle Act, § 113 (St. 1923, p. 553) when child was struck, declared in substance that child need not exercise same care as adult, but motorist nevertheless is not liable where child runs in front of automobile, unless motorist saw child in time to have avoided accident by ordinary care, or unless reasonable opportunity to see child was presented and motorist negligently failed to observe child; "furthermore after the child was seen, due care having been exercised by the driver in watching the highway, such driver cannot be held responsible for the hitting of such child unless it was due to the driver's carelessness."

5. Automobiles ⚷246(20).
Trial ⚷194(16).

Instruction that motorist could lawfully drive 35 miles an hour *held* erroneous as invading province of jury, and disregarding statute requiring prudent speed (St. 1923, p. 553, § 113).

Instruction in question was erroneous as being invasion of province of jury and as disregarding mandate of California Vehicle Act, § 113 (St. 1923, p. 553), requiring operator of vehicle on public highway to drive at careful and prudent speed not greater than is reasonable and proper, having due regard to traffic.

6. Automobiles ⚷168(2).

Motorist, if driving 35 miles an hour within 20-mile zone, was negligent per se (St. 1923, p. 553, § 113).

7. Evidence ⚷574.

Jury could believe admission of motorist that she was driving within zone where speed was limited to 20 miles an hour, and also believe witness testifying that automobile was traveling about 35 miles an hour (St. 1923, p. 553, § 113).

8. Trial 🔑253(9).

Instruction that evidence offered on behalf of plaintiff must be of greater weight *held* erroneous, as depriving plaintiff of benefit of defendant's admissions or evidence supporting plaintiff's case.

9. Negligence 🔑119(1).

Plaintiff alleging negligence must prove case by preponderance of evidence.

10. Trial 🔑295(1).

In determining whether reversible error exists, instructions must be construed as whole.

> If single instruction omits essential element of cause, but is correct declaration of law so far as it goes, and omitted element is correctly given in another instruction, omission will ordinarily be cured thereby.

11. Trial 🔑296(1).

If instruction stating essential legal principle is materially incorrect, error will not ordinarily be cured by correctly stating same principle in another instruction.

> Giving instructions which are contradictory in essential elements may warrant reversal of judgment for the reason that it is impossible to ascertain which charge controlled determination of jury.

Appeal from Superior Court, Placer County; Henry B. Neville, Judge.

Suit by Mate Soda against J. E. Marriott and another. Judgment for defendants, and plaintiff appeals.

Reversed and remanded.

Martin I. Welsh, of Sacramento, and K. D. Robinson, of Auburn, for appellant.

Myrick & Deering and Scott, of San Francisco, for respondents.

R. L. THOMPSON, J.

This is an appeal from a judgment in favor of the defendants in a suit for damages for the killing of a child as the result of alleged negligence in the operation of an automobile. A reversal of the judgment is sought on the sole ground that erroneous instructions were given to the jury at the request of the defendants.

The defendant, Mrs. Marriott, was driving a Dodge sedan automobile southerly along Riverside avenue in Roseville, on the afternoon of January 23, 1927. She had nearly reached the city limits when the accident occurred. The street was eighty feet in width, with a twenty-foot paved strip in the center thereof. The spaces between the paved portion and the curbings on either side were surfaced with crushed granite. Riverside avenue connected with the Sacramento highway just beyond the point where the accident occurred. The traffic was light. No cars were parked at the sides of the street. Only a few machines were traveling in either direction. A grocery store was situated on the easterly side of this avenue near the city line. Peter, aged four and a half years, the infant child of the plaintiff, accompanied Mary, his adult sister, to this store. The child was given a piece of candy, and the pair left the store. Peter started to run westerly across the street, pursued by his sister. Mr. Lyons, who was then about 150 feet away, was driving his automobile along the highway toward Roseville. He saw Mary in close pursuit of her brother, and, stopping his machine at the curbing near the store, he witnessed the tragedy. Mr. Lyons testified: "I was traveling north, going from Sacramento to Roseville. Approximately 50 feet from Lee's store I noticed a boy run from the store and a woman chasing him. She made a grab for him and missed him, made a second attempt and missed him again. He darted across the highway hurriedly. * * * I noticed the child first 150 feet (away)."

Mrs. Marriott, who was driving the defendants' machine at the time of the accident, testified she had just left her cousin's home on Earl street, which was but a few blocks away, and, accompanied by her husband, daughter, uncle, and nephew, she was proceeding along Riverside avenue, within the twenty-mile zone, near the city limits, at the rate of fifteen or twenty miles an hour, when she saw the lady pursuing the child across the highway directly toward her machine; that they had come from behind a car which was driving northerly along the easterly side of the avenue; that when they were quite near the automobile the lady grasped the child's sweater, but failed to hold it, and the child plunged directly in front of the machine, and was struck by the bumper and carried some distance before the car could be stopped. Mrs. Marriott said she had no warning of the approach of the child, and was unable to sound the horn or prevent the accident. She did apply the brakes, but the machine rolled some distance before it was stopped. She said, "As I was driving along there was traffic coming my way toward Roseville on my left, and the first thing I knew I saw a car stop suddenly and turn to the right of the road, and from a car that was driving in front of that I saw a little blond child running out just as fast as he could run and in my path, being followed by a woman who was trying to reach for him or stop him, and she did catch a slip of a very loose-knit sweater and pulled him toward her. From my position at the driver's wheel it appeared her grasp broke and threw him toward my car and he struck my bumper on the left and disappeared under the fender as I turned my car to the left and stopped."

There is a conflict regarding the speed at which the machine was running at the time of the accident. Mr. Riga, a bystander, saw the defendants' automobile pass along Riverside avenue just before the child was struck. He testified:

"I saw a machine coming pretty fast and I stopped. * * *

"Q. How fast was that car traveling when it passed you? A. Approximately 35 miles per hour."

Mr. Lee, the merchant who owned the grocery store near which the accident occurred, heard Mary scream when her brother was struck, and rushed out to ascertain the cause. He testified that the defendants' automobile tires left skid marks on the surface of the street some 75 or 80 feet in length caused by the application of the brakes.

The plaintiff's theory of the cause of the accident is that Mrs. Marriott was driving the car at an excessive rate of speed, in violation of section 113 of the California Vehicle Act (St. 1923, p. 553) and that she failed to use due care in watching the street for pedestrians, which is evidenced by the fact that she failed to observe Mary and the child racing across the comparatively open and unobstructed street for a distance of forty feet or more directly in the pathway of her vehicle.

The defense was based chiefly upon the contention that the child was killed as a result of an unavoidable accident, without negligence on the part of Mrs. Marriott, and that the parents of the child were guilty of contributory negligence in permitting the boy to run upon the street unaccompanied by an adult person. The jury was elaborately instructed upon this last-mentioned theory. This was a legitimate defense, but, under the undisputed facts of this case, it would appear to be entitled to slight weight. Mary, the adult sister, accompanied the child to the store. She was in actual pursuit of the child and was attempting to grasp its clothing at the very moment it was struck by the bumper of the machine. There is slight evidence of neglect in the care of the child. It seems strange that a vigilant driver of an automobile, under the circumstances of this case, should have failed to see Mary and the child racing across the street for a distance of forty feet or more, into the very pathway of the machine. In view of the facts of this case and the giving of the erroneous instructions complained of, we are unable to say there was not a miscarriage of justice.

[1-3] Defendants' instruction number 22 is erroneous. It contains the following language: "* * * The circumstances to be considered are those which the evidence shows may reasonably be supposed to have been known to such person and to have influenced his or her mind and actions at the time. These are not, necessarily, the circumstances which afterwards, in the light of the event, it can be seen should have been known to him or her and should have influenced his conduct. Nor is his or her wisdom in determining what to do to be judged by the event." In determining defendants' alleged negligence, this instruction wrongfully limits the consideration of the jury to such evidence only as tends to show what actual knowledge of the danger of the situation the driver of the automobile had at the time of the accident. Negligence may be adequately shown by proof of the fact that the driver of an automobile failed to exercise that degree of vigilance in the operation of the vehicle which an ordinarily prudent person should have used under similar circumstances, even though it also appears that the driver had no actual knowledge of the danger. One is bound to exercise ordinary care to anticipate danger. This instruction is fatally defective for that reason. The prejudicial error of this instruction is not avoided by the fact that the jury was elsewhere correctly instructed, in the language of section 113 of the California Vehicle Act, that the driver of an automobile must regulate the speed and operate the machine in a careful and prudent manner consistent with the condition of traffic under the surrounding circumstances. The jury was here specifically directed that they were confined to the consideration of the actual knowledge of danger which was possessed by the driver of the machine, in determining the question of negligence. This is an incorrect statement of the law.

[4] Defendants' instruction number 56 is obscure and misleading. It fails to take into consideration the plaintiff's contention that the automobile was being operated at an unlawful and excessive rate of speed at the time of the accident. However, the error of this instruction may be cured by the last clause which it contains. It was given in the following language: "While a child of immature years is not held to the exercise of the same degree of care as is one of adult years, nevertheless the driver of an automobile cannot be held liable for injuries to such child due to the act itself in running before her automobile unless either the driver saw such child in time to have avoided striking it by the exercise of ordinary care on her part, or unless a reasonable opportunity to see such child being presented said driver failed to see the child by reason of negligence on the driver's part; furthermore after the child was seen, due care having been exercised by the

driver in watching the highway, such driver cannot be held responsible for the hitting of such child unless it was due to the driver's carelessness."

[5-7] Defendants' instruction number 34 was given in the following language: "You are instructed that it was lawful for Mrs. Marriott, exercising ordinary care, to drive her automobile at the time and place mentioned in the complaint herein at a rate of speed not in excess of 35 miles per hour." This instruction is an invasion of the province of the jury, and disregards the mandate of section 113 of the California Vehicle Act, which requires the operator of a vehicle upon a public highway to "drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic. * * *" Subject to the twenty-mile zone restriction, the jury had the exclusive right to determine the rate of speed which would be lawful under the particular circumstances of the case. Mrs. Marriott admitted she was driving the automobile within the twenty-mile zone of the city of Roseville at the time the accident occurred. If this be true, then she was guilty of negligence per se in driving the machine at the rate of 35 miles an hour. She testified:

"I was still in a twenty-mile zone (when the accident occurred).

"Q. Do you base your going 20 miles an hour on the fact that you were in the twenty-mile zone? A. I am a strict observer of speed and of zones."

The jury was entitled to accept her admission as true that she was driving within the zone where the speed of a vehicle was limited to twenty miles an hour at the time of the accident, and at the same time assume that the witness, Riga, was correct when he testified she was running "approximately 35 miles an hour." The instruction is therefore fatally erroneous.

[8, 9] Defendants' instruction number 52 erroneously charges the jury that the evidence which is offered "on behalf of the plaintiff" must be "of greater weight and more satisfactory and convincing to your minds than is the evidence on the part of the defendants," to entitle the plaintiff to judgment. This instruction fails to inform the jury that the plaintiff is entitled to the benefit of any evidence or admissions offered in behalf of or made by the defendants which supports the plaintiff's case. For instance, the admission of the defendant, Mrs. Marriott, that she was driving her machine within the twenty-mile zone of the city at the time of the accident, would be adequate proof of her negligence per se, provided the jury further found that she was then driving at the rate of thirty-five miles an hour, and that this excessive speed was the proximate cause of the accident. It is true that the burden is upon the plaintiff to prove her case by a preponderance of the evidence. It is true that the evidence shall preponderate in favor of the plaintiff's case. But it is not true that this favorable evidence shall necessarily be offered or produced by the plaintiff. It is sufficient if the weight of the evidence supports the plaintiff's case, regardless of which side produces such preponderance. This objectionable instruction was given in the following language: "I instruct you that if after a careful examination and consideration of all the evidence in the case you find that the evidence on behalf of the plaintiff is not of greater weight and more satisfactory and convincing to your minds than is the evidence on the part of the defendants, or that it is equally balanced by the evidence on the part of the defendants, in either of such cases the plaintiff will have failed to prove his case against said defendants by a preponderance of the evidence and it will be your duty to render a verdict in favor of the defendants."

[10, 11] It is true that some of the incorrect principles announced in the foregoing challenged instructions were elsewhere correctly stated to the jury in other instructions which were given. It is also true that the instructions which were given must be construed as a whole, in determining whether they contain reversible error. If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury. Chidester v. Cons. P. D. Co., 53 Cal. 56; Buttrick v. Pac. Elec. Ry. Co., 86 Cal. App. 136, 260 P. 588; Gaster v. Hinkley, 85 Cal. App. 55, 258 P. 988; Noce v. United Railroads, 53 Cal. App. 512, 200 P. 819.

The judgment is reversed, and the cause is remanded for a new trial.

We concur: PRESTON, P. J.; PLUMMER, J.

118 Cal.App. 573

FERNHOLTZ MACHINERY CO. v. WILSON et al.

Civ. 4307.

District Court of Appeal, Third District, California.

Nov. 25, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Denied by Supreme Court Jan. 21, 1932.

1. Appeal and error 🔑1010(1).

Appellate court cannot interfere with findings of trial court supported by any substantial evidence.

2. Sales 🔑441(2).

As respects warranty, evidence *held* to sustain finding that certain placer machine was constructed in accordance with agreement warranting recovery of purchase price.

3. Sales 🔑273(5).

Manufacturer was not responsible for operation of machinery manufactured in accordance with model furnished by purchasers.

4. Evidence 🔑513(1).

Testimony by experts having immediate supervision and control of work that machine was completed in conformity with contract *held* admissible.

5. Sales 🔑87(2).

Excluding testimony respecting payments for machinery, including specified amount on signing contract and further amount and freight when machinery was ready for shipment, *held* not erroneous.

> Objections to questions respecting payments of specified amount on signing contract and further payment and freight when machinery was ready for shipment were properly sustained, in that contract provided for the two payments which were made as stated, and also that machine was to be delivered f. o. b. cars at named point, term "f. o. b." as used in contract having a well-settled meaning, that is, to be delivered free of all charge and expense of transportation up to and including the actual delivery of article on board the cars.
>
> [Ed. Note.—For other definitions of "F. O. B.," see Words and Phrases.]

6. Sales 🔑273(5).

Manufacturer's guaranty of fitness for purpose for which machinery was intended did not apply, where devices were made under direction of purchasers.

7. Sales 🔑178(4).

Purchasers of mining machinery *held* estopped by reason of acts of ownership to assert that they never accepted delivery.

> Facts disclosed that one of purchasers, with knowledge and acquiescence of other sold to a third person his one-half interest in mining property, including machinery, and that subsequent purchaser thereafter, with knowledge and consent of his co-owner, spent a large sum rebuilding machinery, wherein entire principle of machine was changed, both the sale and rebuilding being unknown to seller.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by the Fernholtz Machinery Company against Lee W. Wilson and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Harry W. Hanson and Timon E. Owens, both of Los Angeles, of counsel), for respondent.

Mr. Justice pro tem. BURROUGHS delivered the opinion of the court.

This action grows out of a contract made and executed between the Fulton Engineering Company, assignors of the plaintiff herein, and Lee W. Wilson and J. Andrew McLaughlin, the defendants. By the terms of the contract, the said assignors agreed to construct for the defendants a certain placer machine in accordance with the terms of said contract, and the defendants agreed to purchase the same.

It is alleged in the complaint that the contract was fully completed on the part of the plaintiff and its assignors; that by the mutual agreement of the parties certain changes were made which had been fully executed; that, in addition to the above-mentioned placer machine, the plaintiff had constructed for the defendants certain "gold saving devices"; that the purchase price of said placer machine was the sum of $14,500, of which sum $5,000 had been paid by the defendants; that the principal changes made in the construction of the said placer machine consisted in making the superstructure thereof of steel instead of wood, making the trucks of caterpillar type instead of wheel type, making the excavator of rehaul type instead of gravity return type, changing the hoist track cables and lines to accommodate, making a change in the drive to permit all power for the entire machine to be taken from one motor instead of two, as originally planned; that all of the said changes were of the reasonable value of $2,500; that the "gold saving devices" were constructed according to certain models and plans furnished by the defend-

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ants, and that the reasonable value thereof was the sum of $1,200; that plaintiff's assignors furnished certain lumber, bolts, and various materials of the reasonable value of $310; that they furnished certain steel tracks for the placer machine of the reasonable value of $160.

It is further alleged that in the erection of the machinery at the mine said plaintiff's assignors furnished extra labor of the total value of $1,800. It is further alleged in the complaint that all of the foregoing were furnished at the special instance and request of the defendants, for which the said defendants agreed to pay the reasonable value thereof. The defendants admitted the making of the contract, but denied that the placer machine had been completed; denied that any extras had been furnished or was a proper charge against them; alleged that the "gold saving devices" were manufactured by the plaintiff's assignors, and that the placer machine and the devices were intended by all the parties to co-ordinate and work as one unit, whereas they did not work together, and that neither the placer machine nor the devices were properly constructed. Many other allegations of the failure of the said machine and devices to meet requirements were alleged in the answer. The court found that the allegations of the complaint were true and those of the answer were untrue, and rendered judgment against the defendants for the full amount claimed by the plaintiff.

[1, 2] It is first contended by the appellants that the evidence is insufficient to support the findings of fact, and also that certain rulings of the trial court in relation to the admission and rejection of evidence were erroneous and prejudicial to the appellants' rights. Under appellants' claim that the findings of fact are without support in the evidence, it is unnecessary to cite authority to support the well-settled rule of law that, if the findings are supported by any substantial evidence, this court cannot interfere. In the light of this ruling, we will examine the evidence.

It is admitted that the contract sued upon was executed by the parties as set forth in the pleadings; that two payments of $2,500 each were made by the defendants.

F. A. McAllister, who was one of the partners in the Fulton Engineering Company, testified, in substance, that, after the contract had been signed, the Fulton Engineering Company prepared designs and shop working details for the construction of the placer machine. The drawings were made as the work proceeded. The defendants saw the drawings and plans as the work progressed. The parties to the contract had many discussions over them, and the defendants never made any objections. The conditions to be met in the use of the machine and the handling of the material were discussed. There were certain alterations suggested. Mr. McLaughlin suggested making the excavator rolling type instead of gravity return type. This was one of the principal changes in the machine. The defendants saw the changes in the working plan. "My recollection is that they were both pleased with it; what they wanted." That was the substance of what they said. Another suggested change was made at the instance of the defendant McLaughlin; that the trucks were to be made of the caterpillar type instead of the wheel type. There was a discussion at the time as to the cost of such a change, and the witness told McLaughlin then that the added cost of that would be about $1,500. And there was some further talk about how that expense could be avoided at that particular time, and that that difficulty was avoided by omitting the true tractor type and building the truck in such a fashion that power could be applied later. At the same time, it became necessary, on account of the fact that power might be applied directly to the trucks, to change the substructure from wood to steel. This was discussed with Mr. McLaughlin. There was not an exact discussion as to what that particular construction would cost. Mr. McLaughlin and Mr. Wilson saw the drawings. They were at the Fernholtz Machinery Company, where the work was being done. They both said they were well pleased with the work. The contract as originally written called for use of one gas engine or motor on the hoist for excavator machinery, and called for Wilson and McLaughlin to furnish an auxiliary engine for driving of the screening and drilling apparatus. In discussing the matter with them, it was agreed to make a change that would enable them to cut out the auxiliary engine. McLaughlin brought the subject up; he told us to go ahead and do it. We suggested the use of a Holt tractor type model of a larger size than indicated in the contract. Mr. McLaughlin acquiesced in the use of that model. Drawings were made so that machine could be built with that model of engine. The contract provided that the defendants were to furnish certain parts which are referred to in the contract as the "gold saving devices." The witness had his first conversation about manufacturing them about a month after the contract was signed. Work had already begun on the dredger machine itself. The witness also testified that the various items of machinery were completed according to the contract, except where modified by the agreement of the parties, and that these modifications were executed according to the said agreements; that the "gold saving devices" were manufactured according to models which were furnished to them by the defendants. The witness also testified that, when completed, the machinery was all loaded f. o. b. the cars Los Angeles. It was transported on the cars to Goldfield, Nev., for shipment to Lida, Nev., where it was unloaded and shipped by truck from thence to the point where the plant was to be erected near Lida, Nev. The witness further testified that an engineer was sent upon the ground, who erected the machinery as per the contract. There was much delay in finishing the machine, because, according to this witness, of the changes made and the defendants' failure to furnish the necessary labor and material, and which were finally furnished by the plaintiff's assignors. The witness further testified that, when completed, the machine did not operate in a satisfactory manner because the "gold saving devices" could not handle all of the concentrates produced by the placer machine. Said "gold saving devices" were constructed in accordance with the model furnished by the defendants, and, had said "gold saving devices" been of proper design, the same would have handled all of the concentrates which were produced by the placer machine. This witness further testified that, at the time the defendants made the second payment, the defendants both "urged us to get our bills in for the extras. Mr. Wilson said: 'Well, if you boys have your bills for extras, get them in now and we will take care of them and settle things up as we go along.' Our reply was that we had not had sufficient time to get at the extent of those extras. The bills for those extras were mailed sometime in October, after the job was completed." The witness qualified himself as an expert, and gave evidence as to the reasonable value of the extra work done and the value of the "gold saving devices," and that in his opinion the amounts claimed were the reasonable value thereof. The witness, with others, made an investigation on the ground for the purpose of ascertaining if a drag line excavator would handle the amount of concentrates. According to his evidence, that was all they went to investigate. The placer machine could take care of the amount of material called for by the contract.

Robert A. Smart testified that he bought a half interest in the mine from defendant McLaughlin. He purchased a one-half interest in everything; McLaughlin told the witness that the placer machine was his and went with the mine. In the year 1925 Smart spent about $30,000 on this machine. Mr. Wilson was there some of the time when he was spending this money. He made material changes in the machine; even changing the principle of it. He could not make the "gold saving devices" work with the machine. There was a second "gold saving device," and there were other material changes made on the machine.

Vanden Heuvel, one of the copartners of the Fulton Engineering Company, testified along the same lines as did Mr. McAllister, corroborating the evidence of the latter in many details. There is also much other evidence in the voluminous record presented, which both supports and contradicts the findings of the trial court. But we are of the opinion that the evidence above cited is sufficient to sustain the material findings of the court which are the subject of attack.

[3] It is also a contention of the appellants that it was the intent of all the parties that the placer machine and "gold saving devices" were to operate as a single unit, and that the responsibility for their failure to so operate was the fault of the plaintiff and the plaintiff's assignors. We do not read the evidence that way. The contract itself provides that the "concentrates to be fed to a hopper giving access to the gold saving devices to be furnished by parties of the second part." The evidence discloses that, although the "gold saving devices" were manufactured by the assignors of plaintiff, they were made from a model furnished by the defendants. It is true they were expected to operate with the placer machine, but, having been manufactured in accordance with the model furnished them by defendants, no responsibility rested upon the plaintiff or its assignors. We think the principle of law here involved is well stated in section 75 of volume 22, California Jurisprudence, p. 1003, where it is said: "Where a machine or appliance is made according to plans and specifications, there is no implied assurance or warranty that it is adequate to the buyer's purpose. * * * If the article corresponds with the plans and specifications, the manufacturer cannot be held liable."

In the instant case, the "gold saving devices" were to be furnished by the appellants. They were manufactured according to a model furnished by them. There is no complaint that they were not built according to the model, but that they did not co-ordinate with the placer machine which the court has held upon sufficient evidence was built according to the contract and agreements of the parties. Cases in point are: Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 P. 496; Madera S. P. Co. v. N. B. Livermore & Co., 179 Cal. 116, 175 P. 456. After a careful examination of the entire record, we are satisfied that the findings of the court are sustained by substantial evidence.

[4] Complaint is also made that the court erred in the admission of certain evidence. The evidence objected to was the opinion of the witnesses McAllister and Vanden Heuvel that the machine was completed in conformity with the specifications of the contract, with the exception of the changes which had been made by oral agreement. It is claimed by the appellants that this was calling for the conclusion of the witnesses. It appears that the witnesses are mechanical engineers and constructors; that they had had super-

vision of construction and were familiar with that kind of work and had charge of this particular job. The court overruled the objections, and the witnesses answered "Yes." A number of other objections were made to similar questions, and overruled by the court. We think the rulings were correct. The witnesses were experts in that line of work. They had had immediate supervision and control of this particular work, and therefore they were in a position to assist the court by their answers. Furthermore, they were subject to cross-examination and were cross-examined. This is the ruling laid down in Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 P. 105.

[5] Complaint is also made that the court erred in sustaining objections made by the plaintiff to questions asked of the witness Vanden Heuvel to the effect that defendants were to pay $2,500 on the signing of the contract; a further $2,500 and the freight when the machinery was ready for shipment. These objections were properly sustained. The contract provided for the two payments which were made as stated. And also that the machine was to be delivered f. o. b. cars Los Angeles. We are of the opinion that the term "f. o. b." as used in the contract has a well-settled meaning, that is, to be delivered free of all charge and expense of transportation up to and including the actual delivery of the article on board the cars at Los Angeles. J. K. Armsby Co. v. Blum, 137 Cal. 552, 70 P. 669.

[6] Another reason advanced for a reversal of the judgment is based upon the fact that the respondent's assignors knew the purpose for which the appellants were having the machine and "gold saving devices" manufactured, and therefore they guaranteed its fitness for the purpose for which it was intended. We think this contention is answered by the fact that the placer machine did conform, according to the evidence, to the plans and specifications, and was able to perform according to the requirements; the difficulty being with the inability of the "gold saving devices" to handle the concentrates put forth by the placer machine, and, as heretofore said, these devices were made under the direction of defendants.

[7] There is another reason why the judgment must be affirmed. The defendant McLaughlin, with the knowledge and acquiescence of his codefendant, sold to one R. F. Smart his one-half interest in the mining property referred to, including this machinery. Thereafter Smart, with the knowledge and consent of Wilson, spent about $30,000 rebuilding the machine. In so doing, the entire principle of the machine was changed. Both the sale and the rebuilding were unknown to the plaintiff or its assignors. We are of the opinion that by these acts of ownership the defendants cannot now be heard to say that they never accepted delivery of the machine. Black on Rescission of Contracts, vol. 2, p. 1336; McLean v. Clapp, 141 U. S. 429, 12 S. Ct. 29, 35 L. Ed. 804.

Other objections are made to the soundness of the judgment, but we have examined each one of them, and are of the opinion that the judgment is right and must be affirmed. It is so ordered.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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118 Cal.App. 663

LEGARE v. WEST COAST LIFE INS. CO.

Civ. 7928.

District Court of Appeal, First District,
Division 1, California.

Nov. 28, 1931.

Rehearing Denied Dec. 28, 1931. Hearing Denied by Supreme Court Jan. 25, 1932.

1. **Insurance** 🔑665(2).

Evidence supported jury's verdict that illustration sheet was physically attached to life policy when delivered.

2. **Insurance** 🔑520.

Language of life policy *held* to incorporate attached illustration sheet, showing amount of surplus payable in twenty years into policy.

> The policy provided that twenty years from date company guaranteed that cash value of policy should be $3440, and, in addition thereto, the policy's share of the surplus earnings then apportioned by company, and provided that the benefits, statement, and values on succeeding pages of the policy were made part thereof, and the illustration sheet showing amount of surplus payable in twenty years was pasted to third page of policy.

3. **Insurance** 🔑133(3).

Where life policy was signed, it was unnecessary that illustration sheet pasted to policy be signed to make it binding on insurer (Civ. Code, § 416).

4. **Insurance** 🔑149.

What is written in insurance policy controls what is printed (Civ. Code, § 1651).

5. **Insurance** 🔑520.

Illustration sheet showing amount of surplus payable at end of twenty years attached to life policy bound insurer to pay amount of surplus earnings stated.

6. Insurance ⚿520.

Where life policy contained option of insured to take stated amount of surplus at end of twenty years, stipulation in policy respecting apportionment or distribution of surplus earnings did not bind insured to accept smaller amount determined by following certain method.

> The stipulation referred to provided in substance that in any apportionment or distribution of surplus earnings, principle and method which might be adopted by company for such apportionment or distribution and its determination of amount belonging to policy should be conclusive upon insured.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Balie Peyton Legare against the West Coast Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Francis V. Keesling, C. A. S. Frost, and Garton D. Keyston, all of San Francisco, for appellant.

William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondent.

GOODELL, Justice pro tem.

This appeal is from a judgment on a verdict for $2,826.85. The action was brought by the respondent, a policyholder, to recover from the appellant, an insurance company, the share of the surplus earnings, apportioned at the end of the twenty-year period, to which the respondent claims his policy is entitled. The appellant claims that such share is $1,025.87 and no more, which amount it always has stood ready to pay. The position of the respondent is that the policy contains an outright promise to pay a stated figure as the policy's share of the surplus earnings, which view was taken by the jury. The question presented is whether a so-called illustration sheet attached to a policy of life insurance is a part of the contract and, if so, whether the legal effect of an "option" therein is a promise to pay the insured (at his election) the amount therein shown, or merely an estimate and a prediction that such amount ought to be coming to him at the end of twenty years.

[1] In 1909 the appellant issued to the respondent a $5,000 endowment policy, on the first page of which is found, among other promises, the following: "Twenty years from the date hereof, which is the end of the dividend period, the Company guarantees that the Cash Value of this Policy * * * shall be $3,440 * * * and in addition thereto the Policy's share of the Surplus Earnings then apportioned by the Company." The signatures of the officers appear upon the first page only, and just above them is the provision that "the Benefits, Statements and Values on the succeeding pages of this Policy are made a part hereof." On the question whether the illustration sheet was attached to the policy when issued, the respondent testified without contradiction that when the policy was delivered to him the sheet was pasted to its third page; further, that the figures on the sheet were substantially those given him by the agent during negotiations; that in 1929 when he last saw the policy the sheet was attached as at first; and he introduced in evidence a photostatic copy of the "policy" sent him by the appellant in 1920, which included the "illustration." The sheet, detached from the policy—but with its missing upper left-hand corner still stuck to the third page—was introduced in evidence without any testimony, however, as to when or how it had become detached. All these facts were, of course, before the jury, whose verdict for the respondent impliedly found as a fact that the sheet was physically attached to the policy when delivered, and we are satisfied that the evidence on that score is more than sufficient to support the verdict.

[2] In addition to the question thus presented to the jury, we are satisfied that the sheet was, as a matter of law, part of the policy and so intended to be by the company. The appellant points out that the policy contains no stipulation expressly making the illustration part of it, but meaning and effect must, of course, be given to the provision on the first page of the policy that "the Benefits, Statements and Values on the succeeding pages of this Policy are made a part hereof." The company doubtless recognized that the form in general use would not be adequate to cover all possible risks, and that peculiar and special cases were bound to arise and would have to be added. This very case presents an example of that, for the uncontradicted evidence shows that this was to be a "special policy issued to only a very few professional men," and, further, that the figures in the illustration were made up by the company's actuary at the time, for this policy. The illustration sheet contains "benefits" and "values"; it certainly is a "statement," and it was pasted to one of the "succeeding pages." We are satisfied that the jury could have reached no other conclusion on the facts, but we are satisfied, also, that the language of the policy itself was designed to, and did, incorporate the illustration sheet into it.

[3] Attention is drawn by the appellant to the fact that the "illustration" is not signed, and section 416 of the Civil Code, requiring all policies to be subscribed by the president or vice president and countersigned by the

secretary, is invoked, as well as a provision of the policy itself so requiring. The policy proper is of course signed. That is all that the law requires. No requirement has been called to our attention that every rider attached to a policy must, likewise, be signed. It is not a question of a modification of the policy after its issuance. This sheet, as we have seen, was part and parcel of the policy when it was issued.

[4, 5] The principal inquiry is as to the legal meaning of this illustration sheet. Is it, in law, a definite and specific amplification of a broader and more general promise, or is it mere "sales talk" designed to entice a prospective insured? This inquiry calls for a somewhat detailed examination of the paper.

The sheet is much like an ordinary business letterhead in size and appearance, with the company's name printed, and its home office building pictured, at the top. Its design, printing, and ruling show that it was specially prepared. It is printed in red and black ink and ruled horizontally and in vertical columns with spaces left for the filling in of figures. In what follows, italics will be used to indicate what is written in, all else being printed in type of varying sizes and styles. Under the company's name is printed "Office Clinton J. Hutchins General Agent California" and his address. Then follows the heading "Illustration" in large type, and under it the following:

"Limited Premium Policies *Deposit $394.00 1st 10 yrs.*
"Age *45* Amount *$5,000* Deposit *$151.50 2nd 10 yrs.*
"Options or Settlements at the Selection of the insured at the end of the Deferred Dividend Period (*20* years)
"(In red ink): The only figures authorized by the Company to be inserted in this blank are those printed in its rate book.
"Options.
"1st. Receive a Fully Paid-up Participating Policy for *$5,000.00* and the surplus *$2,881.48* Earnings then apportioned In Cash, or
"2nd. In Equivalent Paid-up Participating Insurance, or *$8,914.00*
"3rd. In Equivalent Annual Income for life, or *$735.00*
"4th. Withdraw the Guaranteed Cash Value of *$3,440.00* and in addition the Surplus Earnings then apportioned In Cash *2,881.48* Total *$6,321.48*"

(The figures "$2881.48," both times they appear, are written in red ink; all other figures are written in black ink.) Then follow six columns (not particularly material here) under the heading "Guaranteed Values These values are in the policy," such columns being entirely filled in by handwritten figures and showing, respectively, the amount payable in event of death, cash or loan value, automatic paid-up life insurance, and extended insurance at each of the twenty years, the tables being filled out, obviously, to fit this particular case. The whole table we have described fills the entire sheet.

Clinton J. Hutchins testified that the company furnished the illustration blanks and that the figures on this one were written by Eugene D. Eaton, one of the agents through whom this policy was written. E. L. King, Eaton's fellow agent in writing this policy, testified, on behalf of the appellant, that the figures he had written in "had to come from the home office," and, further, that "Mr. Eaton got those figures from Mr. Beaudry; * * * He was the actuary of the company * * * the actuary's duties in a life insurance company are to figure out any kind of a contract. I have had other contracts figured out by him that were not in the rate book, and Mr. Beaudry would figure them out for you. He was employed by the company for that purpose; he was one of the officers of the company."

We are satisfied that the illustration is an amplification and extension of the "guarantee" already quoted and that it should be read as part of it. In the "guarantee" on the first page, the company fixed $3440 as the cash value of the policy at the end of twenty years, but at that point it descends into no detail with respect to the additional "Surplus Earnings then apportioned by the Company," or as to how they shall be arrived at, or what they amount to. The illustration sheet seems to be an appropriate way to accomplish this; its contents are in no way inconsistent with the general guarantee, but, on the other hand, dovetail with it. It is a settled principle that what is written controls what is printed in a contract. Civ. Code, § 1651. The general guaranty (except the figure "$3440.00" which was written in) is printed, and presumably is to be found in every policy of this type; the illustration, on the other hand, is almost entirely handwritten. There is nothing on the face of the illustration sheet to indicate that it was mere "sales talk" or simply a prophecy or estimate. On the contrary, everything about it is consistent with the idea that it is an amplification of the general language of the guaranty provision found on the first page, for it makes clear, definite, and specific what has been only general. Further, if the illustration were not intended to mean what it says, why attach it to an already formidable document? Take, for instance, the heading "Options or Settlements at the Selection of the insured at the end of the Deferred Dividend Period (20 years)." Certainly this is tantamount to a promise that at the end of 20 years the company will pay the amount therein shown according to the option which the insured elects to exercise. Then follows a somewhat guarded statement printed in red ink: "The only figures authorized by the Company to be inserted in this blank are those printed in its rate book." But an insured is not supposed to know what figures are, or are not, printed in the rate book, and there is nothing in the record to show that the respondent knew anything about them. Moreover, the figures were supplied and written in by the company's people, and the sheet, by being pasted to it, was made a part of the policy, as has been noted. Then follow the "Options." The fourth is the one in question, namely: "Withdraw the Guaranteed Cash Value of *$3440.00* and in addition the Surplus Earnings then apportioned In Cash. *2881.48 Total $6,321.48.*" If, as contended by the appellant, the illustration is not to be read as part of the policy, although physically attached to it, and if its language is not contractual language, what possible purpose is it supposed to serve? Civ. Code, § 1641. If it had served its purpose in enticing the respondent to become an insured, it is difficult to understand why it was left attached to the policy when it was delivered. The respondent relies chiefly upon the case of Forman v. Mutual Life Insurance Co., 173 Ky. 547, 191 S. W. 279, 285, L. R. A. 1918F, 330, Ann. Cas. 1918E, 880. What is said therein aptly applies to this inquiry and may well be adopted: "But if the company did not intend to practice a fraud on Forman or to deceive him * * * what was the purpose in making a part of the contract this 'illustration' and specifying in it that he should have the option at the end of 20 years 'to draw accumulated surplus in cash, * * * $996.08'?"

We are satisfied with the reasoning of the Forman Case, and we can find no substantial distinction between that case and this. An earlier Kentucky case upon which the respondent relies—and we think with justification—is Equitable Life Assur. Soc. v. Meuth, 145 Ky. 160, 140 S. W. 157, 158, Ann. Cas. 1913B, 661. A reference to the report of that case will show the facts to be substantially the same as those in the instant case. In analyzing the language "together with the surplus then apportioned by the society," the court says: "When we come to construe the contract, the only purpose of the writer in setting down the figures '$544' after the words 'together with the surplus then apportioned by the society' could have been to indicate that the surplus thus apportioned by the society should be $544. This is not only the natural meaning of the words, but we do not see how any other meaning can be given to them. In like manner the figures '$544' after the word 'cash,' must mean $544 in cash. The grammatical construction of the words is that in the second contingency the policy holder may continue his policy and withdraw the accumulated surplus either in cash, $544, or have paid up insurance, $1,000, or an annuity."

In all the cases relied upon by the appellant, distinctions are to be found either in the language used in the illustration or in the way it is related to the policy proper. Maddox v. Mutual Life Ins. Co., 193 Ky. 38, 234 S. W. 949, 950, 22 A. L. R. 1276, is cited from the same jurisdiction as the Forman and Meuth Cases. It holds the language to be nonpromissory, but it in no way questions the authority of the Forman Case. A brief quotation of the language found in the "Adapted Illustration," in Maddox's policy, will show at a glance that the case is not similar to either the Forman Case, the Meuth Case, or the case at bar. It read: "'The accompanying figures are correct as an illustration adopted from the past experience of the company.' * * * The surplus portion, i. e., former results ($10,247), added to the reserve value or incorporated with the equivalent options in this example is to be understood as a sum adapted for purposes of general illustration only, and to be based on actual experience in policy results of the past, and not as pledged hereby in future settlements." The court itself distinguishes the two cases as follows: "It will thus appear that the deceptive language found in the Forman Illustration is wanting in the Maddox Illustration, since in the latter attention is sharply drawn to the reserve which is 'guaranteed,' and to the item of surplus immediately thereunder, which purports to be only 'former policy results.'" In Mutual Life Insurance Co. v. Brock, 203 Ky. 229, 262 S. W. 4, also relied upon by appellant, the "Adapted Illustration" was hedged in with the same language found in the Maddox policy and just quoted. The Kentucky Court of Appeals simply followed the Maddox Case, pointing out its distinction from the earlier Forman decision. Tourtellotte v. New York Life Ins. Co., 155 Wis. 455, 144 N. W. 1117; Untermyer v. Mutual Life Insurance Co., 128 App. Div. 615, 113 N. Y. S. 221; and Williams v. N. Y. Life Ins. Co., 122 Md. 141, 89 A. 97, are likewise relied upon by the appellant. All are distinguishable from the case at bar and the distinctions pointed out in the Forman Case.

The appellant argues that the respondent, an intelligent professional man, could not possibly have been misled into believing that the surplus earnings apportionable to a particular policy twenty years thereafter could be forecast or predicted when the policy was written. The testimony is interesting in this regard, for it shows that the respondent questioned this very point at the time.

"Q. What did you say? A. I asked why they could come to the definite figure, and they said they knew how to do it.

"Q. But that didn't fool you, did it? A. I am not a life insurance man, and I did not know anything about how they did their business.

"Q. You did not really believe that when they first told you that? A. I absolutely did. If I did not I would not have taken the policy. * * * I did not take the agent's word. I took the policy itself which came from the company, I assumed they knew their business."

It must also be borne in mind, in this same connection, that the policy was permitted to lapse and that the company's renewal superintendent successfully solicited the respondent to have it reinstated. This was done. The same policy, with the same illustration sheet attached, was reinstated and, as has been said, when a photostatic copy was sent the respondent such copy included the illustration sheet. Twice, then, the respondent acted upon the figures in the illustration sheet, and the second time, if not the first, he changed his position and reobligated himself after he had once permitted the policy to lapse.

[6] Under the heading "Statement" on page 2 of the policy are found certain provisions in fine print, among which is the following: "In any apportionment or distribution of surplus earnings, the principles and methods which may be adopted by the Company for such apportionment or distribution, and its determination of the amount belonging to this Policy, shall be conclusive upon the Insured. * * *" It is urged that this provision binds the respondent to accept the $1,080.50 without question. A card was introduced in evidence showing $1,080.50 to be the amount apportionable at the end of the 20th year, and there was testimony that that figure was arrived at according to a principle and following a method. There was nothing to show, however, what the principle was or what method was followed. But be that as it may, from the view we take of the case we are satisfied that the respondent was not subject to this stipulation in the policy. The fourth option, which he exercised, called for the payment of a stated, definite figure, and any computation less than that—however arrived at—would not alter the appellant's obligation.

We find no error in the record, and for the reasons herein given are satisfied that the judgment should be affirmed. It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

EBRITE v. CRAWFORD et al. *

Civ. 6932.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1931.

Rehearing Denied Dec. 18, 1931. Hearing Granted by Supreme Court Jan. 18, 1932.

1. Municipal corporations ⚷721(1).

City had extraterritorial power necessary to regulate and lay down rules governing use of municipally owned airport lying partly without city (St. 1927, p. 485, § 1 et seq.).

2. Trial ⚷253(4).

Instruction respecting liability for injuries in collision between airplanes *held* erroneous as ignoring possibility of negligence on part of one pilot.

> Instruction was that, if jury believed from evidence that immediately before collision defendant was at a greater height than plaintiff and that he was behind plaintiff's plane and that plaintiff was not taking off, but was preparing to land, they should return a verdict for plaintiff without mention of any acts of negligence on part of plaintiff which might relieve defendant from liability.

3. Trial ⚷253(7).

Formula instruction must contain all elements essential to recovery.

4. Trial ⚷253(4).

Instruction, in action to recover for injuries in airplane collision, respecting contributory negligence that would prevent recovery, *held* properly refused as too narrow.

> Instruction was to effect that, if jury found that plaintiff had touched ground with landing gear of plane for purpose of making student landing, or was piloting plane in such manner that his conduct in that respect would lead defendant to believe he was making or attempting to make a student landing, in either of those events they would find for defendant.

5. Trial ⚷252(8).

Instruction, in action to recover for injuries in airplane collision respecting doctrine of last clear chance, *held* erroneous as without support in evidence.

6. Negligence ⚷139(1).

Instruction, in action to recover for injuries in airplane collision, setting out ordinance, *held* properly refused as confusing.

> Instruction set out provision of ordinance respecting duty of plane at higher

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 12 P.2d 937.

level to avoid collision with aircraft at lower level, including definition of overtaking aircraft as every aircraft coming up with another aircraft from any direction more than 110 degrees from ahead of the latter or in such position with reference to the aircraft that it was overtaking that at night it would be unable to see either of aircraft's side lights, which was hardly understandable by ordinarily intelligent persons not versed in science of engineering.

7. Trial ⟹252(8).

Instruction, in action to recover for injuries in airplane collision, respecting ordinance provision requiring due caution in operation, *held* erroneous as inapplicable.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Alva E. Ebrite against Ray Crawford and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Kelby & Lawson, of Los Angeles, for appellants.

Todd, Pawson & Watkins, of Long Beach, for respondent.

IRA F. THOMPSON, J.

The defendant Lloyd O'Donnell during February, 1928, and for some time prior thereto, was engaged in the business of carrying passengers for hire in aeroplanes and of giving flying lessons to students, and to that end maintained his place of business at the Long Beach Municipal Airport. Ray Crawford was an employee of O'Donnell's and at the time of the collision which gave rise to this litigation was acting within the scope of his employment. The respondent Ebrite was engaged in a like enterprise. The Long Beach Municipal Airport is approximately 2,900 feet wide from north to south, and for a distance of about 2,200 feet from the west to east, and at this point narrows to about 200 feet and continues on easterly 4,500 feet or thereabouts. Intersecting the narrow portion of the field at a point about 2,700 feet easterly of the wide part is a ditch or drainage canal. This stretch of the field, i. e., the plot 2,700 by 200 and lying easterly of what we may call the main airport and westerly of the ditch was used by pilots for the purpose of giving landing lessons to students. Just previous to the collision Ebrite and a student had taken off from the main field, risen to an altitude of about 900 feet, and after turning had descended to that portion of the field already indicated until the landing wheels touch the ground, whereupon the motor had been opened up and they had risen to repeat the operation. Thrice they had landed. On the fourth occasion, according to the testimony of Ebrite he came down to an altitude of about 50 feet, where he leveled off and flew directly westward for the purpose of making his final landing on the main field, and while so flying the airplane driven by Crawford descended upon and collided with his plane. Crawford testified that he was coming onto the field and that at an elevation of about 1,500 feet he saw Ebrite on the ground just westerly of the ditch; that at 900 feet he made observations to see if any planes were in his way; that the next he saw was Ebrite's ship crashing through his own right wing in an upward direction. Both planes fell on the narrow runway at a distance of from 700 to 800 feet easterly of the main field. The jury returned a verdict in favor of the plaintiff to compensate him for the damage to his airplane and the injuries sustained personally. This is an appeal by the defendant O'Donnell from the judgment entered on the verdict.

The first reason assigned for a reversal of the judgment is that the court misinstructed the jury as follows: "The court instructs you that if you believe from the evidence that immediately before the collision, the defendant Ray Crawford was at a greater height than the plaintiff Ebrite and that he was behind the Ebrite plane and that the plaintiff Ebrite was not taking off but was preparing to land, then you shall return a verdict for the plaintiff Ebrite and against the defendants Crawford and O'Donnell."

Appellant attacks this instruction in two particulars. He says that the conditions mentioned therein constitute no "evidence of negligence," and also that it omits facts in controversy material to the defense and entirely ignores the question of contributory negligence, which defense was pleaded. The respondent, however, justifies the instruction as being the substance of sections 10i and 10m of an ordinance of the city of Long Beach, which was introduced in evidence. Those sections of the ordinance read as follows: Section 10i. "Anything in this ordinance to the contrary notwithstanding, an aircraft in the act of landing shall always have the right of way." Section 10m. "In the case of aircraft approaching aerodromes or sea harbors for the purpose of landing, the aircraft flying at the greater height shall be responsible for avoiding the aircraft at a lower level and as regards landing shall observe the rules for an overtaking aircraft for passing." The section which gives the rules for overtaking craft is involved in another of the instructions, but we give it here to fully explain the one now under consideration. It

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

reads: "Any motor driven aircraft overtaking any other aircraft shall so alter its course as to pass to the right of such overtaken aircraft and must not pass by diving. Every aircraft coming up with another aircraft from any direction more than one hundred ten (110) degrees from ahead of the latter or in such a position with reference to the aircraft which it is overtaking that at night it would be unable to see either of that aircraft's side lights, shall be deemed to be an overtaking aircraft and no subsequent alteration of the bearing between the two aircraft shall make the overtaking aircraft a crossing aircraft within the meaning of these rules, or relieve it of the duty of keeping clear of the overtaken aircraft until it is finally passed and clear."

[1] The appellant replies to this contention that the accident occurred outside the city limits of Long Beach, the easterly city limits being westerly of the point on the narrow portion of the field above which the machines collided. This argument of appellant cannot be sustained for the reason that the city of Long Beach had extraterritorial power necessary to regulate and lay down rules governing the use of the municipally-owned airport, lying partly within and partly without the city. By act of the Legislature approved April 28, 1927 (Stats. 1927, p. 485), California municipalities were authorized and empowered to purchase, lease, or otherwise acquire land for and to operate airports or flying fields and in connection therewith "to provide rules and regulations covering the use of such airport and facilities and the use of other property or means of transportation within or over the said airport." Section 4. In addition to the implication which necessarily flows from the quoted language of the statute, it should be observed as is said by the Supreme Court in Re Blois, 179 Cal. 294, 176 P. 449, 451: "* * * Municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality." And it requires no great meditation to realize how strange an anomaly it would be to say that the city might own an airport adjoining its boundaries, and yet be without the power to regulate the manner of its use. For other statements of the right of the city to exercise extraterritorial jurisdiction when necessary to the proper conduct of its affairs, see Mulville v. City of San Diego, 183 Cal. 734, 192 P. 702; 18 Cal. Jur. 803; and case note to Brown v. Cle Elum, 55 A. L. R. p. 1175–1186.

[2, 3] However, the instruction was erroneous. It ignores the possibility of negligence on the part of Ebrite, and in effect says that proof that Crawford was above and behind the plane of Ebrite at a time when the latter was preparing to land, coupled with proof of the collision, is conclusive upon the question of negligence. The respondent in effect recognizes the error when he says: "It is a well known principle in the law of negligence that infraction of a penal law or ordinance is prima facie evidence of negligence." We may assume in accordance with the intent of the ordinance that the lower landing plane had the right of way and that it was the duty of the higher rear plane to pass to the right of and avoid the lower ship, and yet we can conceive the happening of many things not mentioned in the instruction which might as matters of fact relieve the latter of liability, as, for example, the very thing which the defendant claimed herein, to wit: That plaintiff was apparently preparing to land, suddenly changed his mind, and "zoomed" into the air and into the defendant's ship, without possibility of avoidance on the part of the defendant's plane. It is a well-known rule of law that a " 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law." Douglas v. So. Pac. Co., 203 Cal. 390, 264 P. 237, 238, and a long list of authorities there cited. We cannot agree with respondent that the words "preparing to land" saves the instruction. It would be more debatable had the phrase read, "was in the act of landing," which is the language of the ordinance, but "preparing to land" leaves too broad a field wherein to wander. It might easily be reasoned that he was preparing to land from the time he started his descent even though he changed his course and attempted temporarily to take to higher levels. It is a well-known fact that airplanes do not always land on the first attempt; that the pilot may judge the conditions therefor, when near the earth, to be unfavorable, in which event he immediately increases the speed of his propeller and ascends for the purpose of again making an attempt to land safely. Whether he should be deemed negligent in such maneuvers would depend largely upon the surrounding conditions. That he could give every appearance of landing, lull the pilot of a higher plane into a false sense of security, and then without warning project himself into the exact line of flight of the other plane, and his act, in so doing, not be called into question is a conclusion we very much doubt. Whether there was negligence in this particular, or whether the defendants were guilty of negligence in relying upon appearances, bearing in mind the duty of the overtaking plane to avoid a collision, and also remembering that, unlike other vehicles of transportation, airplanes, so long as they are in midair, must keep traveling, are questions which should have been left to the jury under appropriate instructions.

[4] The appellant next complains because the court refused to give an instruction requested by him as follows: "If you find from the evidence that at the time of the last circle of the field by the plaintiff, Ebrite, that he touched the ground with the landing gear of his plane for the purpose of making a student landing, or if you further find that he was piloting his plane in such a manner and under such circumstances that his conduct in that respect would lead the defendant, Crawford, to believe that he was making, or attempting to make, a student landing, then, in either of those events, if you find that either of them did so, of course your verdict will be for both of the defendants."

For similar reasons the court very properly rejected the proffered instruction. It seems obvious from what we have already said that had the instruction been given it would have restricted the jury to an altogether too narrow field of deliberation. In addition, "contributory negligence" was defined to the jury and the jury properly instructed with respect thereto.

[5] The court instructed the jury upon the doctrine of the last clear chance, and the appellant says that in so doing it committed error because the evidence failed to furnish a basis for its application. There is testimony which is sufficient to have warranted a finding by the jury that prior to the collision the plaintiff was guilty of negligence and by reason thereof had placed himself in a position of great danger from which, the jury was justified in believing, he could not extricate himself by the use of ordinary care, because he was oblivious thereto; but we have failed to find any evidence that the appellant knew of this perilous situation. There is evidence which, if believed, would justify the conclusion that by the exercise of ordinary care the appellant should have known of the situation and been able to avoid the collision by the use of ordinary care. The question then is this: Can negligence in failing to discover the dangerous situation of the plaintiff be substituted for actual knowledge as one of the prerequisites for the application of the doctrine of the last clear chance? We think this would be extending the doctrine beyond the proper orbit. Such is the effect of the discussion and decision of our Supreme Court in the case of Starck v. Pac. Electric Ry. Co., 172 Cal. 277, 156 P. 51, L. R. A. 1916E, 58. Reference may also be had to the long list of authorities cited therein.

[6] The court also instructed the jury in the words of section 10m of the ordinance which we have already quoted. As we read the first part of the instruction, it means that it is the duty of a plane on a higher level to avoid a collision with an aircraft at a lower level. This becomes increasingly manifest when read in connection with the other instructions. We cannot believe that the jury when considering other rules for measuring the liability of the appellant could have understood that the higher plane undertook to guarantee against all contingencies that a collision would not take place. Probably it would have been better had the court actually defined the duty of the plane at the higher level, but no damage was actually done. However, the last part of the instruction, to wit, "and as regards landing shall observe the rules for an overtaking aircraft for passing," is so inextricably interwoven with the next instruction of which complaint is made that it must rest or fall therewith. We have also quoted it above. The first sentence, i. e., "any motor driven aircraft overtaking any other aircraft shall so alter its course as to pass to the right of such overtaken aircraft and must not pass by diving," is readily understood, except that we have no definitive statement of what constitutes an overtaking craft. We venture the assertion, however, that 99 out of 100 ordinarily intelligent persons, not versed in the science of engineering, would not be able to understand without assistance the next sentence—the definition. It reads: "Every aircraft coming up with another aircraft from any direction more than one hundred ten (110) degrees from ahead of the latter or in such a position with reference to the aircraft which it is overtaking that at night it would be unable to see either of that aircraft's side lights, shall be deemed an overtaking plane. * * *" The confusion first arises from the words "coming up with another." Does it mean arising with another, or does it mean overtaking another? From the sole fact that the section of the ordinance is discussing overtaking planes we determine that it means the latter, but the loose construction of the definition is at once apparent. But worse still is, "one hundred ten (110) degrees from ahead of the latter." Had the ordinance or the instruction made use of the language employed in subsection F of section 74 of the air traffic rules (Hotchkiss, Aviation Law, p. 251), it would have been understood. That section reads: "An overtaking aircraft is one approaching another directly from behind or within 70° of that position. * * *" But in the section of the ordinance made use of in the instruction, to employ a homely but apt expression, the fathers of the language literally "put the cart before the horse" or they went around in front to get behind. And in so doing the section of the ordinance was rendered unintelligible to the ordinary man. In fact, the writer of this opinion in order to comprehend its meaning submitted the language to his associates, who were as much confused as he, and it was finally necessary to seek the services of an engineer before he clearly understood the language. Enough has been said to demonstrate that the judge of the trial court should not have submitted the section to the jury as constituting an explanation of a rule of law. In 24 California

Jurisprudence, p. 817, we read: "Instructions should be clear and concise, complete, intelligible, unambiguous and certain; and this ordinarily requires that they be couched in plain and simple language which is readily comprehended by the jury." We are not, however, attempting to pass upon its validity as an ordinance, but we do most positively assert that as an instruction it failed to comply with the quoted requirements for an instruction.

[7] Complaint is also made of an instruction which is another portion of the ordinance reading as follows: "The court instructs you that it is unlawful for any person, firm or corporation, whether as principal, agent, servant, employee or otherwise, to knowingly and willfully operate any aircraft within the city of Long Beach without due caution and circumpection or in such manner as to endanger the life, limb or property of any person." We are at a loss to understand what purpose the instruction was intended to serve. The respondent attempts to justify it upon the theory that the violation of a penal ordinance "is prima facie evidence of negligence." But the negligent operation of the aircraft is made the unlawful act by the section given as an instruction. We fear that respondent, like the industrious squirrel, is merely lost in the revolutions of his cage. Not being in response to any issue before the jury, the instruction should not have been given. Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953. However, we doubt, if that were the only error, it would be sufficient to warrant a reversal of the judgment.

The other instructions complained of apply especially to the case of Smith v. O'Donnell (Cal. App.) 5 P.(2d) 690, a companion action which was tried with the present case and the appeal in which is this day determined. No other points require discussion.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

SMITH v. O'DONNELL.*

Civ. 6931.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1931.

Rehearing Denied Dec. 18, 1931. Hearing Granted by Supreme Court Jan. 18, 1932.

1. Carriers 🔑235, 280(1).

Person operating airplane for purpose of carrying for hire passengers applying for ride *held* "common carrier," with duty of exercising highest degree of care (Civ. Code, § 2168).

[Ed. Note.—For other definitions of "Common Carrier," see Words and Phrases.]

2. Carriers 🔑244.

Prospective customer invited to take ride on airplane *held* "passenger," and as such entitled to highest degree of care.

> Passenger had been solicited for business for machine shop by employee of owner and operator of airplane, and in developing good will for purpose of securing business, he was invited to take a ride in the airplane, which he accepted, with resulting injury in collision.

[Ed. Note.—For other definitions of "Passenger," see Words and Phrases.]

3. Carriers 🔑316(1).

Presumption of negligence on part of carrier arises when occurrence is such as does not ordinarily happen without negligence.

4. Carriers 🔑321(21).

Instruction authorizing application of doctrine of res ipsa loquitur in respect to injury to passenger in airplane collision *held* proper.

5. Carriers 🔑284(4).

Operator of airplane is not liable for injury to passenger in collision with another plane in case accident occurred solely by reason of other's negligence.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by James W. Smith against Lloyd O'Donnell, also known as J. L. O'Donnell. Judgment for plaintiff, and defendant appeals.

Reversed.

Kelby & Lawson, of Los Angeles, for appellant.

L. D. Uhlman, of Long Beach, for respondent.

IRA F. THOMPSON, J.

This is the companion case to that of Ebrite v. Crawford, 5 P.(2d) 686, this day determined and is an appeal by the defendant from a judgment against him and in favor of the plaintiff in the sum of $2,000 and costs. In addition to the facts set forth in the Ebrite Case, it is necessary to note the following: O'Donnell was not engaged in carrying passengers from one terminal, i. e., from the Long Beach Municipal Airport to another fixed landing field, but rather of carrying "Two passengers for five dollars. * * * Up and down the road toward the ocean." In other words, he was engaged "in the aviation business" for the

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*For subsequent opinion see 12 P.2d 933.

purpose of taking those who might apply on a flight from the municipal field toward the ocean and back again, landing on the field whence he started. He also maintained and operated a machine shop. On the day in question a Mr. Bradford, working for the appellant, called on respondent for the purpose of getting respondent, and through him respondent's brother, to give them some work for the machine shop. At the suggestion of Bradford they journeyed to O'Donnell's place of business for the purpose of making respondent acquainted with O'Donnell. While there Bradford and appellant asked respondent to go for a ride. He accepted and was injured in the collision which followed.

The trial judge gave four instructions, all based upon the propositions that the appellant was a common carrier and that the doctrine of res ipsa loquitur was applicable to the situation. The appellant asserts, not only that he was not a common carrier and that the doctrine should not have been applied, but also that the facts do not justify the conclusion that appellant was a passenger.

[1] We therefore turn our attention to the question whether the appellant was a common carrier, and liable as such. Counsel for appellant apparently grounds his argument in two thoughts: First, that there must be "the carriage of the thing or person from one place to another on terra firma" in order to constitute a common carrier; and, second, that "so new a craft, so new an industry," ought not to "be so classified and charged with such a liability." His first assertion assumes as a premise and as a reason for the conclusion, the conclusion itself, and the second furnishes no legal basis for the desired result. If the craft be employed as a common carrier vehicle, it is not a reason for applying different rules of liability to say that it and the industry are new. If too new, a conclusion we think unfounded, should not its owner either decline to use it for the purpose, or assume the liability incident to the use to which he puts it? Our attention has not been directed to any case wherein this question was involved, nor do we know of any in this jurisdiction. However, we have found two authorities from other forums. The first is that of North American Acc. Ins. Co. v. Pitts, 213 Ala. 102, 104 So. 21, 23, 40 A. L. R. 1171. In that case a pilot named Lieutenant Albert Whitted visited at Camp Walton, a summer resort in Florida, over the week-ends. And while so visiting he took passengers up for short flights over and around the bay, for hire, and by special contract would carry others from the resort to Pensacola and other points. To quote the opinion in part, it is said: "He had the right to take only such persons as he saw fit; he took only white people, would not take negroes, or intoxicated persons; and it was generally understood that he was under no duty to take up passengers or make any trips unless it pleased him, or he saw fit to do so." The Supreme Court of that state determined that Whitted was not operating his craft as a common carrier, but as a private carrier of passengers, basing its decision largely upon the grounds that the trips in the air were made by special arrangement, and that he did not and would not take all who applied. It is to be noted further that he had no established business, but operated at his own convenience during the week-end visits. The same collision was under the consideration of the United States Circuit Court of Appeals in the second case, that of Brown v. Pacific Mutual Life Ins. Co., 8 F.(2d) 996, 997, where the same result was reached by similar reasoning; the court saying: "He operated on such days, at such hours, and under such conditions as pleased him, and did not pretend to maintain regular schedules." The essential difference between the instant case and the operations of Lieutenant Whitted is that here the appellant maintained a regular place of business for the express purpose of carrying those who applied. Section 2168 of our Civil Code defines a "common carrier" as follows: "Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." Under the wording of this definition it is plain that Lieutenant Whitted was not a common carrier, and it is also almost equally certain that the appellant was, the difference being found in the language, "Everyone who offers to the public to carry, etc." In Forsyth v. San Joaquin Light, etc., Corp., 208 Cal. 397, 281 P. 620, 623, the court, after quoting the Code section, employed the words found in 4 California Jurisprudence at page 815, as follows: " 'Private carriers are such as carry for hire and do not come within the definition of common carrier. Certain prominent characteristics mark the difference between these two classes. To impress upon one the character of common carrier it must be shown that he "undertakes generally and for all persons indifferently to carry goods and deliver them for hire; and that his public profession of his employment be such that if he refuses, without some just ground, to carry goods for anyone, in the course of his employment and for a reasonable and customary price, he will be liable to an action." ' " It will thus be seen, as is said in Nugent v. Smith, L. R. 1 Common Pleas Div. 19 and 423, and quoted with approval in Georgia Life Ins. Co. v. Easter, 189 Ala. 478, 66 So. 514, 516, L. R. A. 1915C, 456, that: "The real test whether a man is a common carrier, whether by land or water" (and we might now add

"or air"), "therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he had room, the goods of all persons indifferently who send him goods to be carried." Under this rule the books contain decisions to the effect that any of the following may be common carriers, viz., stagecoaches, busses, automobiles, hackney coaches, cabs, drays, carts, wagons, sleds, elevators, and in fact almost every vehicle which can be employed for the purpose. There is an interesting and instructive case, that of O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 1007, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407, in which the question was as to whether a scenic railway was a common carrier. The court said: "Why is not this rule [the rule of liability applying to common carriers] applicable to those operating cars upon a scenic railway, such as the one here in question? The passengers carried therein are subject to great risk of life and limb. The steep inclines sharp curves, and great speed necessarily are sources of peril. The argument of appellant that the character of this scenic railway was of itself notice of the danger to its passengers; that its presence and operation involved no danger to those who kept away from it; that in this regard it differed from steam or electric railways or passenger elevators in buildings; and that therefore such a railway should not be held a common carrier—does not appeal to us. Should the motive which causes a person to take passage make any difference as to the degree of responsibility with which the carrier is charged? Passenger elevators are frequently operated in buildings in order to convey persons to some vantage point where they can overlook a great city or some other object of interest, and trips on electric cars are often made solely for pleasure. * * * We think, not only by fair analogy, but on reason and sound public policy, appellant should be held to the same degree of responsibility in the management of the railway in question as a common carrier." To the same effect, see Sand Springs Park v. Schrader, 82 Okl. 244, 198 P. 983, 22 A. L. R. 593, and Best Park & Amusement Co. v. Rollins, 192 Ala. 534, 68 So. 417, Ann. Cas. 1917D, 929. We are conscious of the fact that there are some authorities contra, but we think the better reason supports the quotation, and that every consideration of public policy requires it. There can be no doubt, under the general law of common carriers as we have found it, that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification. The industry itself should be desirous of assuring the public that those who accept their invitation to travel by air will be accorded that protection which may be afforded by the exercise of "the utmost care and diligence for their safe carriage." See section 2100, Civ. Code. It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier. To indulge for a moment in the speculation which follows in the wake of the statement just made, if there are those in the business of carrying passengers in the air to-day (and we do not say there are) who are sufficiently unmindful of their humanitarian duty as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service. The appellant's testimony is that he was in the aviation business principally for the "passenger flying," and it is also established that he maintained a definite place of business to that end; and that he had a fixed charge for the trip "up and down the road toward the ocean." We have no doubt that the trial judge adopted the correct yardstick of care when he instructed the jury that it was the duty of appellant to "exercise the highest degree of care for the safety of his passengers," provided of course that the respondent was a passenger.

[2] And to that question we now direct our attention. We are largely guided in our solution of this problem by the case of Walther v. Southern Pacific Co., 159 Cal. 769, 116 P. 51, 53, 37 L. R. A. (N. S.) 235. In that case Walther, an employee of the defendant, and absent on leave, was traveling on a pass issued to him as an employee and containing a provision purporting to relieve the company of liability for negligence, even though gross. The court held the releasing clause to be void under section 2175 of the Civil Code, and although the plaintiff was carried without money consideration, applied the rule of care required of common carriers. It is there said: "As such [a common carrier], under other provisions of the same chapter and other chapters, it was entitled to refuse to carry any person except upon compliance with certain requirements, including the payment of a prescribed reasonable compensation, but at the time of this accident at least it could legally waive any of these requirements on the part of the passenger, and could receive and carry him for a reduced or different consideration, or altogether without consideration. But, on whatever terms a common carrier of persons voluntarily receives and carries a person, the relation of common carrier and passenger exists. This is recognized by some of the authorities upholding the exemp-

tion from liability for negligence provision in the case of a passenger carried gratuitously. See Rogers v. Kennebec Steamboat Co., supra [86 Me. 261, 29 A. 1069, 25 L. R. A. 491]. The sole inquiry in this regard is, as has been said, whether the person was lawfully on the vehicle (see Ohio & Miss. R. Co. v. Muhling, 30 Ill. 9, 81 Am. Dec. 336), has been voluntarily received by the common carrier on any terms for the purpose of carriage, and is not, as was the case in Sessions v. Southern Pacific Co. [159 Cal. p. 599], 114 P. 982, a mere trespasser on the vehicle. The voluntary waiver of all claim for compensation for carriage of a person does not take away from the status of the carrier as a common carrier so far as the person carried is concerned, any more than would a special reduction in the amount of compensation charged or a special concession as to some other authorized requirement accomplish such effect. The carrier is still a common carrier as to such person, with all the obligations of a common carrier, except in so far as those obligations are limited by contract provisions which are not inhibited by law." This case is in line with Champagne v. A. Hamburger & Sons, 169 Cal. 693, 147 P. 954, and in view of the fact that appellant here was interested in developing the good will of the respondent for the purpose of securing business, the latter case is also very much in point. Taken together, they bring us to the conclusion that respondent was a passenger at the time of the collision.

As already indicated, the court in effect instructed the jury that if by a preponderance of the evidence the plaintiff established that he was a passenger and that a collision occurred between the plane in which he was riding and another as the result of which he was injured, it was then incumbent on the defendant to prove, either that he was free from negligence, or that plaintiff could have avoided the injury by the exercise of ordinary care. In other words, the court instructed the jury to apply the doctrine of res ipsa loquitur to the accident for the purpose of assisting it in determining liability. Appellant's objection to this instruction is approximately the same as it is to those already discussed. He has some other objections, as, for instance, he says that the court assumed in one of the two instructions upon the question that plaintiff was a passenger. This assertion, however, is untenable because the court specifically said that the burden was upon the plaintiff "throughout the whole case" to establish that he was a passenger. He also says that the defense of contributory negligence is not open to the carrier if plaintiff was in fact a passenger and therefore the court might as well have instructed the jury to return a verdict for plaintiff. This position cannot be maintained. In the absence of the slightest suggestion of negligence on the part of the respondent, the instruction is the same as though it ended with the statement that it was incumbent on appellant to show that he was free from negligence. Furthermore, the contention in this particular is concluded by such authorities as Bonneau v. North Shore R. Co., 152 Cal. 408, 93 P. 106, 125 Am. St. Rep. 68, and Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243.

[3, 4] The question really is whether the doctrine was applicable under the facts proved. It should be remembered that the injury was occasioned by a collision in the air with the plane of Ebrite. The foundation or reason for the doctrine is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can the most conveniently prove it raises a presumption of negligence which the defendant must overcome by proof that there was in fact no negligence. O'Connor v. Mennie, 169 Cal. 217, 146 P. 674, 676; Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 341, 73 P. 164. In other words, as is said in the first-cited case: "* * * To justify its application in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. For this reason the rule that the accident speaks for itself and prima facie shows negligence has been held inapplicable in many actions by an employee against his employer to recover damages for injuries sustained by the employee in the course of his employment." The rule has been most frequently applied in common carrier cases where injury has occurred to a passenger. (See Bush v. Barnett, 96 Cal. 202 [31 P. 2]; and 19 Cal. Jur. p. 714), because as is said in Housel v. Pacific Electric Ry. Co., 167 Cal. 245, 139 P. 73, 75, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665: "The reason for the application of the doctrine in such cases appears to be practically as stated in this quotation, viz., that, in view of the very high degree of care essential under the law on the part of a carrier of persons towards those who are its passengers, such a collision would not happen in the ordinary course of events if the carrier exercised such care, and that ordinarily when such an accident occurs it is due to failure on the part of the person operating the car to use the proper degree of care in so operating it, or, in other words, to 'the manner in which defendant used or directed the instrumentality under its control.'" The language is peculiarly apt in the instant cause. If the proper degree of care

is used, a collision in midair does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury.

[5] For reasons now to be stated, the case, however, must be reversed. If the defendants successfully established under proper instructions that they were not guilty of any negligence, and that the accident occurred solely by reason of the negligence of Ebrite, then the defendants were not answerable in damages. We have determined in the Ebrite Case that the instructions given were improper and therefore there was no proper guide by which the jury could determine whether the collision was caused solely by the negligence of Ebrite.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

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118 Cal.App. 602

COUNIHAN v. LUFSTUFKA BROS. & CO. et al.

Civ. 7592.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1931.

1. Master and servant ⚷301(1).

In determining existence of master-servant relationship, test is whether alleged servant is under master's control regarding mode and manner of doing work.

2. Automobiles ⚷244(26).

Evidence *held* insufficient to show master-servant relationship between partnership and its traveling salesman involved in automobile accident.

> Evidence disclosed that salesman worked on commission, which was paid irregularly, and that partnership, which manufactured and sold suitcases and traveling bags, furnished him with samples, order blanks, business cards, and price lists, and specified terms for credit, if any; that at time of accident he was on his way to visit prospective buyer; that he used his own automobile, which he operated at his own expense; that he was not subject to control or direction of partnership as to his time, use of automobile, or manner in which he obtained customers and trade; and that he was not restricted as to business territory, and was at liberty to come and go and do as he pleased.

3. Master and servant ⚷330(3).

That partners were financially benefited by salesman's services, and, whenever they learned of prospective customer, requested salesman to call, did not establish master-servant relationship under respondeat superior doctrine.

4. Automobiles ⚷193(3).

That services of partnership's salesman involved in automobile accident were terminable at will of either did not alter conclusion of nonexistence of master-servant relationship.

5. Automobiles ⚷244(26).

That partnership furnished salesman involved in automobile accident with business cards did not show liability based on ostensible agency.

> It appeared that partnership furnished salesman with two types of business cards, setting forth its name, address, and character of business, one type displaying the words "Presented by," followed by salesman's name, and the other bearing the salesman's name, followed by words "Sales Manager."

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Delia Counihan against Lufstufka Bros. & Co., a copartnership, and others. From a judgment of nonsuit as to defendant named, plaintiff appeals.

Affirmed.

Ford & Johnson, of San Francisco, and Jesse E. Nichols and Paul D. Morse, both of Oakland, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, and Philip M. Carey, of Oakland, for respondents.

KNIGHT, J.

While attempting to cross a street in Oakland, plaintiff was struck and injured by an automobile driven by the defendant Beran; and she brought this action for damages against him and his codefendant Lufstufka Bros. & Co., a copartnership, claiming that the accident was caused by the negligent operation of the automobile and that said copartnership was liable therefor under the doctrine of respondeat superior. A motion for nonsuit was granted as to the copartnership, and, from the judgment entered thereon, plaintiff prosecutes this appeal. The question presented for determination is therefore whether there was any evidence adduced at the trial legally sufficient to support the conclusion that the relationship of master and servant existed between said firm and Beran at the time the accident happened.

[1, 2] The authorities hold that the real test to be used in determining the question of such relationship is to ascertain whether the

person claimed to be the servant was subject to the control of the party sought to be charged as master as to the mode and manner in which the work was to be done (Royal Indemnity Co. v. Industrial Acc. Commission, 104 Cal. App. 290, 285 P. 912, 913; May v. Farrell, 94 Cal. App. 703, 271 P. 789; Barton v. Studebaker Corp. of America, 46 Cal. App. 707, 189 P. 1025; Slyter v. Clinton Const. Co., 107 Cal. App. 348, 290 P. 643); and, after reviewing the evidence in the present case, we are satisfied that the trial court was correct in holding that it is legally insufficient to establish such element.

The main facts appearing from the evidence are as follows: The firm was engaged in the business of manufacturing and selling suitcases and traveling bags. Beran was a traveling salesman working on a commission basis, and selling by samples. The firm supplied him with the samples, and also furnished him with order blanks, business cards, and a price list specifying the terms, conditions, and trade discounts subject to which the orders for goods were taken. Credit was extended only on approval of said firm. Settlements for commissions due Beran were made at irregular intervals, whenever it was convenient; and occasionally he drew money in advance. At the time the accident happened he was on his way to visit a prospective buyer of goods. The evidence further shows, however, without dispute that in traveling in pursuit of his business Beran used his own automobile, which was operated entirely at his own expense, and that neither as to his time, the use of his automobile, nor the manner in which he obtained customers and trade, was he subject to the control or direction of said firm. He was free to employ whatever business methods he chose to secure orders for goods, he was not restricted as to business territory, and he was at liberty to come and go and do as he pleased. It would appear that the foregoing facts relating to the relationship of the parties are analogous to those involved in the case of Barton v. Studebaker Corp. of America, supra, wherein it was held, after a discussion of numerous cases, that the relationship of master and servant did not exist; and we are of the opinion, therefore, that the decision therein is controlling here.

[3] True, the evidence shows that said firm was financially benefited by the result of Beran's services, and it also shows that whenever the members of the firm learned of a prospective customer they requested Beran to call on him; but these facts alone do not bring the case within the relationship mentioned, because, as frequently stated in the decisions: " 'It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled.' Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 811, 159 P. 721, 723. The decisive test of the relationship is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control? Lassen v. Stamford Transit Co., 102 Conn. 76, 128 A. 117, 118; see, also, Fidelity & Casualty Co. v. Industrial Acc. Comm., 191 Cal. 404, 407, 43 A. L. R. 1304, 216 P. 578. In other words, the test of what constitutes independent service lies in the control exercised. The test of control means complete control, and we must carefully distinguish between authoritative control and mere suggestion as to detail. Western Indemnity Co. v. Pillsbury, supra." Royal Indemnity Co. v. Industrial Acc. Commission, supra; Moody v. Industrial Acc. Commission, 204 Cal. 668, 269 P. 542, 60 A. L. R. 299.

[4] Nor does the fact that Beran's services were terminable at the will of either the firm or Beran alter the situation, for, as said in the decision last quoted from: "While the right to discharge a person at any time, without recourse, has been held to be a strong circumstance tending to show the subserviency of the employee (Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820), it is of less significance in a case of this sort, where it fits in equally with the theory of an independent association. In this regard, both parties testified that the right to terminate their arrangement was a mutual one." In support of her contention that the doctrine of respondeat superior does apply, plaintiff cites a number of cases, notably Brown v. Industrial Accident Commission, 174 Cal. 457, 163 P. 664, and Dillon v. Prudential Ins. Co. of America, 75 Cal. App. 266, 242 P. 736. But in all of them it will be found that there was some evidence tending to prove the right of control, and in the present case, as stated, such evidence is lacking.

[5] Plaintiff also stresses the fact that the firm furnished Beran with two types of business cards, setting forth its name, address, and character of business, one type displaying the words "Presented by W. Beran," and the other the words "W. Beran, Sales Manager"; and in this regard she contends that the firm is liable under the doctrine of ostensible agency, citing the case of Donnelly v. S. F. Bridge Co., 117 Cal. 417, 49 P. 559. This same point was urged in Barton v. Studebaker Corp. of America, supra, wherein the case cited by plaintiff is fully discussed, and the court disposed of the point adversely to plaintiff's contention. Therefore, in conformity therewith and for the reasons stated therein, we hold the contention to be without merit.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

214 Cal. 414

ANDERSON v. ANDERSON et al.

S. F. 13569.

Supreme Court of California.
Dec. 15, 1931.

1. Bastards 🔑6.

Evidence established, as regards defendant's liability for child's support after divorce, that he was not father of child.

2. Bastards 🔑3.

As regards liability for child's support after divorce, presumption that issue of wife is legitimate prevails only where period of gestation following intercourse with husband is normal (Code Civ. Proc. § 1962, subd. 5).

3. Bastards 🔑3.

Proof necessary to overthrow presumption of legitimacy of child born in wedlock must be clear and satisfactory (Code Civ. Proc. § 1963, subd. 31).

This is so, as regards divorced husband's liability for support of child born in wedlock.

4. Bastards 🔑3.

Presumption of legitimacy of child born in wedlock *held* not to obtain where fact of prenuptial pregnancy by stranger was established (Code Civ. Proc. § 1963, subds. 28, 31).

Presumption of legitimacy did not obtain, as regards divorced husband's liability for child's support, since fact of prenuptial pregnancy by stranger was established beyond question.

5. Bastards 🔑16.

That divorced husband knew at time of marriage of wife's pregnancy did not preclude him from disclaiming fatherhood, as regards liability for child's support.

That husband knew at time of his marriage, that wife was pregnant did not preclude husband from disclaiming fatherhood as regards liability for child's support, since he did not know at time of marriage the duration of pregnancy.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Ophelia Anderson against Clarence A. Anderson and others. From an interlocutory decree of divorce, the named defendant appeals.

Affirmed in part, and reversed in part.

Edward J. Smith and William W. Hoffman, both of Oakland, for appellant.

Ezra Cox, of Oakland, for respondent.

SHENK, J.

This is an appeal by the defendant from an interlocutory decree of divorce and particularly from that portion of the decree which requires the defendant husband to pay $25 per month for the support and maintenance of a daughter of the plaintiff, now about 5 years of age. The issue at the trial and now is whether the child is also the daughter of the defendant.

The parties intermarried on May 15, 1926. The child was born on September 1, 1926, or three and one-half months after the marriage. At birth the child weighed seven pounds and two ounces, with hair on its head, smooth skin, fingernails and toenails fully developed, and nursed at the mother's breast within a few hours. In other words, at birth the child was fully developed and gave every evidence of birth after a full period of gestation, which normally is 280 days. In the months of November and December, 1925, the mother had engaged in sexual intercourse with one Pete Brown. The first act of intercourse between the parties hereto took place about February 15, 1926, which was less than 200 days before the child was born. According to the record, a child delivered following a 200-day period of gestation could, under no case known to science or experience, be fully developed as this child was.

[1] The foregoing facts were conclusively established by the testimony of the plaintiff and by expert testimony with the aid of scientific authorities on the subject. The only shadow of conflict in the testimony, and which is relied upon by the plaintiff to support the finding of the trial court that the defendant is the father, relates to the time of the last menstruation of the plaintiff prior to the birth of the child. On this point the record shows the following: On the 26th day of January, 1929, the plaintiff made an affidavit, under circumstances that suggest no coercion or undue advantage, that her last period of menstruation was in November, 1925. After the complaint herein was filed on February 1, 1929, the plaintiff gave her deposition in which she stated that from November, 1925, until the time she met the defendant she had not menstruated. She stated to the attending physician at the time of childbirth that her last period occurred in November, 1925. On cross-examination at the trial she first stated that her last menstrual period was "around November." Upon further questioning she stated that she had thought the matter over and over again and had seen where she had made a mistake, and that she did menstruate in December and January. An examination of the record discloses that there is no conflict in the evidence on this point worthy of that designation. It is insubstantial in the highest degree, and to

permit it to control the undisputed and physical facts, for the purpose of supporting a finding giving to the defendant an heir by a stranger, would be to tax human credulity to the breaking point.

[2] It remains to be determined whether the presumptions of legitimacy are controlling in the plaintiff's favor in the face of facts established beyond the peradventure of a doubt. First we have the presumption declared by subdivision 5 of section 1962 of the Code of Civil Procedure that "the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." But this presumption prevails only where the period of gestation following intercourse with the husband is usual and normal. Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313; 13 Cal. Jur., p. 921. It cannot prevail as against undisputed facts to the contrary and at variance with the laws of nature.

[3, 4] Then there is the presumption declared by subdivision 31 of section 1963 of the Code of Civil Procedure "that a child born in lawful wedlock, there being no divorce from bed and board, is legitimate." By the same section it is presumed in subdivision 28 that things have happened in the ordinary course of nature. These presumptions are declared to be satisfactory if uncontradicted, and may be controverted by other evidence. While the proof necessary to overthrow the presumption of legitimacy in such a case as this must be clear and satisfactory (Estate of Walker, 180 Cal. 478, 181 P. 792), it has been held that, where the conception of a child is before marriage, a slighter degree of proof is necessary to overcome the presumption of legitimacy. Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687. While it may be said that the authorities as to the degree of proof in such a case are in conflict (Jackson v. Thornton, 133 Tenn. 36, 179 S. W. 384), we are here not called upon to weigh the probabilities, for we have a case where the fact of prenuptial pregnancy by a stranger is established beyond question, and the presumption of legitimacy no longer obtains.

[5] It is true the defendant herein knew at the time of his marriage that the plaintiff was pregnant. This is disclosed by the fact that in April or May, 1926, the father of the plaintiff wrote a letter to the defendant informing him that he was responsible for the condition of the plaintiff and threatening criminal prosecution of the defendant unless he married the plaintiff. But in the nature of things the defendant did not know at the time of marriage the duration of pregnancy. Under these circumstances we find no principle of estoppel which would prevent the defendant from disclaiming fatherhood when the facts became known.

No question is raised as to the insufficiency of the evidence to support the finding with reference to the plaintiff's right to a divorce, and we find it sufficient.

That portion of the interlocutory decree declaring the plaintiff entitled to a divorce is affirmed. That portion of said decree adjudging the defendant to be the father of the child and making an allowance for its support and maintenance is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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214 Cal. 361

SEABOARD ACCEPTANCE CORPORATION v. SHAY, County Sheriff, et al.

L. A. 11940.

Supreme Court of California.

Nov. 27, 1931.

1. Constitutional law ⚷205(1).
Statutes ⚷74(1).

Statutory classification of persons dealing with buyer in possession of poultry and live stock under conditional sales contract differently than other chattels *held* reasonable (Civ. Code, § 2980, as added by St. 1927, p. 1567; Const. art. 1, §§ 11, 21).

Civ. Code, § 2980, as added by St. 1927, p. 1567, provides that any conditional sales contract reserving interest or lien on live stock or poultry not in possession of person having such interest or lien shall be void against other persons, unless acknowledged and recorded in same manner as mortgages on live stock.

2. Constitutional law ⚷70(1).

Court has no power to rewrite statute to make it conform to presumed intention (Code Civ. Proc. § 1858).

3. Constitutional law ⚷70(1).

Court is limited to interpreting statute in accordance with language used (Code Civ. Proc. § 1858).

4. Sales ⚷452.

Statute requiring conditional sales contracts involving live stock or poultry to be acknowledged and recorded like mortgages on live stock *held* unconstitutional because of uncertainty (Civ. Code, § 2980, as added by St. 1927, p. 1567).

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by the Seaboard Acceptance Corporation against W. A. Shay, as Sheriff of San Bernardino County, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Superseding opinion in 295 P. 523.

Nichols, Cooper & Hickson, of Pomona (A. L. Hickson and Bert L. Cooper, both of Pomona, of counsel), for appellants.

Leland S. Davidson, of Ontario, and Clement L. Shinn, of Los Angeles, for respondent.

Loyd Wright and Charles E. Millikan, both of Los Angeles, amici curiæ.

PER CURIAM.

This appeal presents to this court for the first time the question as to the validity of the provisions of section 2980 of the Civil Code as enacted in 1927. Stats. 1927, p. 1567. The section has since been materially amended. Stats. 1931, p. 1607. As first enacted, the section read as follows:

"Any conditional sales contract creating or reserving any interest in or lien upon live stock or poultry not in the possession of the person having such interest or lien shall be void against all others than the parties to the agreement unless acknowledged and recorded in the same manner as mortgages on livestock are required to be acknowledged and recorded.

"Sections 2959 and 2965 of the Civil Code, and sections 408, 4130, 4140 and 4300c of the Political Code, are hereby made applicable to conditional sales contracts involving live stock and poultry in the same manner as to mortgages on live stock."

The Civil and Political Code sections mentioned in the last paragraph of section 2980, as above quoted, provide for the place of recordation of chattel mortgages on live stock and other migratory chattels, and for the fees and duties of the various officers connected therewith.

Before discussing the question as to the validity of the above section, the facts of the present case should be briefly set forth. These facts were practically all stipulated to by the parties.

In 1927, O. D. Beard purchased from W. E. King certain dairy cattle by means of three separate conditional sales contracts, each of which reserved title in the seller until the full purchase price should be paid. These three contracts are dated November 4, 1926, February 25, 1927, and July 28, 1927, respectively. The effective date of section 2980 of the Civil Code was July 29, 1927, so that the contracts were executed before the section became operative. On the day that each contract was executed, King sold and assigned his interest therein to respondent corporation. On November 15, 1927, there was still owing to respondent corporation from Beard a sum of money in excess of $3,200 upon these contracts. On that date, for reasons that do not appear, the three original contracts were canceled (being returned to Beard on November 30, 1927) and a new conditional sales contract was executed. Although King had long since sold his interest in the three original contracts to respondent, the new contract names King as seller and Beard as buyer. The new contract covers the same cattle covered by the original contracts, except for the fact that four or five of the original cows had died, and, in a few instances, different cows had been substituted for those named in the original contracts. On the date that the new contract was executed, King assigned his interest therein to respondent. On November 16, 1927, Beard was notified by letter that the November 15th contract had been assigned by King to respondent. This contract was recorded by respondent December 10, 1927, twenty-five days after its execution. In the meantime one J. P. Loubet, a creditor of Beard, on November 19, 1927, brought an action against Beard and attached the cattle in his possession. It is not clear as to when the debt forming the basis of this suit was incurred, but inferentially, at least, it appears that this indebtedness arose before November 15, 1927. Respondent so contends, and appellants do not deny the correctness of this assertion. Loubet prosecuted his suit to judgment, and then proceeded to enforce the same by execution. On December 10, 1927, respondent filed a third party claim, setting up its title under the conditional sales contract. On December 13, 1927, the sheriff caused the seized cattle to be sold to satisfy the judgment, receiving therefor the sum of $3,200. Respondent thereupon commenced this action to recover the reasonable value of the cattle sold. The trial court held that the rights of respondent, as evidenced by the November 15, 1927, contract, were superior to those of Loubet, an attaching creditor of the buyer, and gave judgment in favor of respondent. From such judgment appellants prosecute this appeal, contending that, under section 2980 of the Civil Code, the conditional sales contract reserving title in the seller was void as against a creditor of the buyer, regardless of whether such creditor extended credit to the buyer before or after the execution of the conditional sales contract. Respondent, among other things, contends that said section is unconstitutional, being in violation of article 1, §§ 11 and 21, of the California Constitution; that there is no reasonable basis for classifying conditional sales contracts on poultry and live stock differently from conditional sales contracts on other chattels; that such legislation is arbitrary and unreasonable.

[1-3] Appellants contend that such legislation was intended to protect those dealing with a buyer in possession, and that, so construed, the classification is reasonable. We have no doubt that there is a reasonable basis for classifying persons who deal with a buyer in possession of poultry and live stock under a conditional sales contract differently from persons dealing with a buyer in possession of other chattels. One basis for such classification is that a purchaser from a buyer in possession of poultry or live stock under a conditional sales contract must immediately expend money for their care and feed, while such expenditure is not necessary to the same degree upon a purchase from a buyer in possession of other chattels under a conditional sales contract. This distinction alone, under well-settled principles, would seem sufficient to sustain such a statute. See, generally, Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; Hellman v. Shoulters, 114 Cal. 136, 44 P. 915, 45 P. 1057.

The difficulty with the statute now under consideration is that, if the words used therein be given their usual and ordinary meaning, creditors or others dealing with the buyer are not protected at all. The statute provides that, in the event a conditional sales contract on poultry or live stock be not recorded, it is "void against all others than the parties to the agreement. * * *" In other words, not only is the provision reserving title in the seller void, but the entire conditional sales contract is void as to the whole world, with the exception of the contracting parties. It would therefore follow that such a conditional sales contract is void as to the creditors of the buyer, and that as to such persons the situation is the same as if the conditional sales contract had never been entered into. In other words, as between the seller and creditors of the buyer, the seller must prevail, the buyer having no interest in the goods attachable at the instance of his creditors. Such a result is, of course, not that intended by the Legislature, and such an interpretation would tend to defeat the only possible purpose such legislation could have. If this be the proper interpretation, then such section is undoubtedly unconstitutional, because no reason has been suggested, nor does any occur to us, why such contracts on poultry and live stock should be void as to the whole world, with the exception of the contracting parties, if not recorded, when conditional sales contracts on other chattels are valid as to the whole world, even though not recorded. In other words, the only basis for the classification of such contracts has no application. It is probably safe to assume that the Legislature had in mind the protection of persons dealing with a buyer in possession, but the difficulty is that they have not expressed this intent in the language used. This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used. By the express provisions of section 1858 of the Code of Civil Procedure, "in the construction of a statute * * * the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted. * * *" It is elementary that there can be no intent in a statute not expressed in its words; that the intention of the Legislature must be determined from the language of the statute. Ex parte Goodrich, 160 Cal. 410, 117 P. 451, Ann. Cas. 1913A, 56; In re Application of Monrovia Evening Post, 199 Cal. 263, 248 P. 1017. As stated in City of Eureka v. Diaz, 89 Cal. 467, at page 469, 26 P. 961, 962: "It is a cardinal rule in the construction of statutes that the intent of the legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act." See, also, Hopper v. Keys, 152 Cal. 488, 92 P. 1017; Smith v. Union Oil Co., 166 Cal. 217, 135 P. 966. Applying these rules of construction to the statute before us, it necessarily follows that the contract is void as to appellant, and that, as to him, the buyer Beard had no attachable interest.

Appellants strongly rely on the case of Seaboard Dairy Credit Corporation v. Erickson (C. C. A.) 41 F.(2d) 726, 727. This court granted a hearing in the instant case, after decision by the District Court of Appeal, largely because of the contention made by petitioner that the District Court decision was in conflict with the federal case cited, wherein the Circuit Court of Appeals, Ninth Circuit, held that the section here involved was constitutional as far as classification was concerned. Following this holding, which is made without pointing out any basis for classification, the federal court continued as follows: "More plausible, we think, would be an argument that the section is void for uncertainty. Read literally, it will be observed the language fully supports the plaintiff's second position. If not recorded, the instrument is void; not any special condition or stipulation, but the contract as a whole. Hence, appellant claims, if the statute was operative at all, the transaction of sale was altogether void and ineffective for any purpose, and therefore, as the assignee of Lassalle [the seller], it is the sole owner of the cows with a possible right in the trustee to recover what was paid by the bankrupt from time to time on account of the supposed purchase price. But while we do not know just what the Legislature intended, it must be assumed that such a result was not contemplated. In that view the provision would be self-destructive, and what must have been a major, if not the only, purpose of the enactment would be wholly frustrated. Assuming, as we think we may, that the Legislature intended to protect the public dealing with a vendee in possession, against secret titles and liens, perhaps we can, without unreasonable violence, restrict the operation of the 'voiding' clause to that portion of the contract purporting to retain title in the vendor."

Just how this result can be properly reached is not made apparent. By limiting the voiding provision of the statute to the clause in the contract reserving title in the seller, the court did not interpret the language used in the statute, but inserted a qualifying clause not found therein. We do not feel warranted in thus rewriting the statute. We are of the opinion that, under the statute as written, creditors of the buyer have no rights against the seller.

[4] However, even if it were possible to interpret the statute so as to limit the voiding provision to the clause reserving title in the seller, the statute even then would be void for uncertainty. To give any effect to such statute, it would be necessary to insert other qualifying and explanatory provisions not found therein. This is clearly illustrated in the federal case relied upon by appellants. After first holding that the voiding provision only applied to the clause reserving title in the seller, as above stated, the court went on to consider other phases of uncertainty and ambiguity found in the statute. The court pointed out that there is no provision in the statute for the time within which such conditional sales contracts must be recorded; that the protection afforded by the statute is not limited to those who deal with the buyer in good faith; that there is no mention of the rights of the parties who deal with the buyer after recordation, when such recordation has been withheld for more than a reasonable time. The court points out that, under the statute as now written, one dealing with the buyer in possession, even with notice of the seller's rights, would prevail over the seller, and that likewise one dealing with a buyer in possession, even after the contract is recorded, if such recordation be withheld more than a reasonable time, would prevail over the seller. The court then continues [41 F.(2d) at page 728]:

"We do not think the Legislature intended such a result, and are of the opinion that, if the section is not wholly void for uncertainty (a question we do not decide), it should be construed as declaring only that the title retaining stipulation in such a contract is without effect as to third parties unless and until the instrument is recorded, and that it is void as to those, and only those, who deal with one of the parties or in respect to the property during such period of nonrecord. Whether such scope is subject to a further exception in case of actual knowledge on the part of one so dealing, we need not determine.

"Certainly, if we have regard for the reasons underlying the legislation, the provision should not be interpreted as having a broader scope than we have indicated, and, inasmuch as in any possible practical view some liberties must be taken with the text, we are inclined to think that, if valid at all, the provision should be given this construction."

From the above quotation, it is at once obvious that the federal court did not directly hold that the statute involved was constitutional, but in fact had grave doubts on the point. That court merely held that, in order to sustain its constitutionality, the factual situation there presented necessarily did not come within the meaning of the statute.

In order to reach the interpretation suggested as a possible interpretation by the federal court, the following provisions must be read into the statute: (1) The voiding provision must be limited to the clause reserving title in the seller; (2) there must be inserted a provision that the contract must be recorded within a "reasonable" time; (3) there must be inserted a provision that only those dealing with the buyer during the period of nonrecordation are protected; (4) there must be inserted a provision that only those acting in good faith are protected; (5) there probably would have to be inserted a provision limiting the application of the statute to those dealing with the buyer, and excluding those dealing with the seller.

At least some of these provisions necessarily would have to be inserted in the statute in order to sustain its constitutionality. This court always, of course, attempts, if possible, to sustain the constitutionality of any legislative enactment, but this can only be done where the statute expresses a constitutional purpose. This court cannot, as already pointed out, in the exercise of its power to interpret, rewrite the statute. If this court were to insert in the statute all or any of the above qualifying provisions, it would in no sense be interpreting the statute as written, but would be rewriting the statute in accord with the presumed legislative intent. That is a legislative, and not a judicial, function.

From the above analysis, it is obvious that the judgment appealed from must be, and hereby is, affirmed.

214 Cal. 378

WEBBER v. JOHNSTON.

Sac. 4612.

Supreme Court of California.
Nov. 30, 1931.

Rehearing Denied Dec. 28, 1931.

1. Sales ⚷71(4).

Contract to furnish highway contractor, for surfacing designated strip of highway, 15,000 cubic yards, more or less, of crushed rock, exact quantity to be agreed upon as work progresses, *held* to contemplate entire quantity of crushed rock used by contractor for highway.

It was evident from terms of contract that 15,000 cubic yards, more or less, was merely estimate, not exact quantity that would be required, nor exact quantity which contractor agreed to purchase, and that provision respecting quantity to be agreed upon as work progresses was inserted for purpose of ascertaining quantity of crushed rock that would be required by contractor, and not as limitation of quantity which contractor was bound to accept.

2. Appeal and error ⚷907(3).

On appeal upon judgment roll alone, court could not presume, in support of judgment, existence of subsequent agreement or that appellant suffered no damages; pleadings of both parties showing contrary.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by H. W. Webber, and H. W. Webber doing business under the firm name and style of the Webber Construction Company, against J. E. Johnston. From a judgment in favor of defendant, plaintiff appeals.

Affirmed in part, and reversed in part.

Superseding opinions in 300 P. 983 and 2 P.(2d) 49.

Rehearing denied; CURTIS, J., dissenting.

H. A. Postlethwaite and Samuel W. Gardiner, both of San Francisco, and Daniel V. Marceau, of Stockton, for appellant.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for respondent.

Fitzgerald, Abbott & Beardsley, of Oakland, amici curiæ.

PRESTON, J.

We are satisfied with the conclusion and the major portion of the discussion found in the opinion of the learned District Court of Appeal, and hereby adopt certain portions thereof as the basis for our conclusion herein:

The complaint in this action contained five counts. Counts 3 and 5 were abandoned at the trial, and the defendant had judgment on counts 1, 2, and 4. From this judgment the plaintiff appeals. Count 2 is not pressed for our consideration upon this appeal, it being admitted that the verdict of the jury thereon is conclusive. The verdict of the jury upon count 4 appears to be sufficiently supported. The answer sets forth a composition and settlement of all damages claimed by reason of the matters set forth in count 4, and we find nothing as to that count which calls for our consideration upon this appeal. Our attention will be given to count 1 of the complaint and the defendant's answer thereto.

The action is based upon a failure of the defendant to receive and pay for crushed rock in accordance with the terms of a contract entered into between the plaintiff and defendant, dated the 10th day of August, 1928. The complaint alleges that the defendant had a contract with the state of California, made through the department of public works, for the improvement of a certain portion of a state highway known as and called the "Redwood Highway," between Wilson creek bridge and Klamath river bridge, the improvement being known as "Job No. 91-T-C-3"; that thereafter the plaintiff and the defendant, on or about the 10th day of August, 1928, entered into a certain contract by the terms of which the plaintiff was to furnish all the crushed rock to be used in making the improvement called for in the contract just referred to. The complaint further alleges that in the construction of said improvement 24,000 cubic yards of crushed rock, or thereabouts, were used. The complaint further alleges that the defendant accepted only 9,590.9 cubic yards of said rock, and no more, and refused to receive any more rock under said contract, though the plaintiff was ready and willing at all times to furnish the same. It is then alleged in the complaint that the cost of producing the additional rock required for the construction of said improvement, in addition to the 9,590.9 cubic yards accepted by the defendant, would not have exceeded the sum of $10,500, and that the value thereof, produced, would have been the sum of about $22,334.10, and that the plaintiff's profit under the contract would have been a sum not less than $11,843.10, no part of which has been paid by the defendant to the plaintiff.

[1] The pertinent portions of the contract referred to in the first count of the complaint, the substance of which we have set forth, are in the following words and figures, to wit:

"That Whereas, there exists between the

said J. E. Johnston, and the California State Highway Commission, a contract for the construction of 7 and 3/10 miles of highway between Wilson Creek Bridge and Klamath River Bridge, in the state of California by said J. E. Johnston, known as 'Job No. 91-T-C-3', and is desirous of contracting with the said H. W. Webber for crushed rock for surfacing said highway;

"Now, Therefore, it is hereby agreed by and between the parties hereto that said party of the second part shall furnish 15,000 cubic yards more or less, of 1 inch crushed rock for surfacing said highway, the same to comply with, and pass the specifications of the said California State Highway, the exact quantity to be delivered shall be agreed upon between the parties hereto as the work progresses; preparations for said work to begin immediately after the execution of this contract, and the work thereunder to begin as soon as machinery can be installed.

"The price at which said party of the second part shall furnish said crushed rock as aforesaid shall be $1.55 per cubic yard, truck measurement, at second party's bunkers to be located 2 1/10 miles north of Wilson Creek, to be paid by said party of the first part herein to said party of the second part as early as the 10th and not later than the 20th of each month after commencement of work, for the previous month's production of crushed rock aforesaid, all of which said crushed rock shall be accepted and accounted for at said second party's bunkers."

The answer of the defendant admits the contract; admits that the defendant refused to accept any greater quantity of crushed rock than 9,590.9 cubic yards; and admits further that there was used in the making of said improvement 20,258 cubic yards of crushed rock. The pleadings on the part of both the plaintiff and the defendant show that no other contract or agreement was entered into between the parties than the instrument which we have set forth. Without setting it forth in detail, it is sufficient to say that the allegations of the complaint and the admissions of the answer present for our consideration only one question, to wit, What quantity of crushed rock is called for by the agreement entered into between the plaintiff and the defendant, as set forth herein?

The contention of the respondent and the verdict of the jury as to the first count and the judgment of the court based thereon can be supported only upon the theory that the following words contained in the contract, to wit, "the exact quantity to be delivered shall be agreed upon between the parties hereto, as the work progresses," controlled and limited the quantity of crushed rock to be delivered by the plaintiff to the defendant, and that as no further contract or agreement was entered into between the parties, the defendant had a right to refuse to accept any crushed rock under said contract, at such time as he saw fit. In other words, to state it broadly, the contract did not bind the defendant to receive any crushed rock to be used in the making of the improvement contemplated, unless the defendant saw fit to accept the same. This statement shows the inherent weakness of the interpretation of the contract necessary to support a judgment in the defendant's favor, and that the contract must be read as a whole or entirely disregarded. By so doing it will be readily seen that the excerpt which we have just set forth is only inserted in the contract for the purpose of ascertaining the quantity of crushed rock to be paid for, and not as a limitation of the quantity which the defendant was bound to accept under the terms and provisions of the contract. Let us examine the contract and set forth what appears to be the clear intent of the parties entering into the same.

In the very beginning of the contract it is recited that J. E. Johnston has a contract with the California state highway commission "for the construction of 7.3 miles of highway between Wilson creek bridge and Klamath river bridge, in the state of California, * * * and is desirous of contracting with the said H. W. Webber for crushed rock for surfacing said highway." There can be no question as to what highway is referred to here; it is 7.3 miles of highway between two certain designated points. Then the contract proceeds: "Now, therefore, it is hereby agreed by and between the parties hereto that said party of the second part shall furnish 15,000 cubic yards more or less, of 1 inch crushed rock for surfacing said highway." What highway? Again, there is no uncertainty as to the highway referred to, said highway being 7.3 miles of highway between Wilson creek bridge and Klamath river bridge. "The exact quantity to be delivered shall be agreed upon between the parties hereto as the work progresses." It is evident that the 15,000 cubic yards, more or less, is only an estimate, not the exact quantity that would be required, not the exact quantity the plaintiff covenanted to deliver, and not the exact quantity which the defendant agreed to purchase. That quantity was to be determined from time to time as the crushed rock was delivered; it could not be agreed upon otherwise, unless the parties knew exactly the number of cubic yards required to surface the said highway, which was set forth as being 7.3 miles.

[2] The respondent contends that as the appeal is upon the judgment roll alone, that in order to support the judgment it must be presumed that there was a subsequent agreement between the plaintiff and the defendant,

that the quantity of crushed rock to be delivered was 9,590.9 cubic yards, and that such agreement was proved at the trial. Under the pleadings in this case, however, no such presumption can be indulged in. It is specifically set forth in the complaint and in the answer that there was no other agreement than the written agreement which we have set forth. It is further contended that as the defendant denied damages, it must be presumed that the plaintiff suffered no damages. This contention, however, is squarely in conflict with the pleadings, and especially the admission of the defendant's answer. The answer of the defendant admits refusal to accept more than 9,590.9 cubic yards of crushed rock; it admits the use of 20,258 cubic yards in the construction of the highway mentioned in the contract.

From what we have stated, the contract and the admissions of the pleadings in this case demonstrate that the plaintiff was entitled to judgment on the first count set forth in his complaint.

The judgment of the trial court as to counts 2 and 4 of the plaintiff's complaint is affirmed; and the judgment of the court as to count 1 of the plaintiff's complaint is hereby reversed; neither party to be allowed costs.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

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214 Cal. 384

PACIFIC COAST ENGINEERING CO. v. DETROIT FIDELITY & SURETY CO.

S. F. 14188.

Supreme Court of California.

Nov. 30, 1931.

1. Principal and surety 🔑119.

As respects discharge of surety, whether contractor's notice to defaulting subcontractor constituted rescission or election to stand on contract and sue for damages *held* matter of intent.

2. Principal and surety 🔑161.

Finding contractor's notice to defaulting subcontractor and surety constituted election to terminate performance and to sue for breach *held* supported.

> The general contractor's notice to subcontractor contained information that contract was terminated and cancelled because of default, but the notice to the subcontractor's surety stated that the subcontractor's contract had been canceled for his delinquency and that general contractor would proceed with performance of obligation and would hold surety responsible for liability on bond.

3. Principal and surety 🔑117.

If obligee's premature payment without surety's consent is one on which obligee seeks recovery, payment constitutes alteration of principal's obligation, exonerating surety (Civ. Code, § 2819).

4. Principal and surety 🔑117.

If obligee's premature payments without surety's consent is one on which obligee is not seeking recovery, payment does not constitute alteration of principal's obligation (Civ. Code, § 2840, subd. 2).

> In such case, surety is exonerated under Civ. Code, § 2840, subd. 2, if payment has injuriously affected its rights.

5. Principal and surety 🔑117.

Where contractor based right to recover from subcontractor's surety on premature payments made within contract, payment constituted alteration of obligation exonerating surety (Civ. Code, § 2819, and § 2840, subd. 2).

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tyron, Judge.

Action by the Pacific Coast Engineering Company against the Detroit Fidelity & Surety Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Superseding opinion of District Court of Appeal in 293 P. 140.

John Ralph Wilson, of San Francisco, for appellant.

George F. Snyder, of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment for the plaintiff in an action on a contractor's surety bond.

On November 25, 1925, the plaintiff entered into a contract with one Worswick whereby the latter agreed to furnish all the material and labor, etc., for the erection and field painting of the structural steel for the Sacramento memorial auditorium, which the plaintiff was under obligation as the general contractor to complete. On the same date the defendant wrote its bond to the plaintiff for the faithful performance of the contract on the part of its principal, Worswick. The contract between the plaintiff and Worswick provided that 75 per cent. of the valuation of all work installed shall be paid monthly by the plaintiff upon presentation of certificates issued by Worswick. On January 14, 1926, and about ten days after commencement of the work, Worswick, being in need of funds wherewith to proceed with his contract, arranged to and did receive from the plaintiff, concededly without the defendant's knowledge or consent, the sum of $1,000 for which he gave to the plaintiff his demand note in that sum. In January and February, 1926, Worswick furnished steel and labor of the value of $1,775.50, on which he had been paid other cash sums aggregating $650. Further payments had been refused by the plaintiff, although 75 per cent. of the value of the work and material furnished had been demanded, on the ground that the advance of $1,000 had been applied to the payments due. On February 17, 1926, Worswick abandoned the contract. The plaintiff through its president then carried on negotiations with Worswick and his surety, the defendant, in a futile attempt to procure either one of them to complete Worswick's contract. On March 1, 1926, the following letter signed, "Pacific Coast Engineering Company, by J. J. Coney, President," was sent to Worswick: "Inasmuch as you are in default in your performance of the agreement entered into between yourself and the undersigned, Pacific Coast Engineering Company, on the 25th day of November, 1925, for the erection of the steel work on the Sacramento memorial auditorium at Sacramento, and this default has continued for a period of more than ten days to our great damage, this will serve to notify you that your contract above mentioned is now terminated and cancelled." At the same time the plaintiff sent a letter to the defendant in which the following pertinent portions appear: "Pursuant to said agreement work was commenced by Worswick and continued by him until the 17th day of February, 1926, since which date he has ceased and failed to carry out the terms and provisions of said contract, and is now in default thereunder. By reason of the terms above stated and in consequence of the position we occupy obligating us to carry out and complete the erection of the steel on this job we are compelled to notify you that we are this day advising Mr. Worswick that his contract is cancelled for his failure and delinquency in the performance of same and we shall proceed with the performance of the obligation undertaken by him thereunder. This notice is given to you to advise you of your status under your bond and we shall hold you responsible for your liability thereunder."

The plaintiff completed Worswick's contract, expending a sum greatly in excess of the original contract price, and sued the defendant in this action on its bond. The trial court found, among other things, that prior to the abandonment by Worswick of his contract the plaintiff had paid to Worswick at least 75 per cent. of the value of the work completed under the contract up to that time and the plaintiff had complied in all respects with its obligations under said contract; that the plaintiff, in accordance with the contentions, and evidence produced in support thereof, had advanced to Worswick the sum of $1,000 without a certificate of work done, for the purpose of enabling said Worswick to carry on his work under the contract; and that it was not true that said contract had been canceled or rescinded. Judgment for the plaintiff in the sum of $5,000 and interest was entered.

The trial court made no special finding as to whether the president of the plaintiff corporation had authority to sign the letter of March 1, 1926, so as to bind the plaintiff, and in the absence of any evidence in the record to overcome the prima facie showing of authority in the president (Grummet v. Fresno Glazed Cement Pipe Co., 181 Cal. 509, 185 P. 388), we must assume that the court based its finding that the contract was not canceled or rescinded upon its conclusion from the evidence that the letter written to Worswick did not have that effect.

The defendant makes two contentions on this appeal: (1) That the letter of March 1, 1926, to Worswick operated to cancel Worswick's contract and the plaintiff could not thereafter maintain an action for its breach against Worswick or against the defendant as his surety; and (2) that the $1,000 note transaction between Worswick and the plaintiff, without the knowledge or consent of the defendant, exonerated the defendant from any liability under its bond.

[1] There is no dispute with the principle that if the letter to Worswick operated to discharge the contractor from liability under his contract with the plaintiff, the surety also is discharged. But the question presented on this point involves the construction to be placed upon the language appearing in the letter to Worswick, i. e., whether by said letter the plaintiff intended to discharge Worswick from liability on account of his default. Whether a notice is one of rescission, or of termination of further performance amounting to an election to stand on the contract and sue for damages for its breach, has been held to be a matter of intent. See Tuso v. Green, 194 Cal. 574, 582, 229 P. 327; McNeese v. McNeese, 190 Cal. 402, 405, 213 P. 36; Sanborn v. Ballanfonte, 98 Cal. App. 482, 488, 277 P. 152. Looking at the letter to Worswick alone a liberal interpretation would cast at least a doubt as to what the plaintiff intended by the words "terminated and cancelled," which, in the absence of any other evidence of intent, the court may be compelled to resolve in the defendant's favor. But the court would not be justified in ignoring competent evidence which may be said clearly to explain the words used by the plaintiff and to show an intent not to dis-

charge the principal from liability under his contract. The letter to the defendant exhibits clearly the intent on the part of the plaintiff, by reason of Worswick's default, to terminate only his performance, to stand upon its rights under the contract, and itself to complete Worswick's obligation and to charge the liability where it fell under the terms of the contract and the surety bond. The evidence fairly sustains the trial court's conclusion that the letters to Worswick and to the surety did not have the effect of annulling and rescinding Worswick's contract, but that the effect was the same as in the case where the obligee notifies the principal and the surety of the principal's default and of its intent to take over and perform the principal's obligations without releasing any of its rights under the contract and the bond. A notice similar to that involved here was so interpreted in United States v. McMullen, 222 U. S. 460, 32 S. Ct. 128, 56 L. Ed. 269, where the distinction between a notice exhibiting an intent to elect to terminate further performance and stand upon the contract, rather than to rescind the contract, was discussed. The fact that the contract there expressly recognized the effect to be given to an annulment as distinguished from a rescission does not vitiate the applicability of the court's reasoning upon which the result reached is based. In that case the stipulation in the contract merely furnished evidence of the intent to be read from the use of the word "annul," while here the evidence of the meaning to be attributed to the words "cancel and terminate" is supplied by the letter to the defendant surety itself, and by the conceded purpose and tenor of the prior negotiations had between and among the obligee, the principal, and the surety.

[2] In support of its second contention, the defendant relies upon sections 2819 and 2840 of the Civil Code and authorities which will be discussed. It is urged that the $1,000 advanced by the plaintiff to Worswick before any money was due under the contract was an alteration of the original obligation of the principal by which the surety is exonerated in like manner with a guarantor. It is apparent from the findings that the trial court concluded that the $1,000 received by Worswick was a premature payment under the contract and not a loan transaction outside of the contract, but that nevertheless the plaintiff was entitled to judgment against the defendant surety. We may say that it is conceded by both parties that the findings in this respect are supported by the evidence. In fact, we find throughout the record that the plaintiff has at all times insisted that the payment of $1,000 to Worswick, concededly not authorized under the terms of the contract, was on account of payments to become due under the contract, and the plaintiff has based a recovery upon its right to offset that amount against the sums due to the contractor at the time of his default.

The defendant contends that it is established by the authorities cited by it that a premature payment is a material alteration of the contractual obligation which will exonerate the surety without any inquiry into the question whether the surety has been prejudiced thereby. It is the position of the plaintiff that there is authority in point in this state which establishes that the premature payment will not exonerate the surety if it has not prejudiced its rights.

The case first relied upon by the defendant is Calvert v. London Dock Co., 2 Keen 638, 48 Eng. Rep. Full Reprint 774, where the contractor abandoned the work and the obligee completed it and sued at law to recover from the contractor and his sureties. The sureties, by a bill in equity, sought to be relieved of liability under their bond on the ground "that the company [the obligee] until the entire performance of the contract, would have retained in their hands, so much of the contract price, as by the contract, they were entitled to retain, as a security for the performance of the rest of the contract; and that by advancing to Streather more than they were bound to do, the company deprived the plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond." It was there said: "The argument however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of the time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security. * * * What the company did, was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands, one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather, was so far altered, that the sureties must be considered to be discharged from their suretyship."

In Bragg v. Shain, 49 Cal. 131, it was held that the use of some $5,000, out of a fund to be retained amounting to over $9,000, in paying off liens prior to the time when the obligee was authorized to do so, operated to release the surety, and a judgment against the latter was reversed. In a brief opinion the court expressly followed Calvert v. London Dock Co., supra, holding that the case before it was not distinguishable in principle from that case and Taylor v. Jeter, 23 Mo. 244. In the latter case the money required to be retained was paid prematurely directly to the contractor who failed to apply it to lien claims for labor and materials of which the obligee previously had notice. The court there relied on Calvert v. London Dock Co., supra, in affirming a judgment for the surety on the ground that "the owner having notice of them [the liens], and paying what by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly."

The next case cited is Kiessig v. Allspaugh, 91 Cal. 231, 27 P. 655, 13 L. R. A. 418. There the plaintiff sued to recover the sum of $1,800 expended to discharge liens after the full contract price had been paid to the contractors. The court, relying on Bragg v. Shain and Taylor v. Jeter, supra, in reversing the judgment against the surety, stated: "The judgment cannot be sustained upon the facts. The appellant Lundeen was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or ought to have been, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building, and in equity he held the same also for the benefit of the sureties. It was a special fund to which they had a right to look for their indemnity * * * and the plaintiff was not authorized to surrender it without their knowledge or consent, and, having done so, the appellant was discharged."

We are next referred to Bateman Brothers v. Mapel, 145 Cal. 241, 78 P. 734, 736, as the first case, so it is claimed, in which inquiry is made into the question whether the surety was prejudiced by a premature payment. In that case the contract to furnish brick provided that payments were to be made to the contractor of 90 per cent. of the value of the materials delivered conditioned that materials are satisfactory to the architects. A special provision permitted the obligees to make payments, if they desire, in advance of deliveries, but it was held that this provision did not waive the requirement of evidence of satisfaction on the part of the architects. The contractor, Mapel, failed to manufacture or deliver any brick, but the plaintiffs had advanced to him money from time to time, aggregating $7,000, to assist him in his experiments to produce a satisfactory product, but his experiments failed. The plaintiffs then purchased the brick in the open market expending in excess of $2,000 over the contract price, and sued the surety. The surety defended on the ground that it was exonerated by the payments to Mapel, and obtained judgment in its favor. This court in that case made a clear distinction between an alteration in the original obligation (section 2819, Civ. Code), and an act of the creditor by which the surety is prejudiced. Subdivision 2, § 2840, Civ. Code. The court pointed out that the plaintiffs did not plead the payments to Mapel, nor did they base a recovery upon them; that the payments to Mapel were not made under the contract, but, at the utmost, were but transactions outside of the contract to the benefit of both Mapel and his surety, by which the latter was not injuriously affected; and the judgment was reversed. The gratuitous statement is there made that "if a recovery were here sought against the surety because of these advancements, he might well be heard to say that he was not responsible therefor, and was exonerated under his bond, because they were not made in accordance with its terms," and "if the recovery were sought for the $7,000 so advanced, the materials for which were not furnished, the surety could rightfully claim his exoneration."

The defendant next refers us to County of Glenn v. Jones, 146 Cal. 518, 80 P. 695, 697, 2 Ann. Cas. 764. There the surety gave a bond in the sum of $2,500. The plaintiff made the first payment of $1,860 provided for in the contract, prematurely, before all of the materials had been placed on the grounds as required by the contract. The contractor pocketed the money and abandoned the contract. The plaintiff relet the contract at a sum which was $1,070 in excess of the original contract price, and sued the surety on its bond, and recovered judgment. The judgment was reversed upon the ground that the obligation of the principal by the premature payment had been altered in a material respect without the consent of the sureties. The court relied upon all of the hereinbefore cited cases down to Bateman Bros. v. Mapel, supra. In answer to the respondent's contention that the sureties could be released only to the extent of the premature payment, it was stated: "We do not think the facts of this case warrant the application of such rule. The contract might have been fully performed by Jones if the plaintiff had not given him money before it was due. After he had received more money than he could possibly have made as profit by continuing his contract, the pressure that should have continued to keep him honest was entirely removed, and he was left, without compass or rudder, to follow his own dishonest inclinations. We think it the better rule in a case like this to hold that the sureties are entirely released. Where plaintiff willfully departed from its contract, and gave the contractor money not due him, and the damages occurred by reason thereof, we do not feel called upon to enter the field of conjecture as to whether or not the loss should be shared by the parties."

The next case relied upon as deeming material the question of prejudice in relation to premature payments is Russell v. Ross, 157 Cal. 174, 106 P. 583. But it appears that there the trial court instructed the jury that if the plaintiffs had made any payments to the principal Ross prior to the time when they became due under the contract, such payments had the effect of releasing the surety and the latter was entitled to a verdict. The verdict was for the plaintiffs. On the appeal it was held that, as the case had been tried on the theory that any prepayment would have relieved the surety, the implied finding of the jury to the effect that no such prepayment had been made was supported by the evidence. That case, therefore, on the facts and on principle, is analogous to Bateman Bros. v. Mapel, supra.

We come now to the case of Dunne Inv. Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 P. 405, 411, 412, which, without more, may be said to have tended expressly to open up the subject of prejudice to the sureties in connection with premature payments under the contract. There a payment was made in advance of the time when the materials were placed in the building and before the issuance of the required certificate, contrary to the provisions of the contract. Subsequently, however, the materials were placed in the building and the advance payment was deducted from a larger payment then due and the balance paid in accordance with the contract. Relying on Bateman Bros. v. Mapel and distinguishing County of Glenn v. Jones, the District Court of Appeal, after a full discussion, concluded that the surety, not having been prejudiced by the premature payment, was not exonerated. However, on denial of the petition for hearing, this court definitely relegated the case to that class of cases such as Bateman Bros. v. Mapel, viz., cases where the payment is made *without* the terms of the contract and the original obligation of the principal is not altered. This court stated that where the original obligation was altered "it is thoroughly settled by our decisions that no inquiry will be allowed as to whether or not the surety was in fact injured thereby," and that the facts of that case were not such as to bring it within the provisions of section 2819 of the Civil Code, but were to be considered as being affected only by subdivision 2 of section 2840.

The cases of County of Glenn v. Jones and Kiessig v. Allspaugh were followed in Silberstein v. Kitrick, 35 Cal. App. 91, 169 P. 250, wherein premature payments upon which the plaintiff relied for a recovery were held to exonerate the surety.

In the next case, Union Oil Co. v. Pacific Surety Co., 182 Cal. 69, 187 P. 14, the construction contract was between the plaintiff oil company and Webber-Duller Company as the principal. The trial court concluded that the defendant surety was exonerated by payments made by a third company, called the transportation company, but which maintained a close affinity with the oil company, under a loan agreement made with the contractor, basing its conclusion upon a finding that the loan agreement was a subterfuge and a fraud on the surety for the purpose of covering premature payments under the construction contract. It was held that the finding of fraud and subterfuge was not sustained by the evidence, and that the payments under the loan agreement were not payments under the construction contract, but were simply a transaction outside thereof which did not prejudice the surety, and the judgment in favor of the surety was reversed. This case, therefore, is in line with the cases headed by Bateman Bros. v. Mapel, supra.

We are finally referred to Mazzera v. Ramsey, 72 Cal. App. 601, 238 P. 101, 105, wherein a finding that the payments claimed to have been premature were made with the knowledge and consent and at the instance and request of the sureties, was held to be supported by the record. It is true that the District Court of Appeal there said, "Even if the premature payment had been pleaded, it would not be a defense, because, under the circumstances stated, the sureties were not prejudiced thereby," citing Bateman Bros. v. Mapel and Dunne Inv. Co. v. Empire State Surety Co., supra. But without reference to the fact that the payment was consented to by one of the sureties, the "circumstances stated" referred to the fact that a payment of $400, made in advance of the time when it became due, was in payment of labor and material which were actually furnished and the amount was deducted from a subsequent payment, so that on these facts the case is in effect in line with the cases cited as supporting the quoted statement.

[3, 4] The above résumé must make it obvious that the authorities reviewed establish the following: (1) That if the premature payment made by the obligee without the knowledge or consent of the surety is one upon which the plaintiff is relying and is dependent for a recovery against the surety, then the payment has materially altered the principal's obligation, the injury to the surety

is established, and the surety is exonerated by virtue of the provisions of section 2819 of the Civil Code. (2) If, however, the advance made without such knowledge or consent prior to the time when a payment under the contract is due, is one upon which the plaintiff is not relying nor dependent for a recovery against the surety, it is a payment made without the terms of the contract and is not an alteration of the obligation of the principal in any respect, and is governed by the provisions of subdivision 2 of section 2840 of the Civil Code, and the surety is exonerated if the payment has injuriously affected its rights. We discover nothing to the contrary in the cases of Siegel v. Hechler and Southwestern Ins. Co., 181 Cal. 187, 183 P. 664, and Burr v. Gardella, 53 Cal. App. 377, 200 P. 493, as in those cases the facts show that the payments were made within the terms of the contracts.

[5] In the present case, as we have seen, the plaintiff is relying and basing his right to recovery upon the $1,000 payment to Worswick, which the plaintiff contends was made within the contract, and therefore premature, and the trial court so found. Under these circumstances and the law as so established, it must be held that the premature payment altered the obligation of the principal under the contract, and that the surety was exonerated.

The judgment is reversed.

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214 Cal. 396

PEOPLE v. FAROLAN.

Cr. 3430.

Supreme Court of California.
Nov. 30, 1931.

1. Homicide 🔑354.

Evidence *held* to justify imposition of death penalty for murder in first degree.

2. Homicide 🔑294(1).

It was not error to instruct that, if jury found accused guilty of murder, they would be retained to try issue of insanity, on theory that, if jury had known insanity issue might be submitted to another jury, it would not have returned verdict carrying death penalty.

3. Homicide 🔑237.

Evidence *held* to sustain finding that accused convicted of murder in first degree was not insane.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Victor Farolan was convicted of murder in the first degree, and he appeals.

Affirmed.

Martin Murphy, of San Jose, for appellant.

Fred L. Thomas, Dist. Atty., and H. S. Bridges, Asst. Dist. Atty., both of San Jose, for the People.

SEAWELL, J.

The defendant, a native of the Philippine Islands, and whose true name seems to be Santos Amigay, was charged by an information filed in the superior court of the county of Santa Clara with the crime of having on August 9, 1930, murdered one Damaso Mangna. The jury impaneled to try the case found him guilty of murder in the first degree, without making any recommendation as to penalty, and such a verdict carries with it, by operation of law, the imposition of the death penalty. He has appealed to this court from the judgment pronouncing the death penalty upon him, but his counsel has filed no brief in his behalf. We have nevertheless made thorough examination of the record, including the transcript of testimony, without receiving any suggestion or aid from counsel as to whether or not defendant had suffered any material injury or the denial of any right which the law guarantees to persons charged with crime. The defendant being unable to provide himself with counsel, the court appointed one to defend him. Under the rule we would be justified in dismissing the appeal without examination into the record, but, by reason of the fact that the extreme penalty of the law was imposed upon the defendant, we have felt constrained to go fully into the merits of the trial. The same jury which found the defendant guilty of first degree murder disagreed as to the issue of insanity interposed by him, and another jury impaneled to try said issue of insanity found against defendant on his said plea of insanity at the time the homicide was committed.

The defendant and six or seven of his countrymen were engaged approximately two weeks before the homicide was committed in picking prunes and tomatoes on a ranch owned by one Silacci. The defendant, the deceased, and several other Filipinos lived in a small primitive building on said premises which comprised a kitchen, dining room, and at least two sleeping rooms. The homicide was committed approximately at 6 o'clock p. m., Saturday, August 9, 1930; the pickers having quit work at 5 o'clock p. m. on that day. Vidal Contarno, Santiago Cabanis, Victor Farolan, the defendant, and the deceased immediately at the close of their labor returned to their living quarters. Others went to town and did not return until shortly after the homicide. Contarno, Cabanis, and the defendant sat down at the dinner table a little before 6 o'clock, while the deceased went into the kitchen and took a bath. He and the defendant were apparently not on friendly terms. Upon finishing his bath, the deceased, clad in his underclothing, walked from the kitchen through the dining room into his bedroom. As he passed through the dining room, Santiago Cabanis asked or invited him to sit down and join them at the table. The deceased replied that he would as soon as he could dress. The defendant was silent during the time he was at the table. Soon after the deceased passed to his room, the defendant left the dining room and went to his own room, which was located adjacent to the decedent's room. An open door space not finished with a door connected the two rooms. Very shortly after the defendant left the dining room, a shot was heard by Contarno and Cabanis, who proceeded to the room occupied by the deceased. He was found seated on a cot leaning forward in a dazed condition. The defendant was standing over the deceased, holding a revolver in his left hand, and was violently beating the deceased upon the head and body with an inch and a quarter iron pipe, approximately eighteen inches in length, which he held in his right hand.

The shot aimed at the deceased had missed its mark. As Contarno and Cabanis were observed entering the room, he fired two shots at them, neither of which hit its mark, and he then pursued Contarno into the dining room, where Contarno took refuge under a table. Driven from this position, Contarno seized a tomato box, which was conveniently near, and protected himself by using it as a shield against the violent assault made upon him by the defendant as well as he was able until the struggle was brought to an end by defendant being pushed out of the door to the ground below, which was some three feet lower than the floor level. Contarno, who had received several injuries upon the head and body, and Cabanis, escaped by flight. After Contarno made his escape, the defendant was seen by his associates and companions in pursuit of him, armed with pistol and iron pipe, threatening to kill him if he met up with him.

The autopsy showed that the deceased had received a number of blows upon the head and body, and that death was caused by a blow which produced a fracture of the skull.

The cause of the violent outbreak of the defendant is not very clearly brought out by the evidence. There is evidence as to the motive or exciting cause to the extent that one Captain Oso and defendant had been convicted of some offense committed in the Philippine Islands, and had served jail sentences thereon, and that the defendant during the day had heard the deceased and Contarno speaking about the defendant's trouble in the Islands.

The defendant was known to own a pistol. The iron pipe with which he committed the homicide had been noticed in his room by his countrymen prior to the assault. He said that these weapons were not for them, but for a Filipino whom he first knew in Marysville, and with whom he seemed to have had trouble a short time before the homicide; in fact said Filipino became apprehensive for his safety and left the locality.

The foregoing is a substantial résumé of the evidence introduced on the part of the people. The defendant offered no evidence in his own behalf upon the trial for homicide, but did offer evidence at the two trials upon the issue of his sanity.

[1] If the defendant was legally responsible for his act, there can be no doubt as to the justice of his conviction. The degree of punishment was left entirely to the discretion of the jury. No question is or can be raised as to the fairness of the court's charge. In fact the court throughout the trial exhibited that consideration for the defendant's rights which should always become trial courts in cases where the taking of human life is, under the law, committed to the discretion of human tribunals.

[2] Upon a motion for a new trial defendant insisted that the extreme penalty should not have been imposed upon the defendant by reason of the mental deficiencies with which it is claimed he is affected. It was argued by defendant's counsel upon the motion for a new trial that the jury, which was told by the trial judge at the outset that, if it found the defendant guilty of murder, it would also be retained to try the issues of insanity, would not have visited the extreme penalty upon the defendant had it known that there was a possibility of that issue being submitted to another jury. In short, it was the claim of counsel that the jury would not have returned a verdict which carried the death penalty had it known that the issue of insanity might, under any contingency, be determined by any other body than said jury selected to try the defendant on the murder charge. In other words, appellant's argument was that, because of its supposed power to nullify the verdict rendered in the murder charge by finding the defendant not guilty by reason of insanity, it did not give the serious consideration to its verdict that it would have received had it known that there was a possibility of the issues of insanity being taken from its control. Counsel for defendant made the statement at the hearing of said motion that the jurors had entered into an understanding during the trial of the murder

charge that they would find the defendant not guilty by reason of insanity on the final issue, but finally two or three jurors receded from their agreement, leaving nine voting for not guilty by reason of insanity, and three against the plea of insanity.

No attempt was made to impeach the jury's verdict, and there is nothing in the record whatever which tends to sustain counsel's mere statement or conjecture.

It seems unthinkable that a jury which was instructed as was the jury in the instant case as to its right to relieve the defendant of the extreme penalty of the law if in the exercise of its discretion it was proper to do so, would, under any circumstances, consent to the infliction of the highest degree of punishment known to the law when it was within its power to have relieved the accused of said extreme penalty.

[3] As to the homicide having been committed by the defendant, there is no ground for controversy; counsel for defendant being forced by the overwhelming volume of evidence to admit it. His defense below was directed to the sanity of the defendant. A number of the countrymen of defendant were called and testified as to defendant having been injured by the fall of a horse which he was handling and also by a spell of typhoid fever which he suffered, both of which occurred some years ago in the Philippine Islands. It was claimed that he underwent changes thereafter which were described as "talking to himself," spells of depression and fearfulness, and some acts which would in a small way indicate delusions. Some four or five days after he was placed in jail his demeanor, which had theretofore been normal, radically changed and became such as to attract the attention of an officer connected with the sheriff's office, and the county probation officer, who, basing their opinion on the defendant's conduct for a period beginning some several days after his incarceration and continuing for some time thereafter, were of the opinion that the defendant was not normal, or, as they put it, not "mentally right."

The trial judge summoned two alienists, one connected with the State Hospital at Agnew and the other a practicing physician at San Jose, who, upon making studies of the defendant and his family history, expressed themselves as being entirely satisfied that he was sane. Applying the standard by which legal responsibility is measured in cases of homicide, the defendant cannot escape responsibility for his act. From the first he denied that he had killed the deceased and attempted to cast suspicion upon Contarno by claiming that Contarno committed the deed.

Upon the record this court cannot interfere with the punishment fixed by the judgment, as there appear to be sufficient legal grounds upon which the judgment may properly be sustained.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

119 Cal.App. 1

DARROW v. THAYER.

Civ. 568.

District Court of Appeal, Fourth District, California.

Dec. 2, 1931.

Rehearing Denied Dec. 22, 1931. Hearing Denied by Supreme Court Jan. 28, 1932.

1. Brokers ⚷49(3).

Defendant's contract to pay commission for broker's negotiating exchange of property between certain individuals and defendant did not entitle broker to commission for negotiating sale of same property from trust company to defendant.

The facts disclosed that just prior to the time of defendant's agreement to pay the broker a commission for negotiating an exchange of certain property between certain individuals and defendant, those individuals owned that property subject to a deed of trust; that a few days before such agreement the property was sold under the trust deed to a trust company; that the broker negotiated a sale of the property from the trust company to defendant; and that the broker tried to recover from defendant the commission under the agreement above referred to.

2. Brokers ⚷49(1).

To entitle real estate broker to commission under contract, he must show performance on his part.

3. Brokers ⚷40.

Parties to agency contract may make payment of commission dependent upon any lawful condition.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Millard F. Darrow against W. B. Thayer. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hert & Withington, of San Bernardino, for appellant.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Walter J. Hartzell, of Redlands, and Fred A. Wilson, of San Bernardino, for respondent.

MARKS, J.

Appellant brought this action against respondent to recover a real estate commission in the sum of $6,550, which he claimed he had earned. The case was tried before the court without a jury and judgment was rendered in favor of respondent.

The record shows that at the close of appellant's case the trial court, upon motion of counsel for respondent, struck out a large portion of the evidence offered by appellant. For the purpose of clarity in the statement of facts we will assume, but not hold, that this order was erroneous and will incorporate herein some of the facts learned through a perusal of the stricken evidence.

Appellant was, at all times material to this action, a real estate broker duly licensed as such under the laws of the state of California. On March 12, 1928, he brought respondent and B. P. Biggs and Grace E. Biggs together and secured their signatures upon a contract to exchange real estate situated in the state of Missouri and belonging to respondent, for property in the city of Redlands belonging to Mr. and Mrs. Biggs. On that day appellant and respondent signed an agreement in words and figures as follows:

"Redlands Calif., March 12, 1928.

"This agreement made in duplicate this the 12th day of March 1928, by and between W. B. Thayer and Millard F. Darrow, doing business under the name of Consolidated Realty Company, Redlands, California.

"In consideration of making exchange of properties for the above mentioned W. B. Thayer and B. P. Biggs said W. B. Thayer agrees to pay to Millard F. Darrow the sum of Six thousand five hundred and fifty dollars ($6,550.00) for commission in full for both parties.

"It is also understood that any expense involved in the showing of W. B. Thayer's properties, is to be paid by said M. F. Darrow.

"In the event a Thirty Thousand Dollar loan is consummated through the office of Mr. Darrow in which he is not obliged to pay any commission, there shall be no commission charge to W. B. Thayer. Of course no loan to be issued unless approved by W. B. Thayer.

"In witness whereunto we have here attached our signatures, this day and year above written.

"W. B. Thayer
"Millard F. Darrow

"Henry Blume, Witness."

On March 17, 1928, appellant again brought respondent and Mr. and Mrs. Biggs together and a new exchange agreement was executed. The March 12th agreement was destroyed. In this new agreement one parcel of the Missouri property was omitted from the exchange. It was orally agreed between all parties that the commission contract of March 12, 1928, should remain in full force and effect as the contract governing commissions on the exchange of properties under the contract of March 17, 1928.

The record discloses that prior to February 16, 1928, B. P. Biggs and Grace E. Biggs were the owners of the Redlands property subject to a deed of trust. On the last-named date the property was sold under the terms of the deed of trust to the St. Louis Union Trust Company, Robert D. Sterling, and H. W. O'Melveny, trustees under the last will and testament of Edward C. Sterling, deceased, who thereupon and thereafter became and continued to be its owners. Appellant entered into negotiations with the trustees for the sale of this property to respondent, and respondent entered into an escrow in a Redlands bank whereby he agreed to purchase the Redlands property from the trustees for the sum of $42,000, payable $20,000 in cash, the balance secured by a note and incumbrance upon the property. The escrow was finally closed and respondent became the owner of the Redlands property under a deed to him executed by the trustees.

Thereafter, on or about April 18, 1928, B. P. Biggs and Grace E. Biggs filed their complaint in the superior court of San Bernardino county against W. B. Thayer seeking to enforce specific performance of the March 17th exchange agreement. This case was tried upon the complaint, answer to the complaint, cross-complaint by the defendant, and answer thereto by the plaintiff. Judgment was rendered in favor of defendant and against the plaintiffs, refusing specific performance of this contract and refusing to compel Thayer to convey to Mr. and Mrs. Biggs his Missouri property.

[1-3] Under this state of the record it is apparent that the terms of the March 17th agreement between Mr. and Mrs. Biggs and Thayer were never consummated, and the exchange of their properties was never completed. In lieu thereof there was a sale of the Redlands property from the trustees to Thayer which was negotiated by appellant.

By the agreement under which appellant claims his commission the consideration was definitely stated as the "making exchange" of properties between W. B. Thayer on the one part and B. P. Biggs on the other. The parties to this agreement must be presumed to have deliberately adopted, and that they intended to be bound by, the terms used in this express written contract. Appellant is certainly bound by its terms, and his right of recovery is limited to the promises made by respondent. Appellant must show a performance on his part to entitle him to his commission.

In the case of Miller v. Lerdo Land Co., 52 Cal. App. 662, page 677, 199 P. 1073, 1079, it was said: "It is the general rule that, unless there is a provision in the contract to the contrary, a real estate agent employed to negotiate a sale of land earns his commission, and it is payable when he produces within the time allowed a purchaser who is ready, willing, and able to take the property on the terms prescribed or with whom the owner enters into a contract upon these or other terms satisfactory to him; and the agent cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or because other terms of the contract are not carried out. Stewart v. Bowie [43 Cal. App. 751], 185 P. 868. But the parties to an agency contract may make the payment of commission dependent upon any lawful condition. The contract may be so worded as to make it clear that the parties intended that the commissions, or some part thereof, were not to be paid except upon a completed sale, or (as in the case at bar) out of installments of the purchase money as the same shall be paid by the buyer. Shepherd-Teague Co. v. Hermann, 12 Cal. App. 394, 107 P. 622." The cases of Connor v. Riggins, 21 Cal. App. 756, 132 P. 849, and Jennings v. Jordan, 31 Cal. App. 335, 160 P. 576, are to the same effect.

Under the express terms of his contract appellant can only recover by proving an exchange of the Missouri properties of Thayer for the Redlands property of Mr. and Mrs. Biggs. Instead of proving this exchange, he proved a sale of the Redlands property by the trustees of the estate of Edward C. Sterling to W. B. Thayer. Even though this sale was negotiated by and consummated through the efforts of appellant, it cannot serve as a basis of a recovery of commissions under his agreement with respondent which provided for payment only upon completing the exchange of the properties.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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119 Cal.App. 59

PEOPLE v. MURILLO.

Cr. 2122.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1931.

Rehearing Denied Dec. 21, 1931.

1. Homicide 🔑254.

Evidence *held* sufficient to sustain verdict of murder in second degree.

2. Criminal law 🔑517(4).

Only prima facie evidence of criminal agency in person's death is necessary to admission in evidence of accused's extrajudicial statements.

3. Criminal law 🔑822(1).

Instructions in murder case must be considered as a whole.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Custodia Murillo was convicted of murder in the second degree, and she appeals.

Affirmed.

Frank J. McCarthy and Patrick F. Kirby, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

IRA F. THOMPSON, J.

This is an appeal from a judgment sentencing the defendant for murder in the second degree and from an order denying her motion for a new trial.

It is a sad and, if the jury be right, a most unnatural, case. The appellant is the mother of the girl she was found guilty of murdering. The following testimony was introduced and is now said to support the verdict: On December 20, 1930, the appellant went to the undertaking parlor of Enrique Cloret, in Belvedere, and informed one C. D. Ramirez that her daughter 2 years of age was dead, and that she wanted him to care for the body. Ramirez asked her for the name of her doctor, and was informed that she had none, whereupon Ramirez said that it would be necessary for him to notify the coroner's office. The appellant then told Ramirez that if he could not make arrangements to care for the child not to take the body to the coroner's; that she feared "to have the difficulties"; and that the child had died as a result of a fall from an automobile in which she (the appellant) had been taking her daughter to the hospital a week before. Jessie Flores, a witness for the people, testified that she lived in a part of the same house occupied by appellant during the months of May, June, and July of 1930; that appellant during those months beat the child "two or three times a day," sometimes using her fists and at other times a stick, and on one occasion a bottle; that with the bottle she struck the child on "the back of the neck" or "back (t) here some place," and then grabbed her by the hair of the head and pulled her into the house. The witness immediately following this occurrence asked appellant why she was so mean to the little girl, and was informed by appellant that "she did not like her"; that she

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

hated her; that she wished she could "see her dead"; and that she would "get rid of her."

The most damning evidence, however, consists of pictures which were introduced in evidence and which have been transmitted to this court. They show the little body literally covered with cuts, scratches, and bruises. Dr. Wagner, who performed an autopsy, testified as follows: "I found numerous contusions, abrasions and superficial lacerations on the head, face, shoulder, arms, back and lower limbs, some of which were a week or more old, and a few very recent. There was a large, deep-seated abscess on the outer, posterior aspect of the right arm, which, on section was filled with about two ounces of yellow pus. The right knee was considerably swollen and discolored, and on opening the area I found inflammatory exudite mixed with pus in and around the joint. I opened the head and found no visible injury of the brain or skull. I opened the body and found all the organs free from disease, but of a slight yellowish hue." He further said that the yellowish hue was caused by "the infection which the child suffered from these wounds," that "the cause of death was contusions and abscesses following injuries upon various parts of the body," but that it was contributed to by the very many bruises; and further gave it as his opinion that the injuries resulting in pus had been inflicted about four days before. The appellant told the officers that the bruises were caused by the child falling out of an automobile on the Monday prior to its death, at about the hour of 10 o'clock a. m.; that she was taking her daughter to the hospital in the Dodge automobile belonging to Sam Vasquez or Jose, his brother, the man "living with her as husband," when she fell out; that due to the excitement she put the child back in the car and drove home but did not call a doctor. However, Sam Vasquez, who did own the Dodge touring car, and Careno A. Cayeto and Pablo Talamantes, all testified that they three were working at the Midwick Country Club and used the car every day in December until after the 20th, leaving at 6 a. m. and not returning until after 4:30 p. m. and that on none of these days did the appellant drive them to work or have the use of the car.

We now come to that part of the testimony upon which the appellant especially relies and which we may properly say introduces an element of confusion if not uncertainty into the situation. The child was first admitted to the general hospital on June 18, 1929, at which time it was 6 months and 3 weeks old and weighed nine pounds and nine ounces. According to the testimony of the physicians, she was suffering at the time with lobar pneumonia of the right upper chest, rickets, malnutrition, and some skin infection. During this first stay at the hospital both ears became infected and were lanced. She was discharged therefrom as cured on August 28, 1929, in care of an assistant probation officer, who placed her in a boarding home at Wilmington, and at the time weighed thirteen pounds three ounces. During the child's stay at the boarding home it broke out with a rash, but at the time of its redelivery to the mother, on April 21, 1930, it seemed to be in good health. In July of the same year the assistant probation officer called at the home of appellant and saw the child, at which time also she seemed to be in "fair condition." However, the next time she saw the little girl she had sores on her face and she believed "on the hands" and a "sort of a swelling in one ankle." This probation officer did not see her again until October. However, a Miss Ryden, a nurse of the county health department, attached to what is known as the Mara Villa Health Center, saw the child several times in August. On the 15th day of that month the appellant took her daughter to the health center, and Miss Ryden describes her condition at that time by saying that she was an undernourished child not yet 2 years old; that she had an infection in the upper part of her fingers. The nurse bandaged the fingers and told the appellant to keep them bandaged so that the child could not scratch at the sores, and also that there was a suspicion of tuberculosis and for that reason it would be well to keep the child isolated. Pursuant to this suggestion, the baby was put into a very rude shed constructed out of scraps and open on one side. At a later suggestion of the nurse the child's hands were tied down. On Sunday, September 6, while the appellant was taking a walk with the child's stepfather (the identity of her own father is not clear from the record), some of the neighbors found the girl lying on a board in the shed with its little hands tied down. They summoned officers, and she was taken again to the general hospital. Her condition at that time was very poor. She was dehydrated, rachitic, and emaciated, due in the opinion of the physician to a deficiency of diet or malnutrition. She was unhygienic, with "numerous contusions and abrasions all over the hands" and according to the nurse all over her body. She again had an infection in the ear. And here is an outstanding fact: According to the mother the child would not drink milk, but when taken to the hospital on this occasion she was very hungry on being received into the admitting room. In order that we may convey the exact thought of the witness, a nurse at the hospital, we here set down the testimony verbatim:

"Q. I will ask you if you gave this child at that time anything to drink? A. Yes, we did. We gave her, we offered her some water, and she drank it so greedily that we went upstairs and got her some hot cocoa, and she had about eight cups of cocoa.

"Q. Eight cups of cocoa in what space of time? A. Just about as fast as she could drink it.

"Q. How many ounces in a cup of cocoa? A. About four.

"Q. So she drank how many cups of cocoa? A. About 32 ounces of cocoa, and a cup of water and four graham crackers. That is what we gave her in the admitting room."

Dr. Pedlow also testified that the child was given about two cups or eight ounces of milk in the admitting room within the space of about 20 minutes, and that she requested the nurses to give it no more. The records also disclose that during this stay in the hospital she took milk regularly. She was again discharged to the mother on October 4, 1930, or a little more than two months before her death.

The appellant claims (1) that there was not sufficient proof of the corpus delicti to warrant the admission into evidence of the extrajudicial statements of the defendant; (2) that the evidence is not sufficient to sustain a conviction for any crime; (3) that, if sufficient for any crime, certainly none greater than that of manslaughter; and (4) that the court erred in three instructions given to the jury.

[1, 2] On account of the unusual character of the case, we have set forth the testimony with considerable detail. From that recital, and aside from any admissions of the appellant, sufficient appears to have warranted the jury in finding that the child's death was caused by injuries inflicted upon the child at various times; that those injuries were inflicted by the mother, who was seen to beat the child two or three times a day some five or six months before her death, sometimes with her fists, sometimes with a stick, and once with a bottle. There is another significant fact. Under proper care and feeding, the child flourished. Under the mother's care she languished and became dangerously ill. Assuming for the purpose of argument that the proof, exclusive of the statements and admissions of the defendant, does not indicate beyond a reasonable doubt that the child did not die of natural causes, yet certainly there was sufficient evidence to establish, prima facie, the criminal agency. Such proof is all that is required before the introduction of the extrajudicial statements. People v. Selby, 198 Cal. 426, 245 P. 426, is squarely in point and conclusive upon appellant.

When we consider her statement that she hated the child, that she was going to get rid of her, her false recital of the manner in which the baby was bruised and scratched, and her fear of difficulties if the coroner had to be consulted, together with the other facts, it can scarcely be said that the argument of appellant that the testimony is not sufficient to sustain the verdict merits further comment.

[3] The contention with respect to the instructions is that in three of them the trial judge trespassed upon the functions of the jury by indicating therein that there was no doubt in his mind that the defendant was guilty. There is no substantial foundation for the assertion. The instructions dealt particularly with the subjects of intent, moving cause, and identity of the defendant, and correctly declare the law with respect thereto. The jury, when considering the instructions as a whole, could not possibly have been misled or have gained from the instructions an idea that the judge had any belief concerning the guilt or innocence of the appellant.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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118 Cal.App. 561

MARTIN v. HOLLINS et al.

Civ. 8043.

District Court of Appeal, First District, Division 2, California.

Nov. 25, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Denied by Supreme Court Jan. 21, 1932.

1. Sales 🔑480(5).

Judgment permitting subsequent buyers to retain generator set, innocently bought from conditional buyers, on paying balance due to conditional seller, *held* proper.

> In the absence of express or implied authority on the part of the conditional buyers to make the sale, and in the absence of circumstances giving rise to an estoppel against the conditional seller, such a conditional judgment, permitting the bona fide subsequent buyers to retain the property by paying balance due under the conditional sales contract, is proper.

2. Replevin 🔑69(3).

In replevin, evidence showing damages from detention of property *held* inadmissible without alleging general damage or praying damages for detention.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Joseiah L. Martin against W. C. Hollins and another, copartners doing business under the firm name and style of the Hollins & Arrousez Electric & Engineering

Company, and others. From a judgment granting partial relief and from an order denying a motion to set aside the judgment and enter a different judgment, plaintiff appeals.

Affirmed.

Lynden Bowring, of Los Angeles, for appellant.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for respondents.

SPENCE, J.

Plaintiff brought an action in replevin seeking to recover possession of a portable motor generator set mounted on a trailer. The trial court gave judgment in favor of plaintiff for the recovery of possession of said equipment or its value in the sum of $6,500 with the proviso that the defendant Waldorf Productions, Inc., was entitled to possession thereof conditioned upon its depositing into court within five days the sum of $500 with interest for the benefit of plaintiff. Plaintiff appeals from that portion of the judgment providing for recovery of possession by said defendant upon payment of said amount and also from the order of the trial court denying plaintiff's motion to set aside the judgment and to enter another and different judgment under sections 663 and 663a of the Code of Civil Procedure.

[1] The essential facts are not disputed. The property involved was one of four generator sets originally sold by plaintiff to defendants Hollins and Arrousez under a conditional sales contract dated December 4, 1924, and providing for a total purchase price of $15,600. Said defendants Hollins and Arrousez were engaged in a general electrical contracting business and in selling and renting generator sets. These sets were rented to various motion picture studios by said defendants for a period of about eleven months and payments on the contract were made to plaintiff, bringing the balance due down to $4,500. On November 4, 1925, plaintiff consented to the sale by said defendants of two of said sets and a new conditional sales contract covering the two remaining sets was executed for the amount of said balance. About six months later, without the knowledge or consent of plaintiff, said defendants sold the set here involved together with another generator to defendant Waldorf Productions, Inc., for a cash consideration of $7,000. Hollins and Arrousez subsequently become insolvent, and after their default in making the final payment of $500 which was due on August 4, 1926, plaintiff brought this action. The trial court found in favor of plaintiff and against the subsequent purchaser on the defense of authorization of said sale by plaintiff and also on the defense of estoppel. Nevertheless, the trial court found among other things that at the time said Hollins and Arrousez sold said generator set, the subsequent purchasers believed that said Hollins and Arrousez were the owners thereof and had no knowledge of the fact that plaintiff was the owner. The trial court concluded that the subsequent purchasers were entitled to possession in the event that they made the final payment of $500 together with interest and accordingly judgment was entered as above indicated.

Appellant contends that the judgment in his favor should have been absolute and that the trial court erred in entering a conditional judgment entitling respondents to possession upon payment of the balance due. In our opinion the judgment giving to respondents the right to possession upon payment of the balance due was proper under the circumstances.

Much difficulty has been encountered in establishing just and equitable rules governing the respective rights of the owner of personal property and the innocent purchaser for value from the person possessing the property as agent, bailee, pledgee, or conditional sales vendee of the original owner. Frequently such agent, bailee, pledgee, or conditional sales vendee after wrongfully disposing of the property in his possession disappears or becomes insolvent and the question of the relative rights of his innocent victims becomes of the highest importance. The authorities in the various jurisdictions are not in accord.

Following the great weight of authority, it has been held in this state that the mere fact that the owner delivers the possession of property to another is insufficient to create an estoppel against the owner and in favor of the innocent purchaser (10 Cal. Jur. 642; Pacific A. Corp. v. Bank of Italy, 59 Cal. App. 76, 209 P. 1024; Coolidge v. Austin, 22 Cal. App. 334, 134 P. 357; note 25 L. R. A. [N. S.] 760), but that under certain circumstances when the owner holds out another or allows him to appear as the owner or as having full power of disposition over the property, the innocent purchaser will be protected (10 Cal. Jur. 641; Pacific Finance Corp. v. Hendley, 103 Cal. App. 335, 284 P. 736; Democrat-Herald Pub. Co. v. Pettit, 94 Cal. App. 724, 271 P. 910; General Securities Corp. v. Reo Motor Car Co., 91 Cal. App. 16, 266 P. 576; General Securities Corp. v. Reo Motor Car Co., 91 Cal. App. 22, 266 P. 579; State Finance Co. v. Isaacson, 86 Cal. App. 113, 260 P. 580; Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067; note 47 A. L. R. 85). In many of the cases where the innocent purchaser has prevailed it is not altogether clear whether the decisions are based upon circumstances from which actual authority is implied or upon circumstances negativing any actual authority express or implied but giving rise to an estoppel. See note 47 A. L. R. 85. At any rate, it is apparent that in the absence of express or implied authority the courts have been reluctant to extend the doctrine of estoppel because of the hardship ordinarily inflicted upon the owner who may have received little if anything for his property. On the other hand, when the circumstances are insufficient to create an estoppel great hardship is ordinarily visited upon the innocent purchaser. This leads to the inquiry as to whether there is not some middle ground upon which the respective rights of the owner and the innocent purchaser from a conditional sales vendee may be determined.

Despite the very general use of conditional sales contracts this is a case of first impression so far as we have been able to ascertain. We have found no authority dealing with the propriety of a conditional judgment in an action between the owner and the innocent purchaser from the conditional sales vendee. The case of McConnell v. Redd, 86 Cal. App. 785, 261 P. 506, cited by appellant, is not in point as the rights of an innocent purchaser were not involved. In our opinion in the absence of express or implied authority to make the sale, and in the absence of circumstances giving rise to an estoppel, a conditional judgment such as we have under consideration is proper where a bona fide purchaser for value without notice of the original owner's title has purchased the property from the one in possession under a conditional sales contract with the owner. Such rule does no violence to any established rule or principle and is based upon justice and reason. Unless full payment with interest is made, the original owner obtains possession. If the innocent purchaser meets the condition and obtains possession, the owner receives the entire purchase price agreed upon together with interest and the innocent purchaser is penalized only to the extent necessary to fairly compensate the owner. The law has always endeavored to protect the rights of the innocent purchaser for value and such protection should readily be extended to those cases where no injustice is done to others. The estoppel rule, which entirely defeats the claim of the owner, still remains applicable in proper cases, and the general rule, which entirely defeats the claim of the innocent purchaser, still remains applicable in the so-called "mere possession" cases where no conditional sales contract is involved.

Much is said in the briefs regarding the evidence and findings tending to create an estoppel. We deem it unnecessary to consider these matters, as the trial court found against the defense of estoppel and respondent has not appealed. We further deem it unnecessary to consider the findings of the trial court to the effect that appellant's "right of forfeiture was temporarily suspended."

[2] Appellant makes the further point that the trial court erred in sustaining objection to his offer to prove the usable value of the property as a basis for damages for detention during the pendency of the action. We find no error in the ruling of the trial court, as there was no allegation of general damage in plaintiff's complaint nor was there any prayer in the complaint for damages on account of such detention.

The judgment and order appealed from are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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119 Cal.App. 74

MILLS v. FRIEDMAN.

Civ. 6639.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1931.

Rehearing Denied Jan. 5, 1932. Hearing Denied by Supreme Court Feb. 4, 1932.

1. Malicious prosecution ⚷64(2).

In malicious prosecution action, evidence of defendant's failure to disclose pertinent facts to district attorney sustained finding of malice and want of probable cause.

2. Malicious prosecution ⚷32.

Malice may be inferred from want of probable cause for prosecution.

3. Malicious prosecution ⚷64(1).

Evidence regarding reasonableness of attorney's fees for defending against malicious prosecution of plaintiff is unnecessary to authorize award therefor, especially where case is tried before court without jury.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by E. L. Mills against L. A. Friedman and another. From an adverse judgment, the named defendant appeals.

Affirmed.

Charles W. Cradick and Claude W. Corlett, both of Los Angeles, for appellant.

Homer C. Mills, of Long Beach, for respondent.

HOUSER, J.

Through the efforts of plaintiff and two others, respectively named Pitblado and Copps, defendant became the owner of a large ranch, together with certain farming implements and livestock located thereon. However, defendant's ownership in the property was subject to a mortgage thereon amounting to the sum of $50,000. In addition thereto, defendant appears to have been indebted to plaintiff, Pitblado, and Copps, in at least the sum of $6,000 on account of services rendered by them in his behalf in connection with certain negotiations which led to the acquisition by the defendant of the property. It also appears that it was agreed among the several parties that out of any sale that might be made of the property, after allowing for the $50,000 mortgage thereon and paying to defendant $48,000 for his assumed equity therein, after paying the indebtedness of $6,000 and any other moneys advanced by any of the several parties in the maintenance and operation of the ranch, plaintiff, Pitblado, and Copps would be entitled to the remainder of the sale price of the property. Preceding such contemplated sale, and during a fixed period of time, the three last-named persons (which included plaintiff) were to operate the ranch. To that end, Pitblado and Copps each advanced $750, which was banked as "Pitblado's special account." Whatever expenses over the sum of $1,500 advanced by Pitblado and Copps which might become necessary to operate the ranch were to be borne and paid by defendant. Plaintiff was placed in possession of the ranch as manager thereof; but the foreman of the ranch, who had been acting as such prior to the time when defendant became its owner, remained in the same capacity under the managership of plaintiff. Shortly thereafter, and in accordance with ordinary practice, in pursuance of the advice of the said foreman, and with the consent and approval of Pitblado, but without the knowledge of defendant, plaintiff, as manager of the ranch, sold certain calves which were a part of the live stock on the ranch for the sum of $623.70, which amount was deposited in the bank in "Pitblado's special account," where it remained until it was disbursed by Pitblado in the payment of bills which had been incurred in operating the ranch. Some two weeks or more thereafter, when defendant learned of the sale of the calves, he swore to a criminal complaint by which plaintiff was charged with the commission of a felony, in that he had sold property subject to a contract, the conditions of which were yet unfulfilled, in violation of the provisions of section 504a of the Penal Code, upon which a warrant of arrest of plaintiff was issued, and plaintiff thereupon was taken into official custody. On the preliminary hearing of such charge, plaintiff was discharged by the magistrate. Thereupon the plaintiff brought an action against defendant and one Clute for malicious prosecution, which action resulted in a judgment in favor of plaintiff and against defendant Friedman for the sum of $2,500. It is from said judgment that the instant appeal is prosecuted.

On the trial of the action, in addition to the facts hereinbefore set forth, evidence was presented to the effect that, for the intended purpose solely of facilitating the sale of the ranch, and not otherwise, defendant had executed a deed of trust of the said property to a corporation, wherein plaintiff and his wife were specified as the beneficiaries thereunder; that contemporaneously therewith the corporation executed its declaration of trust regarding the said property, and plaintiff and his wife executed their several promissory notes for the aggregate sum of $50,000 in favor of defendant, and thereupon assigned their beneficial interest in the trust to the said corporation as security for the payment of said indebtedness. But in no manner does it appear that by such pretended transactions, or either of them, it was claimed or intended by any of the parties thereto that either plaintiff or defendant was in any way bound or obligated, or that the actual or equitable position occupied by either of the several respective parties one toward the other was in anywise changed or altered, or intended by any of the said parties to be in anywise changed or altered, by reason of the execution of either or all of such instruments.

The evidence adduced on the trial of the action disclosed the further fact that, prior to causing the arrest of plaintiff, defendant consulted the district attorney of the county of Riverside, by whom, in substance, he was advised that plaintiff had committed the felony specified in section 504a of the Penal Code, to wit, having sold "personal property or effects of another in his possession, under a contract of purchase not yet fulfilled." But both by the evidence of plaintiff and by that of defendant, it was unquestionably established that at no time had plaintiff either actually purchased or agreed to purchase from defendant the calves which plaintiff had sold, and for which sale he had been prosecuted.

With reference to the liability of defendant, among other findings made by the trial court, the following appear:

"That before signing the complaint upon which warrant was issued for the arrest of the plaintiff, the defendant L. A. Friedman, consulted Fred Ford, Esq., an attorney at law and prosecuting attorney of Riverside County, California, who advised said L. A. Friedman to sign said complaint, and that said proceedings would be justified, but that said defendant, L. A. Friedman, did not make to said Fred Ford, a full, or fair disclosure of all the facts within his knowledge, and said L. A. Friedman did not act upon the advice of said counsel in good faith, and did not have an actual or honest belief in the truth of the charge so laid in said complaint, at the time of signing said complaint and procuring a warrant for the arrest of the plaintiff.

"That in causing the arrest of the plaintiff, the defendant, L. A. Friedman, acted maliciously and without probable cause."

The principal point presented by appellant is that the evidence adduced on the trial of the action showed neither malice on the part of defendant toward plaintiff, nor want of probable cause, for instigating the prosecution of plaintiff.

Since the respective parties to this appeal appear to be in harmony one with the other as to the general legal principles which relate to an action for damages arising from the malicious prosecution of any person, it becomes necessary for this court to determine the one question upon which the parties are disagreed; namely, as to whether any substantial evidence was presented to the trial court from which it was authorized to make the findings of fact to which attention has been directed. In that connection, because of the admittedly legal effect which a lack of probable cause for a criminal prosecution may have upon the element of malice in the instigator thereof, an inquiry by this court, in the first instance, will be directed to the former situation.

Assuming broadly as a correct legal principle that which apparently is conceded by each of the parties to this litigation, to wit, that if, before instituting the criminal action against plaintiff, defendant in good faith made a full and fair disclosure of all the facts within his knowledge to the district attorney of Riverside county, as to himself, defendant would incur no civil liability by reason of such prosecution; the research of this court must be directed toward the ascertainment of what, if any, facts known to defendant were omitted from the statement made by him to the said district attorney. In that connection, the record herein shows that, among other pertinent facts known to defendant, but which he failed to tell to the district attorney of Riverside county were the following, to wit: That at the time he sold the calves plaintiff was the manager of the ranch: that as such manager, in accordance with the usual practice and for the purpose of protecting the remainder of the herd of cattle on the ranch, and after consultation with the foreman of the ranch, and with the advice, approval, and acquiescence of Pitblado, the calves were sold; also, that defendant, with knowledge of the facts, failed to inform the said district attorney of the truth of the situation which existed between defendant and plaintiff with reference to the purported purchase of the ranch and personal property thereon, as apparently (although not in reality) was disclosed by the said trust deed, the $50,000 promissory notes made by plaintiff, and the assignment by him and his wife of their pretended beneficial interest in the property; that likewise defendant did not disclose the fact to the said district attorney that no bona fide agreement existed on the part of plaintiff to purchase said calves from defendant. Nor did defendant tell the said district attorney the facts within his knowledge with reference to the connection which Pitblado had and sustained toward the sale of the calves, or the disposition of the proceeds of such sale. In other words, defendant did not mention the fact that, although the check in payment of the calves was made payable to plaintiff, he had indorsed and delivered said check to Pitblado, who deposited it in "Pitblado's special account," and who alone handled the money and thereafter disbursed it in payment of debts contracted by the parties in the operation and maintenance of the ranch; and consequently, as a matter of fact, that plaintiff never received "one penny" of the money which was derived from the sale of the calves. Nor prior to the preliminary examination of plaintiff on the criminal charge preferred against him did defendant ever inform the district attorney of the financial relationship which existed between plaintiff and defendant, or among all the respective parties to the several transactions which led to the acquisition by defendant of the ranch or of the manner of financing the operation of the ranch, or of the agreement among such parties with reference to the proposed division of the money which might be received from the sale of the ranch.

The syllabus in the case of Vernon v. Plumas Lumber Co., 71 Cal. App. 112, 234 P. 869, which is supported not only by the language of the opinion but as well by authorities therein cited, is as follows: "In an action for damages for malicious prosecution, where every element of the defense of advice of counsel and probable cause rests upon disputed facts, and the trial court finds upon conflicting evidence that the agents of defendant did not act either honestly or in good faith upon the advice of counsel, that defendant's agents did not state to said persons all the facts in the case, that defendant's agents were not advised that a criminal prosecution would lie and that there was not probable cause for the prosecutions had, the conclusions of the trial court are conclusive upon appeal, even though there is testimony from which the trial court might have come to a different conclusion."

[1] Accepting such statement of the law as a correct declaration of a legal principle applicable to the question here at issue, it would follow that the contention of appellant to which attention has been directed cannot be sustained by this court; that is to say, that the finding by the trial court as to the lack of good faith in defendant in instituting the criminal proceeding against plaintiff, and the consequent want of probable cause therefor, is fully justified by the evidence adduced on the trial of the action.

[2] That malice may be inferred from want of probable cause is also well-established law. Robinson v. McKnight, 103 Cal. App. 718, 284 P. 1056; Randleman v. Boeres, 93 Cal. App. 745, 270 P. 374; Burke v. Watts, 188 Cal. 118, 204 P. 578.

But if more were necessary to establish

malice in the mind of defendant against plaintiff, it might be supplied from a consideration of the evidence as to certain statements made by defendant preceding the arrest of plaintiff. Without herein setting forth in detail the verbatim declarations of defendant in that regard, it may suffice to state that in general they disclosed a state of mind in defendant which evinced an unquestionable ill will against plaintiff coupled with the determination on the part of defendant to insist upon and to press a criminal prosecution against plaintiff for the purpose of forcing, if possible, a favorable financial settlement to the benefit and in the interest of defendant of certain civil claims which he held against plaintiff, rather than to be of assistance to the state of California in the punishment of a criminal act, or the general administration of justice.

[3] Appellant also complains that, although by the findings of fact and the ensuing judgment plaintiff was awarded an amount of money which included the sum of $800 allowed as attorney's fees, no evidence was introduced on the trial of the instant action as to whether such expenditure by plaintiff as and for attorney's fees in his defense of the criminal action against him was reasonable. That on such question, especially where tried before the court sitting without a jury, no evidence is necessary, has been repeatedly decided by the appellate courts of this state. Spencer v. Collins, 156 Cal. 298, 306, 307, 104 P. 320, 20 Ann. Cas. 49; Estate of Duffill, 188 Cal. 536, 552, 206 P. 42; Kirk v. Culley, 202 Cal. 501, 505, 261 P. 994; Estate of Iser, 52 Cal. App. 405, 408, 198 P. 1014; Grecian v. Jackson, 76 Cal. App. 264, 244 P. 608; Bowman v. Maryland Casualty Co., 88 Cal. App. 481, 492, 263 P. 826; Moore v. Maryland Casualty Co., 100 Cal. App. 658, 667, 280 P. 1008; Theisen v. Keough (Cal. App.) 1 P.(2d) 1015.

No other point presented by appellant merits discussion by this court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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118 Cal.App. 558

POTTER v. LAWTON et al.

Civ. 7824.

District Court of Appeal, First District, Division 1, California.

Nov. 25, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Denied by Supreme Court Jan. 21, 1932.

Judgment ⚷**243.**

In suit by partial assignee of note secured by trust deed against assignor and trustee, court properly refused to adjudicate rights of makers of note and owners of property, not made parties.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Walter H. Potter against W. J. P. Lawton and others. From judgment for plaintiff, he appeals.

Affirmed.

B. S. Gregory, of San Francisco, for appellant.

J. W. O'Neill and James H. Boyer, both of Oakland, for respondents W. J. P. and Anna F. Lawton.

KNIGHT, J.

This is an appeal by plaintiff from a decree entered in a suit instituted by him as partial assignee of a promissory note and deed of trust to establish his interest therein and to obtain certain other relief. The trial court by its findings determined the extent of plaintiff's interest, but by its decree did not grant the full relief sought and for that reason plaintiff contends that the decree is erroneous.

The complaint alleged that Fred L. Kernes and wife executed to W. J. P. Lawton and wife their promissory note for the sum of $1,230, secured by a deed of trust, naming Central Title Company, Inc., as trustee; that the Lawtons assigned to plaintiff a $750 interest in said note and trust deed; and on information and belief it was alleged in paragraph III of the complaint that Louis Horning and wife were then the owners of the real property covered by the trust deed, and were ready, able, and willing to pay said note, and desired to have the property released from the lien of said trust deed; that they had offered to pay the amount due upon the surrender of the note and the execution of a reconveyance of the property, but that the Lawtons had refused to authorize such reconveyance unless the whole amount due on the note was paid to them. The prayer of the complaint was that the court by its decree establish the extent of plaintiff's interest in said note and trust deed and require the Lawtons to deliver said note and trust deed to the court; that the Hornings be allowed to pay the amount due on said note and trust deed into court, and that thereupon it be decreed that said title company execute and deliver to the Hornings a reconveyance of said property and that said note be canceled; that of the sum so paid into court plaintiff receive $750 with interest and costs.

The Lawtons and the title company demurred to the complaint upon numerous grounds, among them being that there was a defect of parties defendant in that the Kernes, the makers of the note and trust deed, were not made parties defendant. The demurrers were overruled, and thereafter the Lawtons and the title company answered, denying among other things the allegations of paragraphs III and IV of said complaint. There was no appearance in the action at any time by the Hornings, and the trial proceeded on the issues raised by said answers.

The court found that it was true that plaintiff was an owner by assignment of a $750 interest in said note and trust deed as alleged in paragraphs I and II of the complaint; but it further found that the allegations of paragraph III and a portion of those embodied in paragraph IV were not true. The substance of paragraph III is hereinabove set out, and according to the negative findings thereon the Hornings were not the owners of said property, nor ready, able, or willing to pay the note and take a reconveyance of the property, nor prevented from so doing by the action of the Lawtons in refusing to authorize a reconveyance. And the negative findings upon the allegations in paragraph IV were to the effect that it was not true that plaintiff had requested the title company to reconvey said property upon the payment to plaintiff of the amount due under his assignment, nor that the Lawtons would not permit this to be done unless the total amount of the note was paid to them. The trial court's conclusions of law were "that plaintiff should take nothing by this action, but, without prejudice to any rights of the Hornings mentioned in said complaint to have the matters herein adjudicated and the rights of all parties mentioned herein determined." The form of the judgment followed the form of the foregoing conclusions.

It is doubtless true, as plaintiff contends, that a partial assignee may bring a suit in equity to have his rights under the assignment determined, and may, if he so desires, bring before the court all parties having an interest in the subject matter and thereby obtain a judgment finally determining the whole matter, leaving nothing to be done by piecemeal. Martin v. Howe, 190 Cal. 187, 211 P. 453; Gause v. Pacific Gas & Electric Co., 60 Cal. App. 360, 371, 212 P. 922; Goldman v. Murray, 164 Cal. 419, 129 P. 462; T. D. Campbell & Co. v. Holehan, 48 Cal. App. 568, 192 P. 121. But in the present case neither the Kernes, the makers of the note and trust deed, and who according to the negative findings relating to paragraph III were still the owners of the property and therefore liable on said note, nor the Hornings, whom plaintiff claims are the present owners of the property and entitled to a reconveyance, were brought in as parties defendant. The Kernes were not even named as such in the complaint, and although Mrs. Horning, as a witness, testified in response to a leading question propounded by plaintiff's counsel that she was a party defendant, the record fails to show that she or her husband ever appeared in the action, or that either was ever served with summons. Something is said in plaintiff's brief about the defaults of the Hornings having been entered; but this is denied by respondents and the record fails to disclose any such entry.

Therefore it was the want of jurisdiction over parties as well as the want of findings that precluded the court from granting the full relief sought.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

WUTCHUMNA WATER CO. et al. v. SUPERIOR COURT IN AND FOR TULARE COUNTY et al.*

Civ. 381.

District Court of Appeal, Fourth District, California.

Nov. 25, 1931.

As Modified on Denial of Rehearing Dec. 21, 1931. Hearing Granted by Supreme Court Jan. 21, 1932.

Injunction ⚷230(4).

Order adjudging defendant in injunction proceedings guilty of contempt could not be supported by trial court's informal decision announced from bench and clerk's minute order thereafter entered.

Original proceeding for writ of certiorari by Wutchumna Water Company and others to review an order of the Superior Court of Tulare County, S. L. Strother, Judge, adjudging petitioners guilty of contempt.

Writ granted.

Guy Knupp, of Porterville, and Walter M. Gleason and Norman J. Ronald, both of Oakland, for petitioners.

W. R. Bailey and Farnsworth, Burke & Maddox, all of Visalia, for respondents.

MARKS, J.

This is an original proceeding brought in this court to review an order of the respondent court adjudging petitioners guilty of contempt of court for the violation of the terms of an injunction.

The petitioner, the Wutchumna Water Company, is a mutual water company with its principal place of business in the city of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 12 P.2d 1033.

Visalia in the county of Tulare, organized and existing for the purpose of diverting water from the Kaweah and St. Johns rivers in Tulare county for distribution to its stockholders. Petitioners, F. R. Heberling and H. Huff, were officers or employees of the company. Several years ago a controversy arose between the Wutchumna Water Company and various other owners and appropriators of water flowing from the Kaweah and St. Johns rivers, over the amount of water being diverted by the Wutchumna Water Company from these streams. It appears that an agreement fixing the quantity of water to be diverted by the Wutchumna Water Company, dependent upon the amount of the flow of waters in these rivers, was executed between this company and numerous other owners of water rights. It was contended by the other owners that the Wutchumna Water Company was diverting and using water in excess of that to which it was entitled under the terms of this agreement, and an action was filed in the superior court of Tulare county seeking to restrain it from the diversion and appropriation of such excess. The plaintiffs in this action sought a temporary restraining order enjoining the Wutchumna Water Company, its agents, servants, and employees from the appropriation and use of such excess water. After a lengthy and exhaustive hearing before the respondent judge, he announced his conclusions and decision as follows: "The injunction will issue. Bond in the sum of $75,000.00. Usual conditions of course." No other order was ever made by him, nor did he ever sign any order for the issuance of a temporary injunction.

On May 20, 1929, the clerk of the superior court of Tulare county entered a minute order, the material portions of which are as follows: "That the application of the plaintiffs for a temporary injunction herein during the pendency of said action as against the said defendant Wutchumna Water Company, be, and the same is hereby granted as applied for in said application, and upon the plaintiffs giving and filing an undertaking in the sum of seventy-five thousand and no/100 ($75,000.00) dollars, the said defendant Wutchumna Water Company, and its officers, agents, servants and employees, be and they are, and each of them is, enjoined and restrained during the pendency of this action, from taking, diverting or carrying away from said Kaweah river through that certain ditch known as the Wutchumna Ditch, leading out of the Kaweah river at a point on the southeast quarter of Section thirty-four (34), Township seventeen (17) South, Range twenty-seven (27) East, M. D. B. & M., any of the water flowing in said Kaweah river at the head of said Wutchumna Ditch in excess of ten per cent. of the amount of water flowing in said river at the head of said ditch at all times when the flow in said river at said point does not exceed one thousand cubic feet of water per second, and any water from said river in excess of one hundred cubic feet of water per second at any time when the flow in said river at said point is more than one thousand cubic feet of water per second, but does not exceed two thousand cubic feet of water per second, at said point, and any water from said river in excess of one hundred cubic feet of water per second, plus ten per cent. of the excess of flow in said river at said point above two thousand cubic feet of water per second at any time when the flow of water in said river at said point exceeds two thousand cubic feet of water per second, but does not exceed twenty-four hundred cubic feet of water per second, and any water from said river in excess of one hundred forty cubic feet of water per second at any time when the flow af water in said river at said point exceeds twenty-four hundred cubic feet of water per second; that the said plaintiffs give a good and sufficient undertaking as required by law with sufficient sureties in the sum of seventy-five thousand and no/100 ($75,000.00) dollars to the effect that said plaintiffs will pay to the defendant Wutchumna Water Company, such damages not exceeding said sum as said defendant may sustain by reason of the injunction herein ordered if the court shall finally decide that said plaintiffs were not entitled thereto, and that upon the giving of such undertaking a Writ of Injunction issue out of this court as against the said defendant Wutchumna Water Company in accordance herewith."

On June 20, 1929, the plaintiffs in the action filed a bond to which exception was made by the Wutchumna Water Company. A supplemental undertaking was filed on the 22d day of June, 1929, and the undertakings were approved on June 27, 1929.

On the 20th day of June, 1929, the clerk of the respondent court issued a temporary restraining order following the terms of the minute order above quoted. This temporary injunction was served upon the petitioners.

On July 26, 1929, the plaintiffs in the injunction proceeding in the court below instituted contempt proceedings against the petitioners and others alleging that they had violated the terms of the injunction by continuing to divert a greater quantity of water than was permitted by the terms of the writ.

Many intricate questions are presented for our consideration by the respective counsel in this proceeding. From the view which we take of the case, it will be necessary for us to consider but one of them: Can the order adjudging the petitioners guilty of contempt, be supported by the informal decision of the trial court announced from the bench, and the minute order thereafter entered by the clerk of the court?

In approaching this question, we must bear in mind that "contempt of court is a specific criminal offense (Ex parte Gould, 99 Cal. 362, 33 P. 1112, 21 L. R. A. 751, 37 Am. St. Rep. 57; Cosby v. Superior Court, 110 Cal. 52, 42 P. 460), and the charge and the finding and judgment of the court thereon are to be strictly construed in favor of the accused (Schwarz v. Superior Court, 111 Cal. 112, 43 P. 580). The findings of the judgment do not conclude a reviewing court from an examination of the record to determine the jurisdictional facts. Blair v. Hamilton, 32 Cal. 50. While all natural and proper conclusions from the record will be indulged, where the performance or taking of necessary steps which ought to appear of record is not shown, it will be presumed that such steps were not taken. 5 Ency. Pl. & Pr. 290. * * * The conviction of a citizen of a criminal offense without service on him of a formal statement of the charge against him and an opportunity to plead and answer such charge would be an anomaly in the law of criminal procedure. That a contempt proceeding is summary in its character is a reason why greater care should be taken in pursuing the steps required to reach a conviction, rather than a reason why certain steps necessary to the ordinary criminal proceeding should be omitted or overlooked. Where an alleged contempt has been committed without the presence of the court or the judge at chambers, there is no step essential to a proper accusation, and plea in an ordinary criminal case which can safely be omitted from the proceeding." Reymert v. Smith, 5 Cal. App. 380, 90 P. 470, 471.

The case of Cosby v. Superior Court, 110 Cal. 45, 42 P. 460, 462, is of considerable assistance to us here. It appears in that case that John C. Kofoed and Lillie H. Kofoed brought an action against Cosby and Samuel B. Gordon seeking to have it decreed that Gordon held certain assets as their trustee. At the conclusion of the trial, a decree was entered adjudging that Gordon held certain assets for the Kofoeds as their trustee, and directing that he convey the assets to the Kofoeds upon their payment of certain specified sums on or before July 31, 1893. On August 1, 1893, the trial judge announced orally from the bench that he would grant the Kofoeds three days further time from the 31st day of July within which to make payment required in the original decree. No minute order of this subsequent direction was made at the time but on April 2, 1895, the trial court directed its clerk to enter such order nunc pro tunc as of August 1, 1893. The Kofoeds had made the tender which had been refused, and they instituted contempt proceedings against Cosby for refusal to accept the money tendered by them. The trial court found Cosby guilty of contempt and imposed a sentence upon him. In annulling this order, the Supreme Court said: "Assuming that, as contended by respondent, its general power over its judgment is such that the order in question, although possibly erroneous, is not void, there is yet an obvious reason why the action of the court in convicting petitioner of contempt cannot be sustained. While the recitals of the contempt judgment are somewhat vague and general, and such as to leave it in doubt upon which particular act petitioner's contempt is based, it must of necessity rest upon one of the offers or tenders made subsequent to the order extending the time. While the attempted tender of Bradshaw is like the others recited in the judgment, it is perfectly obvious that no contempt could be predicated of that tender, since it was clearly insufficient, and petitioner was not in fault in rejecting it. In fact, the order of the court in discharging him from the charge of contempt based upon that refusal manifestly proceeded upon that theory. The contempt, therefore, must consist in petitioner's refusal to accept either the offer of August 2, 1893, or that of January 25, 1895. As we have seen, at the date of these tenders there was no record evidence of any extension of the time for making such tender, but the decree stood unchanged as originally entered. It cannot be that one can be held guilty of a constructive contempt for refusing to comply with a direction or provision having no tangible existence of record, but consisting of a mere verbal announcement. Contempt of court is a specific criminal offense (Ex parte Gould, 99 Cal. 360, 33 P. 1112 [21 L. R. A. 751, 37 Am. St. Rep. 57], and cases there cited); and it would be departing widely from the rule which so sacredly guards the personal liberty of the citizen to hold that a person may be convicted and punished criminally for a violation of a rule or direction having, if anything, but a mere potential existence. Decrees of court are required to be in writing, and remain of record, and those affected thereby have a right to stand by such record."

The case of Maier v. Luce, 61 Cal. App. 552, 215 P. 399, 401, presented a similar question as to whether an order not signed by a trial judge could be made the basis of a contempt proceeding. In deciding the case, it was held: "It will be remembered that at the time the order to show cause why defendants should not be punished for contempt of court was issued, neither by the court's minute order, nor by written order of any sort, was either the original restraining order or the undertaking given as the basis for its issuance, kept or attempted to be kept in force—the nunc pro tunc order to that effect not being signed by the judge who heard the order to show cause in the matter of the temporary injunction until a period of two months had elapsed after the hearing thereon, and being after the time when defendants were ordered to show cause why they should not be punished for contempt of court. Contempt of court is a specific criminal offense, made such by the provisions of sections 1209–1212 of the Code of Civil Procedure [citing cases]; and one may not be held guilty of such an offense by reason of his violation of an order of court having no tangible existence of record, but resting solely in a mere oral announcement by the judge. Interested parties have a right to stand upon the permanent written record of such orders."

In the case of Wheeler v. Superior Court, 82 Cal. App. 202, 255 P. 275, 277, there was under consideration the question of whether or not an oral order or direction announced by a trial judge from the bench and not reduced to writing could furnish the basis for the contempt proceeding. In this case, it was held: "We are of the opinion that as an essential part of their equity jurisdiction courts of equity have the right and power to retain control over their own injunctions, so that they may modify or suspend them as equity should require, at least where the right is reserved in the order granting the same. Without such power, it is clearly evident that great injustice might result. The granting and keeping in effect an injunction might cause as great an injury to a defendant as its denial might cause to the plaintiff. Here it is claimed that the crops belonging to petitioners, and amounting in value to the sum of $10,000, are in great danger of becoming a total loss through moulding, if not disposed of promptly. Nor do we consider that there is any merit in the remaining contention of respondent. Counsel attempts to avoid the effect of the reservation clause of the court's order of November 16, 1926, by claiming that such order was not the order for the injunction, but that the order upon which it was based was the minute entry made by the clerk under date of November 6th, when the court orally announced from the bench that it would grant injunction. This minute entry, it is true, makes no reservation of a right to the defendant to move later for the dissolution of the injunction, but it is plainly manifest that the provisional injunction was not based upon the minute entry. The order as entered by the clerk reads as follows: 'Ordered, application for temporary injunction granted. Bond fixed in the sum of $10,000.' This entry by the clerk was but a memorandum of the court's intention to sign a written order for an injunction when the same was properly prepared and presented. The minute entry lacked the essential elements of an order since it left the terms and extent to be determined later by a written order. A written order was, in fact, prepared and presented, whereupon the court amended it by inserting the provision in question. The written order as signed was clear and definite as to its terms. The minute order was incomplete, and it would have been impossible to have procured a writ of injunction pendente lite thereon in the terms prayed for or by the order to show cause. Then, again, there was no attempted service of the minute order, and none was made until after the written order was prepared and signed. When so prepared and signed, the order enjoined the defendants, naming them, from selling the prunes, and then followed the 'without prejudice clause,' after which it read 'Let an injunction issue.' It is clearly apparent that the written order was the order upon which the injunction was based, and was so considered by all the parties. It is true that in some instances orders may rest upon the clerk's minutes, but it is also true that others require some formulation by the judge. This is particularly so in the case of injunctions. An injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing. In ordinary actions at law, it is the rule that the signature of the judge is not necessary to the validity of the judgment, but it has been the almost invariable rule in this state for decrees in equity to be so signed. Tulare Irr. Dist. v. Superior Court [197 Cal. 649, 242 P. 725], supra. There are many judgments whose entry involves nothing more than clerical or ministerial duties, such as a judgment for the recovery of specific real or personal property, or a fixed amount of damages, or one which is rendered generally that the plaintiff is not entitled to recover from the defendant. In such cases, the mere order for judgment is all that is needed for the clerk, but in many other actions, and especially those of an equitable nature, the form of the judgment and the character of relief that is to be granted are as much a subject for the exercise of judicial power as is the determination of the party in whose favor judgment is to be rendered. Broder v. Conklin, 98 Cal. 360, 33 P. 211. The distinction between oral orders that are full and sufficient in themselves and those that have to be followed up by fuller written orders to dispose completely of the matter is discussed in Barbee v. Young, 79 Cal. App. 119, 249 P. 15, and Brown v. Superior Court, 70 Cal. App. 732, 234 P. 409."

The rule announced in the Wheeler Case finds consistent support in the case of Tulare Irrigation District v. Superior Court, supra, where it was said (page 669 of 197 Cal., 242 P. 725, 733): "To his findings of fact, the respondent judge appended his conclusions of law, wherein he decided that the complainants were 'entitled to a judgment and decree of this court, determining their respective rights, as aforesaid, and to a perpetual injunction of this court forever enjoining and restraining the said defendant,' etc., but, as above noted, no such judgment or decree has been entered. It is the contention of the petitioners herein that the signing of the decree in accordance with the findings and conclusions is merely a ministerial act, and that no decree may now be signed and entered except in strict conformity with said conclusions of law. In ordinary actions at law, it is, of course, the rule that the signature of the judge is not necessary to the validity of the judgment (14 Cal. Jur. 914, and cases cited), but 'it has been the almost invariable custom in this state for decrees in equity to be so signed' (Byrne v. Hoag, 116 Cal. 1, 5, 47 P. 775). Ordinarily the judgment or decree is ineffectual for any purpose until entered. Section 664, Code Civ. Proc.; Consolidated Const. Co. v. Pac. Elec. Ry. Co., 184 Cal. 244, 193 P. 238; 14 Cal. Jur. 937. Until the decree is entered, it is merely a purpose in the breast of the court, and may be changed as the judge may determine. 14 Cal. Jur. 916. Indeed, at any time before the entry of the decree, the court may change its conclusions of law upon the facts that have been found. Condee v. Barton, 62 Cal. 1; Crim v. Kessing, 89 Cal. 478, 489, 23 Am. St. Rep. 491, 26 P. 1074. If, therefore, it be essential to the validity of the decree intended to be entered by the respondent judge that the conclusions of law specify the effective date of the said injunction as upon the determination of the appeal favorable to the respondents, the court would have jurisdiction to change its conclusions of law accordingly, for no judgment or decree has yet been entered."

From the reasoning in the foregoing cases, we have reached the conclusion that the decision of the trial court announced from the bench, and the subsequent minute order entered by the clerk, cannot serve as a foundation upon which to support the order adjudging petitioners guilty of contempt of court. We are of the opinion that it was the duty of the trial court to make an order determining and setting forth the terms of the restraining order to be issued. His brief announcement of his decision, "The injunction will issue. Bond in the sum of $75,000.00. Usual conditions of course," does not disclose what he had in mind concerning the terms of the restraint to be put upon the petitioners. It was incumbent upon him to decide these terms, and to announce and file his decision. Counsel for the parties seeking the restraining order should have prepared and presented a proper order to the judge for signature. This duty should not be delegated to the clerk of a court, as seems to have been done in the instant case.

In one important particular, the minute order entered by the clerk, and the writ issued by her, vary from the terms of the restraining order sought by the notice of motion and order to show cause. The record furnishes no means of determining whether or not the trial judge intended the restraining order to follow the terms and conditions of the moving papers, or those inserted by the clerk, or some other terms and conditions not disclosed here. The law does not contemplate any such uncertainty in an order which might become the starting point for a quasi criminal proceeding, and which might result in depriving a citizen of his liberty or his property.

It is ordered that the order and judgment of the respondents adjudging petitioners guilty of contempt of court and imposing a fine upon them, be, and the same are hereby, annulled.

We concur: BARNARD, P. J.; JENNINGS, J.

COMMUNITY LUMBER CO. OF BALDWIN PARK et al. v. CALIFORNIA PUB. CO. et al. (CALIFORNIA GUARANTY CORPORATION, Intervener).*

Civ. 8042.

District Court of Appeal, First District, Division 2, California.

Dec. 8, 1931.

Rehearing Denied Jan. 7, 1932. Hearing Granted by Supreme Court Feb. 4, 1932.

1. **Mortgages** ⚷151(3).

As respects priority of mortgage and mechanic's lien, purchaser of note given by owner to contractor, *held* not bound to see that contractor applied proceeds in accordance with building contract (Code Civ. Proc. § 1183).

2. **Mortgages** ⚷151(3).

Where building contract provided that proceeds should be applied first to pay for labor and materials, noncompliance did not give priority to mechanics' liens, over trust deeds recorded before building was commenced.

3. **Contracts** ⚷214.

Parties to building contract may provide for times and amount of payments to contractor.

4. **Mortgages** ⚷151(3).

Deed of trust securing note from owner to contractor, recorded before commencing building construction, *held* prior to mechanics' liens (Code Civ. Proc. § 1186).

Such deed of trust was a prior lien, under Code Civ. Proc. § 1186, notwithstanding fact that payee of note failed to comply with building contract requiring funds acquired from sale of note to be used to pay laborers and materialmen, since in such case the maker of the note could not set up such a failure in defense of note, and lien claimants had no greater rights than the maker.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 10 P.2d 60.

5. Mortgages ⚷186(5).

As regards priority of trust deed securing note over mechanics' liens, evidence *held* insufficient to support finding that purchase of note by intervener was conditioned on payment of laborers and materialmen.

6. Contracts ⚷187(1).

Offer by purchaser of owner's note to contractor, not to pay therefor until laborers and materialmen were paid, *held* not contract for their benefit authorizing suit by laborers and materialmen thereon (Civ. Code, § 1559).

Appeal from Superior Court, Los Angeles County; George W. McDill, Judge.

Action to foreclose mechanics' liens by the Community Lumber Company and others, against the California Publishing Company and others, in which the California Guaranty Corporation intervened. From a judgment for plaintiffs, defendants and intervener appeal.

Reversed.

H. P. Babson and A. G. MacRobbie, both of Los Angeles, for appellants.

James B. Ogg, of Alhambra, and Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for respondents.

STURTEVANT, J.

This is an appeal by the intervener in a suit to foreclose some mechanics' liens. No questions as to the regularity of the mechanics' liens are involved, but the questions concern the law as to priority between the liens of the mechanics and certain other liens.

Prior to June 1, 1925, James A. Keeney was the owner of the land. The California Publishing Company desired to purchase it and erect a building thereon. The transaction was perfected as follows: On May 29, 1925, the purchaser, as builder, and the Union Engineering Company, as contractor, executed a building contract which, among others, contained the following clauses:

"The Owner agrees to forthwith execute and deliver to the Superintendent, promissory notes in favor of the Superintendent in the total amount of $22,500.00. Of said notes, $10,000.00 shall mature on or before January 1, 1926, and shall be secured by a Trust Deed, on the regular form of Title Guarantee & Trust Co., Los Angeles, California, which shall be and constitute a first lien on the property above described, together with improvements thereon. The remaining $12,500.00 of said notes shall be executed by the Owner in favor of the Superintendent in denominations requested by the Superintendent, and of said notes $6,000.00 shall mature August 1st, 1925, and $6,500.00 September 1st, 1925. Said last mentioned $12,500.00 in notes shall be secured by a Deed of Trust, on the regular form of Title Guarantee & Trust Co., which shall be a third lien on the above mentioned property and improvements subject only to the Trust Deed first above mentioned and to a Trust Deed which shall be a second lien on said property in an amount not to exceed $6,250.00. All of the above mentioned notes shall bear interest at a rate of 8% per annum.

"The Superintendent shall accept said notes, secured as aforesaid, as the agent of the owner, and shall use said notes for the payment of all material and labor necessary to erect and construct to completion the above mentioned building. The Superintendent shall have full authority to pay said subcontractor and materialmen performing work or furnishing material in connection with said building by said trust deed notes, by assignments thereof to sub-contractors and materialmen without recourse. The Superintendent shall also have full authority to sell such portion of said notes as it may deem necessary to obtain cash which may be necessary in the erection of said building.

"The Superintendent shall erect and construct said building and shall pay all costs thereof in the manner aforesaid, and the Superintendent thereby guarantees that no other cost or expense shall attach to the Owner because of the erection and construction of said building, and in the event the cost of said building cannot be defrayed by the Superintendent, as such agent of the Owner, from said notes and proceeds thereof, the Superintendent shall bear and pay any such additional cost."

Later the purchaser executed its note in the sum of $6,250 in favor of James A. Keeney and to secure it the purchaser executed a deed of trust. It also executed its note in the sum of $10,000 payable January 1, 1926, in favor of Union Engineering Company, the contractor. To secure the payment of the note the purchaser executed a deed of trust. Each deed of trust named Title Guarantee & Trust Company as trustee. By the agreement of all of the parties the latter deed of trust was recorded first, June 4, 1925. The former deed of trust was recorded immediately after. The work on the building was not commenced until June 5, 1925. Prior to the first day of July, 1925, the Union Engineering Company sold the $10,000 note to the intervener California Guaranty Corporation for $9,500, which was paid. The Union Engineering Company used $1,450 in payment of claims of mechanics and materialmen and appropriated the balance to his own use.

Default was made as to the payments on the Keeney note and he, in proper manner, caused a sale to be had and bought in the property.

The claims of plaintiffs were not paid and they commenced this action to foreclose their liens. Among others, they named as defendants James A. Keeney and the trustee named in the trustee deeds. Those defendants answered. California Guaranty Corporation as holder of the $10,000 note intervened, pleaded its note and trust deed, and asked that its lien be adjudged a first lien on the premises. The court made findings of fact and conclusions of law against the defendants and against the intervener and all of them have appealed.

[1-4] The defendants and the intervener attack many findings of fact as not sustained by the evidence and they attack other findings as being immaterial. They also attack the conclusions of law as not supported by the facts. We think the defendants are supported in the position they take. The plaintiffs quote passages from the building contract and they quote several findings made by the trial court to the effect that by the express terms of the contract Union Engineering Company was the agent of the owner, that the intervener knew that fact at the time it bought its note, and, knowing the fact, the intervener was bound to inquire all of the terms of the agency. The findings so relied on do not differentiate this action from any other action to foreclose a mechanic's lien. Whether the contract contains an express provision on the subject, or whether the findings contain specific findings thereon, the general law provides: "* * * Every contractor * * * having charge of the construction * * * of any building * * * shall be held to be the agent of the owner for the purposes of this chapter" (Code Civ. Proc. § 1183), and such statute will be read into every such contract. However, inquiry would have disclosed that the Union Engineering Company had express authority to sell the note and deed of trust. That the Union Engineering Company promised to use the moneys (obtained from selling the $10,000 note) for the payment of material and labor is not pertinent to the issues that were on trial. The purchaser of the note was not bound to see to the proper application of the fund so received by the seller. 8 C. J. 759; 2 C. J. 882. True it is that the provisions in the building contract were to the effect that proceeds were to be applied first to the payment of claims for labor and material and that such provisions were inserted for the benefit of mechanics and materialmen. That fact is expressly or impliedly present in every action to foreclose a mechanic's lien, but such provisions in a building contract do not by reason of noncompliance therewith, operate to give priority to the mechanics' liens. Roebling v. Neb. Elec. Co., 106 Neb. 255, 183 N. W. 546, 550; 40 C. J. 295. The parties had the right to insert in their contract the times and amount of the payments to the contractor. Ah Louis v. Harwood, 140 Cal. 500, 505, 74 P. 41. In the plaintiffs' complaint there was a slight attempt to plead fraud. However, none was proved and there is no finding on the subject. There is no finding and no evidence that the intervener made any payment after it had notice of any breach of contract by the contractor. The plaintiffs cite and rely on M. M. Nat. Bank v. Ohio Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312. It is not in point. In that case the agent stated he was about to use the money for his own purposes and that his principal had authorized him to do so. In this case no such declaration was made and there is no finding that such act was contemplated when the intervener purchased its note. The plaintiffs also rely on the case entitled W. P. Fuller v. McClure, 48 Cal. App. 185, 191 P. 1027. The case is not helpful. Formerly a note secured by a mortgage or deed of trust was not negotiable and it was held in the Fuller Case that the law of nonnegotiable instruments was the rule to be followed. But even at that time, as to a negotiable instrument, the rule was otherwise. Flood v. Petry, 165 Cal. 309, 132 P. 256, 46 L. R. A. (N. S.) 861. Since the Fuller Case was decided the Uniform Negotiable Instruments Law has been adopted. Civ. Code, §§ 3083–3266d. Under that law, although a note is secured by a mortgage or deed of trust, nevertheless it is negotiable. 19 Cal. Jur. 812. In the case entitled Flood v. Petry, 165 Cal. 309, 132 P. 256, 46 L. R. A. (N. S.) 861, the findings were much more favorable to the maker of the note than are the findings in this case. Nevertheless it was held that the holder of the note was a holder in due course and that the failure of the payee to comply with an executory promise did not constitute a defense in favor of the maker. See, also, Brannan on Negotiable Instruments (4th Ed.) p. 458. That rule is clearly applicable in the instant case. The lien claimants have no greater rights than the maker. It follows that the deeds of trust involved in this case were liens prior to the liens of the plaintiffs. Code Civ. Proc. § 1186.

In some states they have statutes regarding improvement mortgages enacted for the express purpose of providing for the dilemma which confronted the parties in this case. In the absence of such statutes, the law defining priority of liens applies. In re Williams (D. C.) 252 F. 924.

[5, 6] The court made a finding that before the intervener bought the note for $10,000 it agreed "* * * to advance $9,500., only and conditional, and upon satisfactory proof being furnished to said intervener, that the bills for labor and materials and construction costs upon said building had been paid * * * and that without proof that the construction costs were paid" it advanced and paid said money. The only support of

that finding is found in a letter written by the intervener to the Union Engineering Company. There is no evidence that the offer was accepted or that the purchase was made on the terms stated in said letter. There is no evidence that the plaintiff saw or knew of said letter. Furthermore the promise to buy was not conditional—the promisor merely reserved the right to ascertain the progress made by the builder before making payments. Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 P. 58. If it be claimed that the mechanics and materialmen could sue on said offer contained in said letter as one made for their benefit (Civ. Code, § 1559), there are two decisive answers. They are not doing so, but they are suing to foreclose mechanics' liens. Moreover, such offer was not made expressly for their benefit, but at most merely incidentally therefor (Chung Kee v. Davidson, 73 Cal. 522, 15 P. 100), and the plaintiffs may not sue thereon.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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118 Cal.App. 742

GUYOT et al. v. CASSAB et al.

Civ. 600.

District Court of Appeal, Fourth District, California.

Dec. 1, 1931.

Appeal and error ⚷612(4).

Where, on appeal from order vacating judgment and permitting defendants to plead, trial judge merely certified that transcript containing judgment roll and copies of papers was correct, review was precluded (Code Civ. Proc. § 951).

> Code Civ. Proc. § 951, requires appellant to furnish appellate court with a copy of notice of appeal, and of order appealed from, and copies of all papers used on hearing resulting in order, but certificate of trial court did not inform appellate court whether or not papers which were copied in transcript were used on hearing or whether there were other papers so used.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Walter Guyot and another against E. K. Cassab and others. Judgment in favor of plaintiffs. From an order granting a motion to vacate and set aside judgment and permit certain defendants to plead, plaintiffs appeal.

Order affirmed.

Fredericks, Hanna & Morton and Byron F. Story, all of Los Angeles, for appellants.

Arthur J. Edwards, of Los Angeles, for respondents.

MARKS, J.

This action was commenced in the court below by the filing of an original complaint on November 16, 1922. John Doe and Richard Roe were named as fictitious parties defendant. After the defendant Cassab Fig & Grape Gardens, a corporation, had answered, an amendment to the complaint was filed on March 29, 1923. This amendment was served on the attorney for this defendant, but not on any other defendant. Mina E. Ballard was not named as a defendant in either the original complaint or the amendment. On March 19, 1925, the plaintiffs filed a notice of motion asking for leave to file an amended complaint, a carbon copy of which was attached to the notice of motion. This motion was granted on March 23, 1925, but no amended complaint was filed by the plaintiffs.

The summons on the original complaint was issued on November 16, 1922, and was served on the Cassab Fig & Grape Gardens, a corporation, but not on any other defendant. E. K. Cassab filed his answer to the original complaint on December 16, 1922. A second summons was issued on May 8, 1925. In the body of the summons, the defendants were directed to appear in an action brought against them by the plaintiffs and to answer the complaint therein. The defendants were further notified that, unless they appeared and answered as above required, "the plaintiff will take judgment for any money or damages demanded in the amended complaint as arising upon contract or will apply to the court for any other relief demanded in the amended complaint." Attached to this summons is an affidavit from which it appears that service was made upon Irving Ballard and Mina E. Ballard by delivering to each of them a copy thereof attached to a copy of the complaint. It nowhere appears that the amended complaint was ever served upon Irving Ballard or Mina E. Ballard. In the typewritten record before us, there is an order to enter the default of the defendants Irving Ballard and Mina E. Ballard for failure to answer the amended complaint. This order was filed July 24, 1925. According to the same record, the default of these defendants appears to have been entered by the clerk on July 24, 1925, by reason of their failure to appear and answer the complaint. By this record this default apparently was attached to the original complaint filed on November 16, 1922. The typewritten record before us is in such poor condition that this court on its own motion ordered the judgment roll and the plaintiffs' original notice of motion to file an amended complaint transmitted here for inspection. The judgment roll contains no entry of the default of the defendants Irving Ballard and Mina E. Ballard, either on the original complaint, the amendment thereto, or the copy of the amended complaint.

On February 2, 1926, the court below entered judgment in favor of the plaintiffs and against E. K. Cassab, Irving Ballard, and Mina E. Ballard for $33,500. In this judgment it was recited that Mina E. Ballard was substituted for the defendant John Doe in plaintiffs' amended complaint, and that the defaults of Cassab and Mr. and Mrs. Ballard had been entered. There is no finding in the judgment that there was service of any process upon either Mr. or Mrs. Ballard. There is no notice of the entry of judgment in the record.

In March, 1929, Irving Ballard and Mina E. Ballard filed a notice of motion to vacate and set aside the judgment theretofore referred to and to permit them to plead in this action because of the failure of the plaintiffs to file any amended complaint and because of the failure to have any service thereof made upon them. This motion was granted on March 27, 1929, from which order plaintiffs have prosecuted this appeal.

The appeal is taken upon the typewritten record which contains the judgment roll. In addition, copies of the following are set forth: The notice of motion of the plaintiffs to file an amended complaint to which is attached a copy of the amended complaint and the default of the defendant, E. K. Cassab; the minute order of March 23, 1925, permitting plaintiffs to file their amended complaint; the order of the attorneys for plaintiff to enter the default of the defendants Irving Ballard and Mina E. Ballard; a copy of an affidavit of Chester F. Dolley who made the affidavit of service upon Irving Ballard and Mina E. Ballard which we have already referred to; a notice of motion to vacate the judgment and permit Mr. and Mrs. Ballard to answer, attached to which are copies of affidavits by both Mr. and Mrs. Ballard, a copy of a letter by one of the plaintiffs to an attorney for one of the other defendants, a copy of the summons issued March 8, 1925, a copy of the amended complaint, and a copy of the proposed answer of Mr. and Mrs. Ballard; a copy of that portion of the minutes of the court below showing the proceedings on the motion to vacate the judgment and permit the Ballards to answer and the order granting the motion; an affidavit of Frederick J. Gorham; the notice of appeal; the order to the clerk to prepare the transcript.

The clerk of the court below has executed the usual certificate certifying that the copy of the judgment roll and the copies of the other documents we have mentioned, together with the copies of the minutes, are true and correct. The trial judge executed a certificate in words and figures as follows: "I hereby certify that the foregoing transcript on appeal, consisting of pages numbered 1 to 128 inclusive, in the above proceedings, is true and correct, and the same is settled, allowed, and made a part of the record in this case. Dated July 30, 1929. G. R. Freeman, Judge."

Section 951 of the Code of Civil Procedure provides as follows: "On appeal from a judgment rendered on an appeal, or from an order, except an order granting a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below."

In the case of Harrison v. Cousins, 16 Cal. App. 515, 117 P. 564, an appeal was taken from an order granting a motion for change of venue. The record was prepared in the same manner as the one in the instant case, except that the certificate of the trial judge was more complete than the one before us. In the Harrison Case it was said: "These papers are followed by a certificate signed by the judge of the superior court of the city and county of San Francisco as follows: 'I * * * do hereby certify that upon the hearing of the motion of H. D. Cousins, one of the defendants in the above-entitled action, for a change of venue to the superior court of the state of California, in and for the county of San Bernardino, the only papers considered were the complaint in said action, the affidavit of merits of H. D. Cousins, with four exhibits, A, B, C, and D; said Cousins' notice of motion for a change of venue, and the demurrer of H. W. Hutton, one of the defendants above named; that said motion was heard by me, and that I granted the order changing the venue in said action; that true and correct copies of the above-named papers which were considered by me upon the hearing of said motion are set out in the foregoing transcript.' This certificate does not purport to have been given in settlement of a bill of exceptions, but appears to have been given ex parte. It states that certain enumerated papers only were considered, and omits to make any mention of the demand for a change of venue. Rule 29 ([144 Cal. xlvi] 78 P. xii) requires that 'in all cases of appeal from the orders of the superior courts the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except when another mode of authentication is provided by law.' In this case no attempt was made to comply with this rule or the procedure authorized by section 953a of the Code of Civil Procedure. The appellant's contention is that under section 951 of the Code of Civil Procedure he is only required on an appeal from an order, except an order granting or refusing a new trial, to furnish the appellate court with a copy of the notice of appeal, of the order appealed from, and of the papers used on the hearing in the court below. While said section does enumerate a list of papers, copies of which must be furnished the appellate court, it does not undertake to provide how such papers or the copies thereof shall be authenticated. That matter is provided for in the rule of court, which requires that the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions. The necessity of complying with this rule is made manifest by what has happened in this case, for by proceeding in this ex parte way appellant procured from the judge of the court a certificate as to what papers were considered (not what were used), which makes no mention of the 'demand for change of venue.' Neither does the transcript before us show whether or not the respondent had answered or demurred at the time he filed his affidavit of merits and demand for a change of venue, or that he ever answered or demurred to the complaint. Section 396, Code Civ. Proc. If the method prescribed by the rule of court had been followed in this case, the respondent would have had an opportunity of having all the proper papers and evidence inserted in the record. The record before us not being authenticated either as required by the rule of court or any provision of the law, we cannot consider it."

In the case of Clark v. McCain, 107 Cal. App. 668, 290 P. 901, 902, a similar question was presented and a like conclusion reached, and the present rule XXIX of the Supreme Court and District Courts of Appeal was considered and given a like construction. The cases of Patterson v. Rutherford, 39 Cal. App. 647, 179 P. 704, and Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748, are to the same effect.

As we have seen, section 951, Code of Civil Procedure, requires the appellant to furnish this court with a copy of the notice of appeal and of the order appealed from and copies of all papers used upon the hearing resulting in the order. The certificate of the trial court in the instant case does not inform us whether or not the papers which are copied in the transcript were used upon the hearing or whether there were other papers so used. As far as the certificate goes, it might well be that none of these papers were used on the hearing and that many others were submitted to the trial court. As was said in Clark v. McCain, supra: "The affidavits filed by the plaintiffs were not merely a part of the 'moving papers' to be submitted to the judge as the basis for an ex parte order. They were evidentiary in character, and had as their object, the vacation of a final judgment. Whether or not these, or any affidavits were read or submitted to the court, we are not informed by record. We think that we are justified in declining to consider the same."

The amended complaint, a copy of which is attached to the notice of motion for leave to file the same, is not contained in the judgment roll. The original complaint with the amendment thereto filed on March 29, 1923, does not attempt to state a cause of action against either Mr. or Mrs. Ballard. The judgment by its terms was based upon the amended complaint which was not filed. The trial court was entirely justified in its order setting aside the judgment against the defendants Irving Ballard and Mina E. Ballard and in permitting them to answer.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

ST. CLAIR v. McALISTER et al. *

Civ. 7001.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1931.

Rehearing Granted Jan. 7, 1932.

1. **Carriers** ⚷316(4).

Negligence of bus causing injuries to passenger cannot be inferred because bus, lawfully traveling public thoroughfare, was struck by car not driven with required degree of care.

2. **Carriers** ⚷318(7).

In action for injuries to passenger of bus struck by automobile, evidence showed accident could not have been avoided by bus driver.

3. **Carriers** ⚷316(4).

Res ipsa loquitur *held* inapplicable where passenger in bus struck by another automobile was injured, and court found driver of automobile negligent.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Eva M. St. Clair against Raymond P. McAlister and others. From a judgment for plaintiff, the defendant the Bay Cities Transit Company appeals.

Reversed.

Rehearing granted; CRAIG, J., dissenting.

Bryce P. Gibbs, of Los Angeles, for appellant.

Fogel & Beman, of Los Angeles, and Orlando H. Rhodes, of Santa Monica, for respondent.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 13 P.2d 924.

CRAIG, J.

The defendant corporation appealed from a judgment based upon findings of fact and conclusions of law in an action for damages sustained from a collision of automobiles.

While the respondent was a passenger in a public bus of the appellant, which was crossing an intersection in an easterly direction, an automobile driven by defendant Raymond P. McAlister in a southerly direction entered said intersection and struck the same, causing injury to the respondent. The instant suit was commenced against said corporation, McAlister, and his parents who had signed his application for a driver's license, for the reason that he was a minor. Judgment was rendered against all defendants except said minor, as to whom the trial court entered a dismissal.

The testimony of all of the witnesses agreed upon the fact that the bus made a full stop at the intersection, and that it was proceeding at a lawful speed when struck on the left side, back of the front fender, by the car which approached from the north; that the driver of the bus was looking forward on his easterly course; that McAlister was also looking toward the east as he neared the intersection which the bus was crossing; and that neither driver was aware of the other's car on the highway until the impact was inevitable.

[1-3] The bus driver was not present to testify at the trial, though served with summons in another case which was submitted at the same time, upon the same evidence. From this fact and the public nature of the latter's conveyance, the trial court concluded that appellant was liable as a matter of law. But we are cited to no authority which we view as justifying an inference of negligence from the fact that a public motor vehicle lawfully traveling a public thoroughfare was struck by another not driven with the degree of care required under the circumstances outlined. We are not confronted here with an instrumentality or agency necessarily inherently dangerous such as presented in Kenney v. Antonetti, 211 Cal. 336, 295 P. 341, wherein it appeared that the defendants permitted horses to stray upon a highway at night, unattended. Although the bus was under the management of a servant of the appellant, the evidence adduced all indicated an exercise of due care upon his part, and that the accident was such as in the ordinary course of things could not have been avoided by him, notwithstanding such care. There was direct and substantial evidence to this effect. We think it error to invoke the presumption that, in the absence of dereliction on the part of one situated as was McAlister here, an accident would ordinarily have occurred to another vehicle which was lawfully crossing his path without warning of his approach, since the trial court found from the evidence that McAlister was negligent. By a long and consistent line of decisions in this state, it has been held that, in applying the rule of res ipsa loquitur, it must appear that "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care." Crooks v. White, 107 Cal. App. 304, 290 P. 497, 499. It has, further, been long established that mere possession and control of an automobile by a defendant entitled the court or jury to infer from other evidence, if there be such, that negligence in its management was the proximate cause of the alleged injury. Dowd v. Atlas T. & A. Service, 187 Cal. 523, 202 P. 870. But in none of the cases cited, nor in any underlying them, was the plaintiff relieved of the burden of establishing at least a prima facie case. When the facts are not such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, the principle of res ipsa loquitur does not enter, and the plaintiff must establish liability by a preponderance of the evidence. As we have observed, the evidence in the instant case failed in these respects.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

Pearl ROBISON, Plaintiff and Respondent, v. Raymond P. McALISTER, G. N. McAlister and Beatrix McAlister, Defendants; Bay Cities Transit Company (a Corporation) and Earl Dawes, Defendants and Appellants.*

Civ. 7002.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1931.

Rehearing Granted Jan. 7, 1932.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Rehearing granted; CRAIG, J., dissenting.

Bryce P. Gibbs, of Los Angeles, for appellants.

Fogel & Beman, of Los Angeles, and Orlando H. Rhodes, of Santa Monica, for respondent.

CRAIG, J.

The respondent, a passenger in a public motorbus of the appellant corporation, was injured in a collision found by the trial court to have resulted from said bus being struck by another machine which suddenly appeared from an intersecting street. The car last mentioned was driven by the defendant Raymond P. McAlister, a minor, as to whom the action was dismissed. Judgment was rendered against his parents, said corporation, and its driver, the defendant Dawes. The latter and his employer appealed.

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*For subsequent opinion see 13 P.2d 926.

The respondent suffered injuries at the same time and in the manner detailed in St. Clair v. McAlister and Bay Cities Transit Co. (Cal. App.) 5 P.(2d) 914, this day decided, and the facts need not again be recited. Upon the authority of that decision, it is sufficient to state that we deem the evidence insufficient to sustain the findings of fact and judgment holding the appellants in the instant case liable in damages upon the ground that they were negligent and that their negligence was the proximate cause of the plaintiff's injuries.

The judgment is reversed.

We concur: WORKS, P. J., IRA F. THOMPSON, J.

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118 Cal.App. 723

UNITED STATES ex rel. HOEY, Dist. Atty., v. DUESDIEKER et al.

Civ. 7970.

District Court of Appeal, First District,
Division 2, California.
Dec. 1, 1931.

1. Appeal and error ⇨957(1).
Judgment ⇨139.

Application to vacate default judgment is addressed to trial court's sound discretion, and its ruling will not be disturbed, except for clear abuse of discretion (Code Civ. Proc. § 473).

2. Judgment ⇨143(10).

Refusal to vacate default judgment allegedly entered through mistake and neglect of former counsel, without showing that neglect was excusable, *held* no abuse of discretion (Code Civ. Proc. § 473).

3. Judgment ⇨143(10).

Defendants in abatement proceeding under National Prohibition Act *held* chargeable with their former attorney's neglect in permitting entry of default judgment (27 USCA).

4. Intoxicating liquors ⇨278.

Judgment in abatement proceeding under National Prohibition Act, including in description words "in city of Richmond" not appearing in complaint, reference to same building being clear, *held* valid (27 USCA).

The judgment was valid even if the premises were outside of "city of Richmond," since it was clear that both complaint and judgment referred to same premises definitely described by metes and bounds, and hence, words "in the city of Richmond" were surplusage.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Abatement proceedings by the United States, on the relation of James F. Hoey, District Attorney of Contra Costa County, against Joseph F. Duesdieker and others, and Joseph F. Duesdieker and Alice Duesdieker as joint tenants. From an order denying motion to set aside default judgment, Joseph F. Duesdieker and Alice Duesdieker appeal.

Affirmed.

George Gelder, of Oakland, for appellants.

James F. Hoey, Dist. Atty., of Martinez, for respondent.

SPENCE, J.

This is an appeal by defendants Joseph F. Duesdieker and Alice Duesdieker from an order denying their motion to set aside their default and the default judgment entered against them.

The complaint was filed on February 6, 1931, seeking to enjoin these defendants and others from using certain premises in violation of the National Prohibition Act (27 USCA), and to obtain an order closing the building on the premises known as "The Chateau" for the period of one year. Summons was personally served on these defendants on February 12th, and a return was filed. The default of defendants was entered on March 5th. After a hearing on March 19th, judgment was entered on March 24th. On April 13th defendants filed their notice of motion to set aside the default and default judgment on the grounds that these were entered through the mistake, inadvertence, surprise, and excusable neglect of said defendants and their former counsel, and that the judgment was void, in that it did not conform to the complaint. The motion was accompanied by a verified answer, and was supported by the affidavit of defendant Joseph F. Duesdieker. The material allegations of the affidavit for the purposes of this appeal showed that defendants engaged their former counsel to represent them in the action, and that they were assured by their former counsel that he would fully care for and protect their legal rights, that defendants learned for the first time on or about March 20th that a default had been taken against them, and that thereupon demanded the return of the summons and complaint from their former counsel. No affidavit of their former counsel

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⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes was filed, and no showing was made as to his reason for not appearing for the defendants. Thereafter the district attorney filed a counter affidavit showing that no written or oral stipulation extending time had ever been granted; that said district attorney at no time communicated with defendants' former or present counsel, except that he addressed a letter to their present counsel on February 10th advising him that he intended to proceed with the action, and that on another occasion he also advised their present counsel that, unless defendants answered, he would take a default judgment against them. The counter affidavit contained further allegations relating to the inability of the district attorney to again secure the attendance of witnesses for trial in the event that the motion was granted.

[1-3] Upon the showing made, appellants contend that the trial court erred in denying their motion, but in our opinion this contention cannot be sustained. It is well settled that an application for relief under section 473 of the Code of Civil Procedure is addressed to the sound discretion of the trial court, and its ruling either granting or denying the motion will not be disturbed, unless an abuse of discretion clearly appears. 14 Cal. Jur. 1072, § 115; Startzman v. Los Banos Cotton Gins, 82 Cal. App. 624, 256 P. 220. We find no abuse of discretion in the present case. Appellants urge that the counter affidavit was not filed in time, and should not be considered. Without regard to the contents of the counter affidavit, the most that can be said of appellants' affidavit is that it showed that they had engaged an attorney to represent them, and did not know that their default or that the default judgment had been entered until subsequently informed of that fact. Appellants' default may have been entered with the knowledge and consent of their former attorney or through his inexcusable neglect, but appellants made no showing whatever as to the reason said attorney had not appeared for them. A reading of appellants' briefs convinces us that it is appellants' theory that their default was entered without fault on their part but through neglect on the part of their former attorney. If appellants' failure to appear was the result of such neglect on the part of their former attorney, they are chargeable therewith (14 Cal. Jur. 1042; Alferitz v. Cahen, 145 Cal. 397, 78 P. 878; Smith v. Tunstead, 56 Cal. 175), and they may not claim that the trial court abused its discretion in refusing to set aside their default without showing that such neglect was excusable.

[4] Appellants further contend that the judgment is void on its face. The complaint described the premises by metes and bounds "together with the buildings situated thereon commonly known as 'The Chateau.'" The judgment contains an identical description by metes and bounds, but one portion of the judgment refers to "the building situated on the premises hereinafter described and commonly known as 'The Chateau' in the City of Richmond, County of Contra Costa, State of California." The words "in the City of Richmond" appearing in the judgment do not appear in the complaint, and appellants state the fact to be that the property described by metes and bounds is outside of the city of Richmond. Appellants then argue that "The Chateau" included in the judgment is therefore not the same building referred to in the complaint, and that it follows that the judgment exceeds the relief demanded in the complaint. Assuming that the premises described in the complaint are outside of the city of Richmond, it does not follow that the judgment is void. It is perfectly clear that both the complaint and the judgment refer to a building known as "The Chateau" on the premises definitely described by metes and bounds. If, as stated by appellants, said premises are outside of the city of Richmond, then the words "in the City of Richmond" are mere surplusage not affecting the validity of the judgment.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

118 Cal.App. 568

PEOPLE v. VON MOLTKE.

Cr. 2111.

District Court of Appeal, Second District, Division 1, California.

Nov. 25, 1931.

As Amended Dec. 10, 1931.

1. Criminal law 🔑854(7).

As regards separation of jury, case is not submitted to jury for decision until judge has completed instructions.

2. Criminal law 🔑855(1).

Jury may not discuss case with any one, even among themselves, until after instructions have been given them in full.

3. Criminal law 🔑854(2).

Until submission of case to jury for decision, whether jury should separate is within trial judge's discretion.

4. Criminal law 🔑854(7).

In burglary prosecution, permitting jury to separate until next day, after several instructions had been given, *held* not abuse of discretion.

> Record disclosed that, after arguments had been concluded, and judge had commenced to instruct jury and had given several instructions, matter was continued, with usual admonition, until next day, and that, on next day, trial judge proceeded to complete instructions to jury, and matter was then submitted to jury for decision. There was nothing in record which showed any special circumstance making it necessary to hold jury together or which showed abuse of discretion by trial judge.

5. Criminal law 🔑1159(3).

Conflict of evidence cannot be considered on appeal, except so far as error committed by court might be more prejudicial in case evidence in favor of prevailing party be weak.

6. Criminal law 🔑1130(2).

Raising questions respecting refused instructions without printing in brief all given instructions bearing upon subjects covered by refused instructions *held* violation of court rule (Supreme and District Courts of Appeal Rule 8).

7. Burglary 🔑36.
Criminal law 🔑1169(1).

In burglary prosecution, admitting evidence respecting value of tools and machinery sold at lower price than market value *held* not error and not prejudicial.

> Evidence was properly admitted, in that it showed wide difference between market value and the low price at which machinery was sold, and could be considered by jury as circumstance tending to show defendant's guilt. It also helped to identify particular tools and machinery and was preliminary to their introduction into evidence for purpose of identification by owners, and, in any event, could in no way prejudice any right of defendant.

8. Criminal law 🔑977(3).

Sentence after time for sentencing expired *held* not error, where defendant, within time, waived objection (Pen. Code, § 1191).

9. Criminal law 🔑977(3).

Sentencing defendant after expiration of time notwithstanding his objection *held* not error, where defendant did not ask for new trial (Pen. Code, §§ 1191, 1202).

> Under such circumstances, court did not commit error in pronouncing judgment, in view of Pen. Code, § 1202, which provides that, if judgment is not pronounced within time allowed under section 1191, defendant shall be entitled to new trial.

10. Criminal law 🔑1177.

Sentencing defendant after expiration of time therefor, if error, *held* not reversible, in view of defendant's undoubted guilt (Pen. Code, § 1191).

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Carl von Moltke was convicted of second degree burglary, and he appeals.

Affirmed.

Larsen & Shaw, of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

YORK, J.

[1-4] The principal question raised by appellant in this matter is that the jury was allowed to separate, after they had been partially instructed by the trial judge. The record discloses the fact that, after the arguments in the case had been concluded, and the judge had started to instruct the jury and had given several instructions, the matter was continued, with the usual admonition, until the next day; that on the next day the trial judge proceeded to complete his instructions to the jury, and the matter was then submitted to the jury for decision.

The appellant evidently contends that the matter was submitted to the jury upon the completion of the arguments of counsel, or at least when the trial judge started to instruct the jury as to the law. This is not the fact. A case is not submitted to the jury for decision until a judge has completed his instructions. The jury is not entitled to discuss the matter with any one, not even among themselves, until after the instructions have been given them in full. It is a matter within the discretion of the trial judge as to whether or not the jury shall separate until the submission of the case to the jury for its decision. It is necessarily left to the trial judge to determine whether or not he will allow the jury to separate after the cause is once begun. There may be some facts connected with some cases which may make it necessary to hold a jury together and not allow them to separate under any circumstance, but there is nothing in the record in this case which shows any such special circumstance or which shows an abuse of discretion by the trial judge. Therefore we find no error committed by the trial court in this point, as raised.

[5] Most of the other points raised by appellant are questions of conflict of evidence

or of insufficiency of the evidence. The question as to conflict, of course, cannot be considered by this court, excepting in so far as any error committed by the court might be more prejudicial, in case of evidence in favor of the prevailing party being weak. There was sufficient evidence to justify the judgment of conviction.

[6] The instructions given by the court were sufficient and properly covered the law of the case. Rule of court VIII is violated by appellant in raising the questions as to instructions refused, without printing in his brief "all instructions given, bearing upon the subjects covered by the refused instructions." Therefore, although we have examined the instructions with care, we have not discussed in detail the objections to the refused instructions. The refusal of the court to give certain instructions, referred to in appellant's brief only by number and page of the clerk's transcript, did not constitute prejudicial error.

[7] The objection of appellant that the court erred in admitting evidence as to the value of certain tools and machinery, to which evidence the counsel for defendant objected, is not well taken. This evidence was properly admitted, in that it showed a wide difference between the market value and the low price at which the machinery was sold, and could be considered by the jury as a circumstance tending to show the guilt of the defendant. It also helped to identify the particular tools and machinery, and was preliminary to their introduction into evidence, for the purpose of identification by the owners, and, in any event, could in no way prejudice any right of the defendant. It is not pointed out in the brief as to how this evidence was prejudicial, excepting only the broad statement that it was "highly prejudicial to introduce any evidence as to the value of the goods taken."

There was no error committed by the court in its denial of the motion to dismiss the burglary count "on the ground that there had been no evidence propounded which could in any way connect the defendant with that said crime." Appellant's Opening Brief, p. 36.

[8-10] The objection raised by the appellant that the defendant was not sentenced within the time provided by law is not well taken, as it appears in the clerk's transcript of the proceedings had before the trial court that the time for sentence was directly waived by the defendant himself within the time when the court could have properly pronounced judgment, and that this waiver by the defendant was the cause of at least one postponement by the trial court of the time for sentence. The reporter's transcript, page 133, shows that this waiver was only a waiver of "objections to the jurisdiction of the court to pronounce judgment, on June 3rd." The court without further waiver of time by defendant continued the matter to June 17th. Reporter's Transcript, p. 138; Clerk's Transcript, p. 14. The record shows that on June 17th probation was denied and sentence pronounced, and that defendant objected to sentence at that time on the ground "that the legal period for sentence has elapsed under section 1191 of the Penal Code." Clerk's Transcript, p. 15; Reporter's Transcript, p. 140. Penal Code, § 1191, provides for the pronouncement of judgment in not less than two nor more than five days after the verdict or plea of guilty; "provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section 1203 of this code. * * *" Conceding that the latest day to which the court was authorized to extend the time for sentence was a day not more than twenty-five days after the date of the return of the verdict (8 Cal. Jur. p. 450), section 1202, Penal Code, provides that, if judgment is not pronounced within the time allowed under section 1191, "then the defendant shall be entitled to a new trial." It has been held that, if defendant does not move or demand a new trial because of delay, then the court can pronounce judgment. People v. Okomoto, 26 Cal. App. 568, 147 P. 598; People v. Martinez, 57 Cal. App. 771, 778, 208 P. 170. In People v. Zuvela, 191 Cal. 223, 215 P. 907, the Supreme Court held that, although it would be error for the trial court to refuse a new trial, requested on account of lapse of time in which judgment should be pronounced, this would be only an error of procedure, and the pronouncing of judgment in such case would not be an act in excess of jurisdiction. The court further held that if, on examining the entire cause, including the evidence, it appeared that the error did not result in a miscarriage of justice, the judgment should not be reversed. People v. Ramos, 80 Cal. App. 528, 251 P. 941; People v. Powell, 83 Cal. App. 62, 256 P. 561; People v. Wilson, 101 Cal. App. 376, 281 P. 700.

The court did not commit error in pronouncing judgment, since the defendant, although he objected thereto, did not ask for a new trial; and further that, even if the court did err, the error, in view of the undoubted guilt of the defendant, as shown by the record in this case, did not result in a miscarriage of justice.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

118 Cal.App. 566

PEOPLE v. PORTLOCK.

Cr. 2104.

District Court of Appeal, Second District, Division 1, California.

Nov. 25, 1931.

Rehearing Denied Dec. 7, 1931.

Hearing Denied by Supreme Court Dec. 24, 1931.

Witnesses 🔑227.

Permitting five year old prosecutrix to testify after examination was had and without proper oath *held* erroneous (Code Civ. Proc. § 2094).

> **Showing in respect to taking of oath was that court merely asked child the question: "Will you tell us the truth and the whole truth, and nothing but the truth?" The answer by the child was "Yes," with the further question: "Will you call on God to witness that you tell the truth?" with the answer again "Yes," without any proof of religious scruples against taking an oath, or proof that witness had any peculiar form of swearing which she recognized as more obligatory than prescribed oath.**

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Walter D. Portlock was convicted of a crime, and he appeals.

Reversed.

Frederic H. Vercoe, Public Defender, and Halford R. Thomas, Dep. Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and James S. Howie, Dep. Atty. Gen., for the People.

YORK, J.

The defendant was convicted of violating section 288 of the Penal Code. He made a motion for a new trial, which motion was denied, and he now appeals to this court from the judgment of conviction and the order denying a new trial.

The defendant contends that the court erred in permitting the prosecutrix, a child five years of age, to testify after an examination was had, before the child was sworn at all.

The form of the so-called oath administered by the trial judge was insufficient under section 2094, Code of Civil Procedure, for the reason that, in the absence of any proof of religious scruples against taking an oath, and in the absence of any proof that the witness had any peculiar form of swearing, which she recognized as more obligatory than the prescribed oath, it must be shown that the oath was given substantially in the form required by the statute. There was no outward manifestation of the taking of the oath. The child was probably unconscious that she was being sworn by the court, the court merely asking her the question: "Will you tell us the truth and the whole truth, and nothing but the truth?" The answer by the child was "Yes." Then the further question was asked: "Will you call on God to witness that you tell the truth?" The answer by the child was "Yes." The form of the oath required is: "You do solemnly swear (or affirm, as the case may be), that the evidence you shall give in this issue (or matter) pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth, so help you God." It has not been held in any case cited to us that, if the oath leaves out the words "You do solemnly swear" or "you do affirm," the oath is sufficient. The only witness by whom could be proven the actual commission of the crime never actually had an oath administered to her.

The judgment and order are reversed.

We concur: CONREY, P. J.; HOUSER, J.

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119 Cal.App. 19

WESTERN PIPE & STEEL CO. v. STATE INDUSTRIAL ACCIDENT COMMISSION.

Civ. 8177.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1931.

Prohibition 🔑16.

District Court of Appeal is without authority to issue writs of prohibition against proceedings of Industrial Accident Commission (St. 1917, p. 876, § 67 (d); Const. art. 20, § 21).

Application for writ of prohibition by the Western Pipe & Steel Company, a corporation, against the State Industrial Accident Commission, to prevent reopening of a proceeding for compensation.

Writ denied.

John W. Carrigan, of Los Angeles, for petitioner.

PER CURIAM.

The petition asks for a writ of prohibition to be directed to the Industrial Accident Commission.

It appears that by an order dated March 24, 1931, the commission made a decision that the injury to the employee (petitioner in that proceeding) was not caused by the serious and willful misconduct of the defendant Western Pipe & Steel Company.

Thereafter said employee Huston applied to this court for a writ of review, and his petition was denied. Since that time Huston has presented to the commission a petition to reopen the case upon the ground that certain of the facts were not correctly determined by the commission in its former decision. The application of Huston to the commission is made under section 20 (d) of the Workmen's Compensation, Insurance & Safety Act (St. 1917, p. 850), being the section which provides for continuing jurisdiction of the commission over all of its orders, decisions, and awards, to the extent and within the limitations there prescribed. The commission, without making any formal order either granting or refusing to reopen the case, has set it down for hearing.

Petitioner steel company now contends that the commission is without jurisdiction to reopen a cause like the one in which it is about to act; and, in order to prevent the commission from further proceeding therein, now files this application for a writ of prohibition.

It may be, or not, that such proceedings by the commission would be outside of its jurisdiction. Before we can approach that question it must first be settled that this court is authorized to issue writs of prohibition against proceedings of the Industrial Accident Commission. The Constitution (art. 20, § 21), which provides for industrial accident legislation, vests in the Legislature "plenary powers" in relation to the subject, with authority to establish an Industrial Accident Commission, and to fix and control, among other things, "the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state."

Section 67 (d) of the Workmen's Compensation, Insurance & Safety Act (St. 1917, p. 876) declares: "No court of this state, except the supreme court and the district courts of appeal to the extent herein specified, shall have jurisdiction to review, reverse, correct or annul any order, rule, regulation, decision or award of the commission, or to suspend or delay the operation or execution thereof, or to restrain, enjoin or interfere with the commission in the performance of its duties; provided, that a writ of mandamus shall lie from the supreme court or the district courts of appeal in all proper cases." So far as we have been able to ascertain, the question which we have suggested has not been the subject of any decision.

In Gumilla v. Ind. Acc. Com., 187 Cal. 638, 203 P. 397, where writ of review was denied because the application for the writ was prematurely made, the Supreme Court said: "It may be that effectual relief could be given by this court or the District Court of Appeal under its general jurisdiction by means of a petition for a writ of prohibition. As the question is not before us, we express no opinion on that subject."

If the writ of prohibition is to be allowed in this case, the like procedure would be permissible in any case where it could be shown that said commission is about to proceed beyond or in excess of its jurisdiction. But the statute plainly intends, so far as the "prerogative writs" are concerned, in relation to proceedings of the Industrial Accident Commission, that the court shall not interfere other than by writ of review, or by mandate, as in such statute provided.

The petition for writ of prohibition is denied.

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118 Cal.App. 643

CHOQUETTE v. KEY SYSTEM TRANSIT CO. et al.

Civ. 7538.

District Court of Appeal, First District, Division 1, California.
Nov. 28, 1931.

Rehearing Denied Dec. 28, 1931. Hearing Denied by Supreme Court Jan. 27, 1932.

1. Railroads 🔑327(1).

Failure to stop, look, and listen before attempting to cross railroad tracks is negligence as matter of law.

2. Railroads 🔑278(1).

Stop, look, and listen rule does not apply at railroad stations.

3. Railroads 🔑278(1).

Person using railroad station's premises is not absolved from acting as reasonably prudent person.

4. Railroads 🔑274(1).

Platforms and structures are not essential to existence of railroad station, but premises must carry implied assurance that tracks may be crossed in safety.

5. Railroads 🔑348(8).

As regards duty to stop, look, and listen, evidence *held* to show that plaintiff was not injured at railroad station.

> Plaintiff was a passenger on a street car and got off in public street that crossed both street railway and railroad. The street railway system had a sign up between tracks bearing announcement that the place was a certain station. Other than the sign there was nothing indicating that the point was a stopping place for trains. There were no buildings or structures or station appliances of any kind either on or adjacent to the tracks or on sidewalks opposite them.

6. Railroads 🔑274(1).

Railroad station rule has no application to stopping places of street cars on public streets.

7. Carriers 🔑247(4).

Street car passenger ceases to be one upon safely alighting in public street clear from car.

8. Railroads 🔑327(3).

Stop, look, and listen rule applies in full force to person after alighting from street car.

9. Carriers 🔑318(11).

Evidence *held* to show that defendant street railway did not negligently fail to provide passenger safe place to alight.

> Where passenger alighted there was a space of 10 feet 4 inches between the street railway track and the track of a railroad. The minimum space between standing car from which passenger alighted and train on the railroad was 5 feet 7 1/16 inches. Passenger was not injured in this space, but after she had left it and while crossing railroad track.

10. Carriers 🔑303(7).

Street railway company is under no duty to warn passenger of observable dangers incident to crossing street after alighting from car.

11. Railroads 🔑350(33).

Evidence of railroad's last clear chance to avoid injuring pedestrian who had just left street car *held* insufficient for jury.

> When plaintiff stepped on track, the locomotive was not more than 40 feet from her. Evidence as to speed of train varied from 18 to 35 miles an hour. Plaintiff attempted to cross track after realizing her peril. Engineer of train had seen plaintiff alight from street car when train was several blocks distant and had observed plaintiff walking toward crossing. Engineer's testimony was conflicting whether brakes were applied before or after plaintiff was struck. The maximum overhang of the locomotive was 2 feet 10⅜ inches.

12. Negligence 🔑83.

Elements of "last clear chance" doctrine are inability to escape danger resulting from one's negligence, awareness of it by another who has last clear chance to avoid injury by exercise of ordinary care, and failure to do so.

> [Ed. Note.—For other definitions of "Last Clear Chance," see Words and Phrases.]

13. Negligence 🔑22.

Where reasonable warnings have been given, person in charge of dangerous instrumentality, upon seeing another approach dangerous place, may assume that latter will not place himself in obvious peril.

14. Railroads 🔑320.

Train engineer was under no obligation to apply emergency brakes until person approaching crossing had placed herself in dangerous position.

15. Railroads 🔑346(5).

Law presumes that person will exercise his normal faculties upon approaching railroad track.

16. Railroads 🔑327(1).

Absent-mindedness or forgetfulness is no excuse for failure to stop, look, and listen before venturing upon railroad crossing.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Dell Choquette against the Key System Transit Company and the Atchison, Topeka & Santa Fé Railway Company. From judgment for defendants, plaintiff appeals.

Affirmed.

Hubbard & Hubbard, of San Francisco (M. Mitchell Bourquin and Clinton L. Markley, both of San Francisco, of counsel), for appellant.

Brobeck, Phleger & Harrison, of San Francisco, and Chapman, Trefethen, Richards & Chapman, of Oakland, for respondent Key System Transit Co.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for respondent Atchison T. & S. F. Ry. Co.

PER CURIAM.

Appeal by plaintiff from an order and judgment of nonsuit in an action brought by her against the Key System Transit Company and the Atchison, Topeka & Santa Fé Railway Company for the recovery of damages for personal injuries suffered by reason of being struck by a train of the latter company while in the act of crossing its track in the city of Berkeley.

The Key System Transit Company (hereinafter sometimes referred to as the Key System) operates a double track railway along and over certain public streets in the city of Berkeley, including part of Sacramento street, using in such operation interurban trains, and also ordinary street cars. It does so by virtue of a franchise from the municipality. The Santa Fé Railway Company operates a single track of railroad for several blocks along Sacramento street, also by virtue of a similar franchise; said track lying westerly from those of the Key System and both tracks being crossed by Ashby avenue. At this avenue, or immediately adjacent to it, the Key System between its two tracks maintains a board sign bearing the announcement: "Key System. Ashby and Sacramento st. station. Sacramento St. Transbay Line." Other than this sign there is nothing indicating that this point is a stopping place for trains. There are no buildings or structures or station appliances of any kind either on or adjacent to the tracks or on the sidewalks opposite them.

The plaintiff was a passenger on the Key System, having crossed the bay from San Francisco on one of its ferry boats and later boarded one of its interurban trains for the purpose of completing her journey. She was a woman about 46 years of age, in good health, and with no impairment of eyesight or hearing. She intended to leave the train at Ashby avenue, but by her inadvertence she did not do so when the train stopped there and was carried farther. Having discovered her error, she at a subsequent stop of the train descended therefrom and boarded one of said Key System's street cars, which brought her back to that point. She there alighted, addressing while doing so an inquiry to the conductor of the street car as to the direction she should take to reach a certain location. This lay in a westerly direction from the stopping point at Ashby avenue, and the conductor so informed the plaintiff and pointed in the desired direction.

The distance between the westerly rail of the Key System tracks and the easterly rail of the Santa Fé track is 10 feet 4 inches, and the minimum space between cars of the respective companies standing or moving upon said tracks is 5 feet 7 inches. The plaintiff upon alighting from the street car stepped aside to make way for two persons who desired to get aboard. She paused a moment to receive the conductor's reply to her inquiry. The car had stopped with its front end about level with the near side of the Ashby avenue crossing. The car was 39 feet in length, so this was approximately the distance the plaintiff was now standing from said crossing. At this point the two railway corporations maintained jointly a wigwag system, including a bell which rang as long as a train or car of either railway was within a city block of the crossing, and this wigwag and bell were now functioning. Having concluded her conversation with the conductor, the plaintiff turned and, proceeding westerly, stepped upon the track of the Santa Fé Railway. From the point at which she alighted and extending to the crossing mentioned, the surface of the ground was smooth and constituted a convenient path to the crossing, and was in general use as such. From here also there was an unobstructed view southerly for several blocks of the railway tracks of the defendants. The rails of the Santa Fé track except at crossings projected their full height above the ground, and the space between the rails was somewhat rough and uneven. According to the plaintiff's testimony, before attempting to cross said track she glanced casually to her right, that is, to the north, and did not at all look to the south, nor did she notice the track at all, although she had to step over the projecting rails, nor did she hear any noise of a train nor the ringing of any bell. At the moment she stepped on to the Santa Fé track a train was approaching thereon from the south, the locomotive of which was not more than 40 feet from her and traveling, according to the testimony of the engineer, at about 18 miles an hour, or, according to the estimate of a witness for the plaintiff, based upon the distance the train continued in movement after application of the brakes, from 30 to 35 miles an hour. The plaintiff immediately became aware of her peril and endeavored by a hasty movement to complete the crossing of the track. She was unfortunately unable to do so in time, and was struck by the pilot of the locomotive and seriously injured. A Santa Fé train passed this point every day about the same time traveling north. Its engineer on this occasion had perceived the street car when several blocks distant from it, and had seen the plaintiff talking to the conductor after alighting therefrom. According to his testimony, immediately the plaintiff started to walk towards the Santa Fé track he gave several short blasts of the whistle, closed the throttle of the locomotive and applied the brakes. The locomotive, however, being but 40 feet distant from the plaintiff, and traveling at least 18 miles per hour (or about 27 feet per second), and the testimony showing that a period of at least three seconds must elapse from the time the engineer commences to close the throttle and apply the brakes before the latter begin to exert any effect on the speed of the train, such speed could not be diminished in time to avoid injuring the plaintiff. At the time of the impact she had almost succeeded in clearing the track, being struck by the pilot bar of the locomotive near its left end. The train consisted of locomotive, tender and six empty cars, and came to a stop 425 feet from the place at which the plaintiff was struck.

In granting the defendants' motions for nonsuit, the trial court rendered a written opinion, from which it appears that the ground of its action was its conclusion that the conduct of the appellant in attempting to cross the Santa Fé Railway track without any effort to ascertain whether there was a train approaching from the south, and without listening for warning bells or the noise of trains or cars which might be approaching, constituted negligence as a matter of law, that such negligence was the proximate cause of her injury, and that there was no evidence which would support a verdict or finding that the defendant Santa Fé Railway Company had a last clear chance to avoid the collision.

The court applied the "Stop, look and listen" rule; and it is urged by the appellant that it erred in doing so, and that the question whether the appellant was negligent in attempting to cross the track as she did should have been left to the jury.

[1] It is the general rule in California that a person who approaches railroad tracks and fails to stop, look, and listen before attempting to cross them is negligent as a matter of law. Holmes v. South. Pacific Coast Ry. Co., 97 Cal. 161, 31 P. 834; Bailey v. Market Street Cable Ry. Co., 110 Cal. 320, 42 P. 914; Klusman v. Pacific Elec. Ry. Co., 190 Cal. 441, 213 P. 38; Trulsson v. Southern Pacific Co., 42 Cal. App. 404, 183 P. 686; Smith v. Pacific Elec. Ry. Co., 66 Cal. App. 485, 226 P. 626; Richardson v. Southern Pacific Co., 88 Cal. App. 648, 263 P. 1039. This rule also prevails in other states, and many cases could be cited therefrom, but it is unnecessary to do so.

[2, 3] Equally extensive with the general rule is an exception thereto that it does not apply at railway stations. The reason upon which the exception is based is variously stated in the cases, and it amounts to this: That at railway stations it is frequently necessary for passengers to cross the tracks in order to board a train or car, or to reach the exit to the public street after disembarking; that this entails a danger which is ever present and is known to the carrier; that the carrier has control of its own premises, and there is cast upon it the duty to operate its trains at such places so as not to endanger unnecessarily its patrons or persons properly using its premises; and that there thus arises an implied assurance from the carrier that such crossing may be made in reasonable safety. In such case the strict rule of "stop, look and listen" is not applied. The person using the premises, however, is not absolved from all care, but it will be left to the jury to say whether under the circumstances he acted as a reasonably prudent person. Wilkinson v. United Railroads, 195 Cal. 185, 232 P. 131; Chicago, R. I. & P. Ry. Co. v. Stepp (C. C. A.) 164 F. 785, 22 L. R. A. (N. S.) 350; Sonier v. Boston, etc., R. Co., 141 Mass. 10, 6 N. E. 84; Richmond, etc., Ry. Co. v. Powers, 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642; Terry v. Jewett, 78 N. Y. 338.

[4] This exception to the general rule applies, however, only to premises which may fairly be considered as stations. It is true that it is not always necessary that there should exist platforms or structures, although these are usually involved; but there must exist some element or some disposition of the premises carrying an implied assurance that the tracks may be crossed in safety. Karr v. Milwaukee Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017; Terrill v. Michigan United Traction Co., 204 Mich. 652, 171 N. W. 340.

[5] In the case at bar we think it clear that there was no evidence in the case to go to the jury that the stopping place at Ashby avenue was a station in any true sense. But, even if it be so considered, the territory comprising it was limited to that occupied under its franchise by the Key System Transit Company and for the purpose of the operation of its interurban trains. But the plaintiff was a passenger on an ordinary street car of the company which stopped at this point only as it stopped at any street crossing along the route of the line as required by a boarding or alighting passenger. Moreover, she was not injured on the premises comprising the so-called station but after she had left those premises. This point was no stopping place for the trains of the Santa Fé Railway Company, on whose track the collision occurred and which was occupied and operated by it under a different and independent franchise. There existed no relationship between the plaintiff and the Santa Fé Railway Company. That company had not invited the plaintiff to cross its track and had given no implied assurance that she might do so in safety. Its track lay upon the public street and was an open and visible sign of danger. In that respect it was no different from other dangers of the street arising from street cars, automobiles, or other vehicles, against which a person crossing it must constantly guard.

In urging her contention that the premises here involved constitute a station, the appellant relies strongly on the cases of Wilkinson v. United Railroads, 195 Cal. 185, 232 P. 131, and Karr v. Milwaukee, etc., Co., 132 Wis. 662, 113 N. W. 62, 13 L. R. A. (N. S.) 283, 122 Am. St. Rep. 1017. The first named case perhaps goes as far as any in dispensing with the characteristic features of a station and applying the station rule; but there, as pointed out in the opinion, there was a structure used by passengers as a waiting room;

and the fact is emphasized that this waiting room was situated so near to the track that the plaintiff in that case (who, as in this, had brought suit for personal injuries) had only taken one step out of it when she was struck by a passing electric car. Attention is also called to the fact that there were no windows or openings in either end of this structure, so that the approach of the cars could only be observed by leaving it or protruding one's head from it in order to get a view of the track to right or left.

In the Karr Case the carrier had installed a device for the use of passengers in signaling trains to stop, it being located upon a pole between the tracks so that a person had to cross a track to reach the signal and then recross it in order to board the train. The necessity for the passenger to cross the track arising from the location by the carrier of the device in question carried of course an implied assurance to him that he might do so in reasonable safety, so that it became a question for the jury to say whether in doing so he had exercised due care.

That the premises constituted a station not only with respect to the Key System Transit Company but the Santa Fé Railway also, notwithstanding that it operated its trains upon an independent right of way and that it had not established any stopping place there, the appellant cites the case of Chicago, R. I. & Pac. R. v. Stepp (C. C. A.) 164 F. 785, 22 L. R. A. (N. S.) 350. There the defendant carrier was held to be negligent in running its train through a station at a speed of 40 or 50 miles an hour. There was no dispute that the premises constituted a railroad station, and the station rule was applied. The defendant was not the owner of the track, but ran its trains over it by virtue of a contract with the Burlington, etc., Railroad, which owned it. The Rock Island Company attempted to defend on the ground that the person injured was not its passenger but a passenger of the Burlington Road; but it was held that in using the station grounds for the passage of its trains it was under the same obligation as the owner of the track to all persons boarding or leaving the trains at that station. The difference in principle between that case and the one at bar is obvious.

[6-8] As already pointed out, the plaintiff was a passenger upon a street car of the Key System, and alighted from the car in a public street at the Ashby avenue crossing. It is well settled that the station rule has no application to stopping places of street cars upon the public streets. A passenger upon such a car ceases to be such when he has safely alighted upon the public street and clears the car from which he alights. From that moment he is no more than an ordinary traveler and must be regarded as such, and the degree of care he must exercise in crossing the street is the same as that imposed upon any traveler, and consequently the "stop, look and listen" rule applies in full force. "As a general rule a passenger, on alighting from a street car and attempting to cross a track parallel with the one on which the car from which he alighted is running, is bound before crossing the track to look carefully for the approach of a car upon such parallel track, and his omission to take any precaution is not justified by the failure of the motorman on the approaching car to ring the bell or give any signal of his approach." Nellis on Street Railways (2d Ed.) 775.

The difference between the status of a passenger on an ordinary railroad and one alighting from a street car is thus pointed out at 4 Ruling Case Law, page 1047: "The general rule just considered that in the case of a carrier having exclusive control of its tracks and stations one traveling may still retain the status of a passenger after alighting from the carrier's vehicle, is from the nature of things not applicable to carriers not so situated, as, for instance, persons traveling on street railway cars. While a passenger attempting to alight from a street car remains a passenger until he has accomplished the act of alighting in safety, and the carrier owes to the passenger attempting to alight that very high degree of care and attention which the law puts upon it generally to the end of promoting the safety of its passengers, and will be liable for negligent injury to the passenger while so alighting, it is the generally accepted view that one who has alighted from a street car and is in safety upon the highway is no longer a passenger, but is thenceforth a traveler upon the highway and subject to all the duties and obligations imposed upon such travelers, and the railway company is not responsible to him as a carrier for the condition of the street or for his safe passage from the car to the sidewalk."

Cases applying the rule are Creamer v. West End St. Ry. Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456; Everett v. Los Angeles, etc., Ry. Co., 115 Cal. 125, 43 P. 207, 46 P. 889, 34 L. R. A. 350; Boa v. San Francisco-Oakland Railways, 182 Cal. 93, 187 P. 2; Smith v. City Ry. Co., 29 Or. 539, 46 P. 136, 780; Indianapolis St. Ry. Co. v Tenner, 32 Ind. App. 311, 67 N. E. 1044; St. John v. Connecticut Co., 103 Conn. 641, 131 A. 396; Kentucky Traction & Terminal Co. v. Soper, 215 Ky. 536, 286 S. W. 776; Hammett v. Birmingham, etc., Ry. Co., 202 Ala. 520, 81 So. 22.

[9] It is also contended by appellant that the Key System Transit Company was negligent in failing to provide the plaintiff with a safe place to alight, and that this question should also have been left to the jury.

In this regard there is no dispute as to the facts. As we have seen, the width of the space upon which the plaintiff alighted between the tracks of the respective railways was 10 feet 4 inches; and the minimum space between the standing car of the Key System and the Santa Fé train in passing was 5 feet 7$\frac{1}{16}$ inches. The plaintiff was not injured in this space, but after she had voluntarily left it. Had she looked and perceived the approach of the train, and been at all apprehensive of danger by reason of its proximity, she could have stood close to the standing street car; or, standing as she was at the rear end of the car, she could have stepped behind it and thus increased the distance from a passing train. No case has been cited in which such a large space between passing cars has been held to be unsafe, and there are many in which the space involved was much less. Zolkover v. Pac. Elec. Ry. Co., 81 Cal. App. 772, 254 P. 926; Ross v. Pac. Elec. Ry. Co., 39 Cal. App. 658, 179 P. 538; Indianapolis St. Ry. Co. v. Tenner, 32 Ind. App. 311, 67 N. E. 1044.

[10] Appellant also urges that the Key System was negligent in not warning her of the approach of the Santa Fé train at the time she alighted from the car, and that this also was a question for the jury.

The precise question has been decided contrary to appellant's contention, and the rule is stated at 10 Corpus Juris, page 910, where it is said: "There is no duty to warn a passenger of his danger where the conditions which constitute the danger are as observable by him and apparently are as obvious to him as to the employees of the carrier."

It was held in Chesley, Adm'r, v. Waterloo, etc., Co., 188 Iowa, 1004, 176 N. W. 961, 12 A. L. R. 1366, that a street railway company which permits a passenger to alight from a car at a place not ordinarily used in discharging passengers and where many automobiles are accustomed to pass is not bound to warn him of the danger of passing cars nor to protect him from such danger after he has left the car. The court said: "Courts have differentiated between the duties of a street car company to its passengers and a commercial railway in so far as a duty rests upon them to furnish safe passage to and from a car. From the nature of things a street car company cannot discharge those duties with respect to passengers. It has no control over the streets or traffic upon the streets; it has no stations or platforms and can erect none upon the street. From the curb to the car is a public place open to travel by all, and over it the company has no control or jurisdiction." That there is no such duty to warn passengers of dangers they may encounter after leaving a street car, see, also, Oddy v. West End St. Ry. Co., 178 Mass. 341, 59 N. E. 1026, 86 Am. St. Rep. 482; Downs v. Northern State Power Co., 200 Wis. 401, 228 N. W. 471.

[11-16] Plaintiff also contends that the question whether the engineer, after he became aware that she was in a place of danger, used ordinary care to avoid injuring her should have been submitted to the jury.

According to his testimony, the engineer had a clear view of the scene of the accident for several blocks, and saw the car approach and stop. He also saw plaintiff alight and, after a pause, start to cross the track. When he saw her step into a place of danger he blew the whistle and turned off the throttle; the locomotive, according to his testimony, being then about forty feet away. His testimony was conflicting as to when the brakes were applied, and it is uncertain whether this was done before or after plaintiff was struck. Paul McClendon testified that while looking from a window in his residence about 150 feet west of the scene of the accident he saw plaintiff alight, after which she stood with her back to the witness talking to some one on the car. While thus engaged, the locomotive approached and was about 100 feet from plaintiff when the witness first saw it. Plaintiff then turned and proceeded to cross the track. In answer to a question as to the approximate distance she was standing from the easterly rail of the track, he said: "Well, my opinion is that if she had stood still the Santa Fé would hit her." Counsel moved to strike the answer as being a conclusion and not a statement of fact. The court in denying the motion said: "The answer may stand as showing the appearance to him that if she stood there she would have been struck. (To the witness): That is the way it appeared to you. (Answer): Yes, sir." This witness testified further that when she started to cross and discovered the locomotive, in an effort to escape, "she jumped and ran across the track," and toward the west, and "lacked but a little" of clearing the locomotive when she was struck. Plaintiff testified that as she descended the car steps she was questioning the conductor regarding the location of a certain block on Ashby avenue; further, that when she alighted she stepped aside to enable other passengers to board the car and remained there facing the car "long enough to ask him (the conductor) another question." She then turned toward the west and approached the Santa Fé track "at an ordinary walk." After she had taken "two or three steps" she saw the "side front" of the locomotive, but was unable to state its distance away except that "it was right on" her. She testified that she heard no bell or whistle and appears not to have been aware of her danger before she saw the locomotive, nor was she able to fix her position when she first saw it. According to the street car conductor, after she had alighted and had moved aside to make way for other passengers she stood clear of the car and about "a step back." This witness, further testified that he saw her step upon the Santa Fé track, and that when the locomotive whistle sounded she hesitated and then moved quickly, apparently in an effort to escape; also that from five to ten seconds elapsed between the sounding of the whistle and the time she was struck. In view of the conceded width of the space between the respective tracks of defendants and that between passing cars, it is manifest from plaintiff's own testimony that, regardless of how she appeared to the witness McClendon during her conversation with the conductor, she was not then in danger, nor did she reach a place of danger until she had taken several steps to the west. It was further testified, however, that the overhang of the locomotive was from 2 feet 8 inches to 2 feet 10⅜ inches; also that plaintiff was struck by the pilot beam (which was the widest part of the locomotive), the portion of the beam with which she came in contact, according to the engineer, being about one foot from its extreme westerly end. As stated, the engineer testified that the train was traveling about eighteen miles per hour, and there is also evidence that the application of the brakes would have diminished its speed within a distance of 39 feet.

There is nothing in this evidence, in our opinion, which would even justify an inference that the engineer when he first saw plaintiff failed to exercise that degree of care which the law required of him. As soon as he perceived or realized that plaintiff might be inattentive to peril he sounded his whistle, and at this time there was nothing to create a doubt as to whether he sincerely believed the calamity would be prevented by the activity of plaintiff. Under such circumstances, he did all that was required of him. Basham v. Southern Pacific Co., 176 Cal. 320, 327, 168 P. 359; Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992; Lobbett & Dean v. Oakland, etc., Ry., 36 Cal. App. 641, 172 P. 1123; 22 Cal. Jur., p. 352.

The elements of the doctrine of last clear chance, which must be present in any given case in order to warrant the invocation of that doctrine, are these: (1) That the plaintiff has been negligent; (2) that as a result thereof she was present in a situation of danger from which she could not escape by the exercise of ordinary care; (3) that defendant was aware of her dangerous situation and realized, or ought to have realized, her inability to escape therefrom; (4) that the defendant then had a last clear chance to avoid injuring her by the exercise of ordinary care; (5) that the defendant failed to avoid the accident by the use of ordinary care. Darling v. Pacific Electric Ry. Co., 197 Cal. 702, 707, 242 P. 703. Where a person is approaching a place of danger and all the warnings of such danger have been given that reasonable care requires, those in charge of the dangerous instrumentality, seeing such person thus acting are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue his approach until he gets into the very place of danger, when it is obvious that he could at any time, with the least care, stop and avoid it. Billig v. Southern Pacific Co., supra. Even, therefore, if we assume that there is a conflict in the engineer's evidence as to when he applied the brakes, and there was just a possibility that the speed of the train might have been lessened and the accident avoided by their application when he first saw the defendant in the vicinity of the tracks, to charge the engineer with negligence under such circumstances would be carrying the doctrine of last clear chance beyond the limits of the decisions. Barnett v. Atchison, etc., Ry. Co., 99 Cal. App. 310, 319, 278 P. 443. As was said in Barnett v. Atchison, etc., Ry. Co., supra, the doctrine was not devised as a last resort to fasten liability on a defendant. Like the body of the law of negligence, to which the doctrine is appended, the test remains as that of ordinary care under all of the circumstances. Here plaintiff, when first observed by the engineer, was not in a position of danger, though perhaps approaching it. Until she placed herself in an inescapable, dangerous place, the engineer was under no obligation to apply the emergency brakes in the exercise of ordinary care. To so hold would be to charge him with the exercise of a greater degree of care than called for by the law. Young v. Southern Pacific Co., 189 Cal. 746, 210 P. 259. With the warning of the crossing bell, the noise and whistle of the approaching train, the engineer was justified in concluding that plaintiff would not proceed upon the track. The law presumes that a person possesses and will exercise his normal faculties. Absent-mindedness or forgetfulness will not suffice as an excuse for the neglect of a person about to cross a railroad track. Young v. Southern Pacific Co., supra, 189 Cal. page 754, 210 P. 259. In these days of congested travel, the practical operation of railway trains would be greatly impeded if the engineer was compelled to stop his train at crossings whenever he noticed persons approaching the track at right angles, in the belief that they might possibly attempt to cross the track directly in front of his train. When the engineer first perceived that plaintiff was in a position of danger, the application of the brakes, considering the short distance and the speed of the train, would have availed plaintiff nothing. The last clear chance doctrine under the facts never came into operation, and it was not error to fail to submit the question to the jury.

From what we have said, it follows that the judgments as to both defendants should be, and they are, hereby affirmed.

119 Cal.App. 56

Ex parte CINNAMOND.

Cr. 1647.

District Court of Appeal, First District, Division 1, California.

Dec. 7, 1931.

Habeas corpus 🔑55.

Petition for habeas corpus, not attaching record upon which trial court acted will be denied; presumption being court acted within its jurisdiction with due regard to parties.

Application by John S. Cinnamond for a writ of habeas corpus.

Denied.

Joseph M. Trusty, of San Francisco, for petitioner.

PER CURIAM.

Petition for writ of habeas corpus.

Application denied for the reason that the petitioner has failed to attach to his petition any of the record upon which the trial court acted. It will be presumed, in the absence of any showing to the contrary, that the court acted within its jurisdiction with due regard to the parties. Goodrich v. Superior Court, 92 Cal. App. 695, 268 P. 669; Brune v. Superior Court (Cal. App.) 297 P. 566.

KOEHLER v. SERR et al. *

Civ. 6923.

District Court of Appeal, Second District, Division 2, California.

Nov. 25, 1931.

Rehearing Denied Dec. 24, 1931. Hearing Granted by Supreme Court Jan. 21, 1932.

1. Attachment 🔑5.

Action disclosing that securities and money of plaintiff were obtained through fraud, and that damage resulted from refusal to deliver certain stock, *held* not to disclose an agreement for "direct payment of money" authorizing recovery on attachment bond (Code Civ. Proc. § 537).

[Ed. Note.—For other definitions of "Direct Payment," see Words and Phrases.]

2. Attachment 🔑7.

Incorporating contract action in complaint where plaintiff could only establish fraud *held* of no avail as basis for attachment.

3. Pleading 🔑52(1).

Separate counts or causes of actions must be complete and as distinct as though standing alone in pleading or constituting single action.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Maurice T. L. Koehler against J. H. Serr, Effie A. Serr, Marianna Leonards, and Walter S. Harris, and another. From a judgment for plaintiff, the named defendants appeal.

Reversed.

A. P. G. Steffes, Frank T. Hennessey, Vernon L. Ferguson, and John L. Schaefer, all of Los Angeles, for appellants.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

CRAIG, J.

The defendants in this action executed to the plaintiff and respondent an undertaking to prevent attachment, and appealed from a judgment rendered thereon, following a successful prosecution of the original suit upon certain causes of action embraced in the complaint.

By three successive counts or causes of action, the complaint in the principal action alleged: (1) That on October 18, 1926, the plaintiff ordered 5,000 shares of stock of Comstock Silver Mining Company, at 95 cents per share, from the defendants, and deposited other stocks as security for payment of the purchase price thereof, thereafter paying certain specified sums of money on account, all of which were converted to the use of the defendants; that the moneys so paid and the alleged market value of stocks so converted aggregated the sum of $9,950. (2) That on November 9, 1926, the plaintiff ordered from the defendants 3,000 shares of like mining stock, for which he paid the defendants $2,010, which sum the latter converted to their own use. (3) That on October 18, 1926, the plaintiff ordered from the defendants 1,000 shares of mining stock, for which $337.40 was paid in cash, and stocks of the alleged value of $950 were deposited as security for payment of the balance of the purchase price thereof—all of which were converted by the defendants to their own use, to the plaintiff's damage in the sum of $2,450. In each of the alleged causes of action first mentioned, it was alleged that the defendants falsely and fraudulently represented to the plaintiff that they had purchased said stocks, with intent to cheat and defraud the plaintiff. By a separate and distinct cause of action, it was alleged that on January 12, 1927, the defendants became indebted to the plaintiff for money had and received by them for the sum of $14,748.30.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 13 P.2d 673.

The complaint was filed on June 16, 1927, and on the same date an affidavit for attachment was filed, the material averments of which were "that the defendants herein are indebted to the plaintiff in the sum of $14,748.30 * * * upon a contract, for the direct payment of money, to wit, money received for the use and benefit of the plaintiff." An undertaking, signed by appellants herein, which is the subject of the instant controversy, was furnished by the defendants in the original action, by the terms of which said sureties agreed that whereas the plaintiff had commenced an action for the recovery of $14,748.30, an attachment had been issued to the sheriff, with directions that the same be levied unless security be given in an amount sufficient to satisfy *said demand*, therefore, to prevent the levy of said attachment said sureties did undertake that "if the plaintiff shall recover judgment in *said action* * * * we will pay to the plaintiff upon demand the amount of *said judgment* * * * together with costs." The trial court thereafter found as true, and rendered judgment upon, the allegations of fraud and conversion, exclusively, for the sum of $10,910.90, with interest from the respective dates and upon the several amounts found to be recoverable thereon.

Upon the evidence adduced in this case, including the former judgment roll, the trial court rendered judgment in favor of respondent for the sum of $10,910. The facts as found by the trial court, and upon which such judgment was founded, recite that it is not true that said attachment was based upon an alleged cause of action for money had and received, nor that the first judgment was not rendered upon a cause of action for money had and received; and, further, that the allegations of defendants that no judgment was rendered upon a cause of action on which the plaintiff was entitled to an attachment, were untrue. Specifically, it is found that "the court made no finding upon the issue set forth in the first cause of action that the defendants became indebted to plaintiff in said action for money had and received, but that it is not true that the court determined that the plaintiff was not entitled to judgment upon said first cause of action." Concisely stated, judgment was ultimately rendered upon proof that the attachment and judgment in the first action were founded upon conversion and damages, and that although there was no finding that the plaintiff was not entitled to the $14,748.30 item of January 12, 1927, it is not true that the court did not *determine* that he was entitled thereto.

[1] From the record before us it does not appear that any evidence was offered by either party in support of or to refute the action upon which the writ of attachment was ostensibly based. That the attachment was not based upon an express or implied contract was definitely found to be a fact. This is equivalent to saying that while the court might without evidence have deemed the plaintiff entitled to judgment for money had and received, it did not so find; and the judgment and findings of fact, general and specific, plainly establish by dates, amounts of interest, and proven acts, that the attachment and the original judgment were in fact attempted to be based upon tort. Conceding that the trial court should have made findings upon each cause of action, it results from the undisputed record that securities and moneys of the plaintiff were obtained through misrepresentation and fraud, and that the damage resulted from a refusal to deliver certain specified certificates of corporate stock. It is not even remotely suggested by respondent that any semblance of agreement for a "direct payment of money" by the defendants was contemplated. That such an obligation is indispensable to attachment must be admitted. Code Civ. Proc. § 537. "Drake (Attachments, § 10, note) well says in discussing statutes limiting attachments to actions arising on contracts, express or implied, for the recovery of money only, as does ours, that this language 'leaves no room for using it in actions founded in tort,' and this most manifestly is true and is so declared in this state. Babcock v. Briggs, 52 Cal. 502; Walker v. McCusker, 65 Cal. 360, 4 P. 206; Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 P. 147; Bechtel v. Chase, 156 Cal. 711, 106 P. 81." Hallidie v. Enginger, 175 Cal. 505, 166 P. 1, 2. "The existence of a contract, express or implied, is an essential basis without which no writ of attachment can properly issue; and, as in this case, the action was founded, not upon contract, but upon the fraud and wrongful acts of the defendant, we are of opinion the writ of attachment issued therein was absolutely void, and cannot be invoked to uphold the jurisdiction of the court." Mudge v. Steinhart, supra.

[2, 3] Since we must conclude from this that the writ of attachment in question was issued upon the only cause of action which the plaintiff could successfully allege and establish by proof, and as the trial court found that he did establish, i. e., the fraud and wrongful acts of the defendants, it follows that merely incorporating in his complaint a cause of action sounding in contract is of no avail here. Mudge v. Steinhart, supra. The theory of separate counts or causes of action is that each shall be complete, and as distinct as though standing alone in the pleading, or constituting a single action. Hopkins v. Contra Costa County, 106 Cal. 566, 39 P. 933. Hence it becomes obviously a matter merely of logical deduction that no valid judgment could have been rendered in the instant case upon a cause of action for the direct payment of money. The judgment from which this appeal was taken is therefore contrary to the finding of the trial court as untrue "that the

only judgment entered in said other action was that plaintiff therein, who is also plaintiff herein, was entitled to a judgment upon causes of action sounding in tort and upon which plaintiff could not and did not base his attachment or right thereto." We must conclude that no judgment was rendered in the first action upon which the respondent was entitled to recover upon the undertaking.

The judgment is reversed.

We concur: WORKS, P. J.; FRICKE, Justice pro tem.

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118 Cal.App. 673

SMITH v. FALL RIVER JOINT UNION HIGH SCHOOL DIST. et al.

Civ. 4380.

District Court of Appeal, Third District, California.

Nov. 28, 1931.

Rehearing Denied Dec. 28, 1931. Hearing Denied by Supreme Court Jan. 25, 1932.

1. Automobiles 🔑244(35).

Evidence of excessive speed and poor visibility *held* sufficient to sustain verdict for passenger against driver of colliding automobile.

On account of smoke, visibility was very poor. Driver of colliding automobile testified that he could see only five feet ahead. There was evidence that both autos were traveling at excessive speed.

2. Appeal and error 🔑1004(1).

Damages must be grossly excessive before reviewing court will interfere.

3. Damages 🔑132(1).

$15,805 for permanent shoulder injuries and other serious injuries sustained by high school girl *held* not excessive.

Plaintiff's right shoulder was permanently injured causing partial paralysis of shoulder, arm, neck, and face, as well as shrunk and shriveled condition and inability of plaintiff to raise right arm above shoulder. Nerve supply to right breast was permanently impaired causing a shrinking. On plaintiff's neck a very ugly scar was left.

4. Schools and school districts 🔑89.

With respect to liability of school bus driver for injury to pupil, it is immaterial whether he was district's servant or independent contractor.

5. Schools and school districts 🔑89.

High school pupil injured in collision between school bus and another car *held* not "guest" within statute preventing guest from recovering for ordinary negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580; School Code, § 1.80).

School district compensated bus driver for transporting pupils to and from school. Plaintiff lived in an unincorporated town. Temporarily she had been visiting a friend who lived in part of district for which transportation was provided. Before accident she had used bus several days with written permission of high school principal.

[Ed. Note.—For other definitions of "Guest," see Words and Phrases.]

6. Schools and school districts 🔑121.

Where school district reserved power to terminate at will contract for transporting pupils, jury *held* justified in finding bus driver was district's employee (School Code, § 1.80).

7. Master and servant 🔑318(1).

Not exercise of control, but right of control, is important in determining whether relation of master and servant exists.

8. Master and servant 🔑316(1).

Power to discharge at will negatives existence of relation of independent contractor.

9. Evidence 🔑458.

Parol evidence as to facts surrounding execution of written contract and manner of carrying it out *held* inadmissible (School Code, § 1.80).

School district was sought to be held liable for negligence of bus driver employed to carry pupils. Instead of relying upon general denial, the defendant school district specially pleaded a written contract and squarely stood on contract in proof of defense that bus driver was independent contractor. Hence, it would be unfair to permit defendant to go beyond the written contract at the trial, even if proffered evidence were admissible.

10. Appeal and error 🔑499(3).

Where error is predicated on rejection of evidence, record must show that reasons urged for admissibility in appellate court were presented to trial court.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by California Smith, by guardian ad litem, Walter B. Aldridge, against the Fall River Joint Union High School District and others, defendants. From a judgment for plaintiff, defendants appeal.

Affirmed.

A. F. Ross, Oliver J. Northup, and Carr & Kennedy, all of Redding, for appellants.

L. C. Smith, of Redding, for respondent.

TUTTLE, Justice pro tem.

Respondent, through her guardian ad litem, brought this action to recover damages from appellants on account of injuries received in an automobile collision. The jury awarded her the sum of $15,805. The appeal is taken from the judgment entered upon the verdict.

At the time of the collision respondent was a student residing within the boundaries of appellant high school district, and attending the high school therein. She was temporarily staying with another pupil upon the day of the accident, at a place some distance from the school, and where transportation was regularly furnished for students from that section. She had used the school bus several days, under written permission of the high school principal. This bus was owned and operated by defendant Dave Fitzwater, under a written contract with the school district, which obligated said defendant to carry students to and from the school. On December 2, 1929, the bus collided with an automobile driven by defendant Pratt, and respondent suffered the personal injuries for which compensation is sought.

The complaint is based upon the joint negligence of defendants Pratt and Fitzwater, and the school district is sought to be charged with liability under the doctrine of respondeat superior. The answer of the district denies that defendant Fitzwater was an employee of the district, and in that behalf alleges that he was a contractor under the contract above mentioned. The said contract is also set up as a special defense. The other defendants filed separate answers, denying their negligence, and each charges the other with contributory negligence.

[1-3] Appellant Pratt contends that the evidence is insufficient to support the verdict. The other appellants do not raise this question. The collision between the automobile of Pratt and the school bus occurred at a point in the road where the visibility, on account of smoke, was very poor. Pratt states that he could only see five feet in advance. There was ample evidence to justify the jury in finding that both drivers were driving at a rate of speed which was excessive under the circumstances. The evidence is sufficient to support the verdict. This appellant also contends that the verdict is excessive. It is only where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice, or at first blush raises a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that a reviewing court is justified in interfering. Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. The evidence shows, as a result of the injury, respondent's right shoulder was permanently injured, causing a partial paralysis of her shoulder, arm, neck, and face; it shows a loss of nerve supply to the shoulder, causing it to shrink and shrivel, and resulting in an inability to raise the right arm above the shoulder. The nerve supply to the right breast was permanently impaired, causing a shrinking thereof. On her neck a very ugly scar was left. Under such circumstances we cannot say, as a matter of law, that the verdict was excessive, nor is there anything in the record which would justify a holding that it was not the result of sober and honest judgment.

The foregoing are the only points raised by appellant Pratt, and there is no merit in either.

[4] As to appellant Fitzwater, his appeal has been combined with that of appellant school district. We shall dispose of those points which are not peculiar to the district. The latter set up the defense that Fitzwater, the driver, was an independent contractor. If that position is correct, it requires no citation of authorities to hold that the driver would be personally liable. On the other hand, if the driver committed the tort as an agent acting under the authority of the principal, he would also be personally liable, for he is primarily responsible because he committed the negligent act, while the principal's responsibility is secondary in the sense that he committed no moral wrong, but under the law is held accountable for his agent's conduct. 1 Cal. Jur. p. 817, § 101. It thus appears that, so far as the liability of the driver is concerned it is not necessary to decide whether he was an independent contractor or the agent or servant of the school district.

[5] The appellant driver raises the point that respondent was a guest, under section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580), and that the court erred in refusing to instruct the jury upon the question of gross negligence and defining a guest, in the language of the section cited. This section defines a "guest" as follows: "For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor."

It is contended "that there is no showing whatever of her (respondent's) connection, remote or otherwise, with the School District, or that she or any of her relatives were taxpayers in such district. The law requires that the compensation be given by the passenger herself." The transportation of high school students is provided for in the School

Code (adopted in 1929) in the following language: "1.80. The high school board of any high school district may provide, in such manner as it deems best, for the transportation to and from high school of such pupils thereof, except pupils living within the limits of any city, as such board may find to be in need of such transportation; and the cost of such transportation shall be deemed a part of the cost of maintaining the high school and paid accordingly; provided, that all contracts or other provisions for such transportation shall, before the same becomes effective, be approved by the superintendent of schools who has jurisdiction over such high school district."

It was stipulated at the trial that the high school here involved was maintained by the taxable property within the Union district. It is undisputed that respondent was a resident of the district, and attending the school at the time of the accident. The question as to the intent of the Legislature in defining a guest, under the provisions of the California Vehicle Act, is ably and exhaustively treated by Mr. Justice Barnard in the case of Crawford v. Foster (Cal. App.) 293 P. 841, 842. The court there held that an intended purchaser of an automobile who accepts a ride therein to test its fitness is not the guest of the dealer. The following excerpt is applicable to the question involved here: "The language used leaves a doubt as to what sort of compensation is intended. Appellants argue that to give compensation implies a transfer, a bestowal, or a parting with some thing. In effect, their view would define a guest as one who accepts a ride without actually handing over some definite payment therefor. To thus assume that the recompense or compensation contemplated by the act is the payment of a cash fare or its equivalent appears to us to place altogether too narrow a construction upon the words used."

It is admitted here that the driver was compensated for the transportation of respondent, but it is insisted by appellant that such compensation must be paid directly by the student, instead of by the high school district. Otherwise the student is a guest. We are not prepared to place such a narrow construction upon the statute. If the driver is paid to transport a certain class of passengers, then each member of that class is thereby removed from the category of guest, although actual payment of the fare is not made by the individual passenger. This is particularly true where, as here, the law does not provide for or permit of the payment directly by the student. The veritable flood of "guest suits" in California during the past few years doubtless spurred the Legislature to action, and hence the enactment. These actions generally arose where generous drivers offered rides to those in need, only to find themselves facing an action for damages. Wives would also sue husbands, and brothers sue sisters. It was such situations as these that called for the legislation. We do not believe, however, that it was ever the intent of the Legislature, in a case where the driver received compensation for the passenger, that the latter should be classified as a "guest" where the result would be the deprivation of the right to recover upon the ground of ordinary negligence. It is also contended that respondent was not a guest because she was not authorized to ride in the school bus. It is pointed out that the School Code does not authorize the transportation of a pupil *who lives within the limits of any city*, and as respondent was a resident of the town of McArthur, she was not entitled to ride. We are of the opinion that the Legislature had in mind the limits of an incorporated city. McArthur is not incorporated under the laws of California. Furthermore, respondent was temporarily residing with a friend at the town of Dana, some miles away from the high school. Upon the day of the accident she was riding from Dana to the school. She was thus a temporary resident of Dana. The statute, in our opinion, authorized the transportation of respondent under these circumstances. We hold, therefore, that according to the undisputed evidence adduced in this case, respondent was not a guest under the provisions of the California Vehicle Act and the trial court was correct in refusing to instruct the jury in the manner requested by appellant.

It is also contended by this appellant that the verdict is excessive. We have already disposed of that question.

[6-8] As to the appeal of the school district reliance is placed upon the alleged error of the trial court in submitting to the jury the question of whether or not appellant Fitzwater was an independent contractor. It is contended that the evidence shows beyond dispute and without contradiction that the driver was an independent contractor, and hence the district is relieved of liability. The contract between the driver and the district was as follows:

"Buss Contracts

"This agreement made and entered into this 5th day of June, 1929, between the Fall River Joint Union High School through its duly elected and qualified Board of Trustees, and David Fitzwater of Dana, California,

"Witnesseth that the said David Fitzwater has agreed to furnish transportation in buss provided with same as now in use, for all High School pupils from August 19, 1929, until the close of the current High School term from Dana via Island School house via Glenburn to McArthur to Fall River Joint Union High School and return. The said High School District is to pay said David

Fitzwater the sum of twenty-four hundred and ninety ($2,490) for said transportation. Payments to be made in ten equal payments of $249.00 each to be paid after regular monthly meeting of the Board beginning with September meeting.

"It is understood and agreed that safe and proper transportation shall be provided. The State traffic laws will not be violated and a speed of not to exceed 20 miles per hour will be maintained. Brakes are to be inspected at least every two weeks, fee to be paid by Board of Trustees. Pupils are to be delivered to High School between 8:20 and 8:40 and returned at 3:35 unless the said David Fitzwater is notified of change. That David Fitzwater carry insurance with a company agreeable to Board and sanctioned by A. A. A. Assn., at least $50,000.00.

"Any violations of terms or conditions of this contract by said David Fitzwater shall terminate this contract. The Board of Trustees is to be sole judge. Five days' notice is enough to terminate contract.

"In witness whereof the parties hereto have hereunto set their hands the day and year above written.

"Fall River Joint Union High School.
"———, Pres.
"———, Clerk.
"David Fitzwater.
"Approved: Bertha Merrill."

We are of the opinion that under the foregoing contract the jury was justified in finding the driver was the employee of the district. The primary consideration which leads to this conclusion is the right reserved by the district to terminate the agreement at will. It is not the actual exercise of control, but the right of control—that is to say, the potential power of control—which is important in a determination of whether or not the status of an employee or independent contractor exists. Claremont Country Club v. Industrial Accident Commission, 174 Cal. 395, 163 P. 209, L. R. A. 1918F, 177. A circumstance tending to negative the independence of the driver is the right to terminate the employment at any time. Brown v. Industrial Accident Commission, 174 Cal. 457, 163 P. 664. In New York Indem. Co. v. Indus. Acc. Com., 80 Cal. App. 713, 252 P. 775, 776, the court said: "Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control."

As was stated in the case of Press Pub. Co. v. Industrial Acc. Com., 190 Cal. 114, 121, 210 P. 820, 823: "One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed. In the instant case, it is undisputed that the Press Publishing Company had the power to hire and the power to discharge its carriers for unsatisfactory service, and in this regard Benefiel was in no better position than the other carriers. *This power of discharge made obligatory any instructions given, for it gave to the Press Publishing Company the power to require obedience to those instructions and insured their being carried out.*"

By retaining the power of discharge the district was virtually in a position to control every act of the driver. The only real test to determine whether a person performing work for another is an independent contractor or a servant is whether or not he, under the arrangement for performing the work, has authoritative control with respect to the manner in which the details are to be performed. 13 Cal. Jur. p. 1319, § 7. The intent of the district to control the acts of the driver is also indicated by the following clause: "Any violation of terms or conditions of this contract by said David Fitzwater shall terminate this contract. *The Board of Trustees is to be sole judge.*"

[9, 10] Error is predicated upon the ruling of the court in refusing to admit evidence as to facts surrounding the execution of the contract, the situation of the parties, and manner in which it was actually carried out. It is contended by respondent that such matters were not put in issue by the pleadings, and this would appear to be correct. The complaint alleges that Fitzwater was an employee of the district. The answer denies that he was an employee, "but in that behalf alleges that the said Dave Fitzwater was a contractor with the said Fall River Joint Union High School District under a certain contract of transportation. * * *" The defense of "independent contractor" is also pleaded specially. It thus appears that the district stood squarely upon their contract in the matter of proof of the defense of independent contractor. Having taken that position in their answer, it would manifestly be unfair to the plaintiff in the action to permit the defendant to go beyond the contract at the trial, assuming that the proffered evidence was admissible. The situation would be otherwise if defendant had been content to rest upon a bare denial of the allegations. We conclude that the trial court was correct in this ruling. We deem it proper to further state that we have grave doubts as to the sufficiency of the offer of proof made by appellants. When error is predicated upon the rejection of evidence, it must appear that the reason for its admissibility which is urged in the appellate court was also presented to the trial judge. This rule is founded upon a sense of fairness to the trial judge, and is announced clearly in Re Estate of Parkinson, 190 Cal. 475, 213 P. 259. Nowhere, in the instant case, did counsel for appellants state precisely what he offered to prove and the reasons why his evidence would be admissible. It is true the trial judge stated that the questions propounded were objectionable under the parol evidence rule, but it was still incumbent upon appellants to state fully their position, and the reasons therefor.

Other points urged by the district for a reversal have been carefully considered. Some of them have been already disposed of in connection with the appeals of the other defendants, and the remainder are without merit.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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118 Cal.App. 707

LANDERS v. CRESCENT CREAMERY CO. et al.

GLENDENING v. SAME.

Civ. 4302, 4303.

District Court of Appeal, Third District, California.

Nov. 30, 1931.

1. Judgment 🔑199(3).

Court where defendants' motion for directed verdict was properly denied thereafter erroneously rendered judgment for defendants notwithstanding verdict (Code Civ. Proc. § 629).

2. Automobiles 🔑245(16).

Negligence of truck driver in respect to collision with motorcycle at intersection *held* for jury.

3. Automobiles 🔑245(82, 88).

Contributory negligence of driver and passenger on motorcycle, in respect to collision with truck at intersection, *held* for jury.

4. Appeal and error 🔑934(1).

Court on appeal from judgment for defendant notwithstanding verdict has duty of reading testimony in light most advantageous to plaintiff (Code Civ. Proc. § 629).

5. Judgment 🔑199(3).

Judgment for defendants notwithstanding verdict is erroneous, if there is substantial evidence to support every essential element of plaintiffs' case.

Appeals from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Separate actions by Alfred Landers and by Roland Glendening against the Crescent Creamery Company and another consolidated for trial. Judgment for defendants notwithstanding the verdicts, and plaintiffs appeal.

Reversed and remanded, with directions.

John Coker and Hamilton & Lindley, all of San Diego, G. W. Adams, of Los Angeles, and Emmett L. Fitzpatrick, of San Diego, for appellants.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

Two separate actions for damages were consolidated for trial. The injuries sustained by the plaintiffs were the result of a collision between a motorcycle on which the two plaintiffs were riding and a truck operated by the defendant Marsh Noe as the agent of the Crescent Creamery Company. At the conclusion of the evidence and before the case was submitted to the jury, the defendants moved for directed verdicts, which motions were denied, and the cases were submitted. The jury rendered verdicts in favor of the plaintiffs, and against the defendants, with damages assessed in favor of the plaintiff Glendening in the sum of $25,000, and in favor of the plaintiff Landers in the sum of $15,000. The jury was polled, and stood eleven to one for the verdicts. Thereafter, upon motions of defendants, the court rendered judgment for defendants notwithstanding the verdicts, and plaintiffs appealed. The appeals are consolidated.

The following facts are undisputed: Plaintiff Glendening was operating a motorcycle owned by plaintiff Landers, and Landers was riding behind Glendening, and on the same seat with him. They were proceeding in a northeasterly direction on Mission road in the city of Los Angeles, at or near the point where Gallardo street intersects said Mission road. At the same time, defendant Marsh Noe was driving an automobile truck owned by the defendant Crescent Creamery Company in a southwesterly direction, along the said Mission road. At or near this intersection, defendant Marsh Noe turned the truck to the left, across Mission road. The left front bumper and fender of the truck came in contact with the left side of the motorcycle, breaking the left leg and knee of each plaintiff, and throwing the motorcycle about ten feet in a southerly direction from the point of impact.

[1] Appellants contend that the motion for a directed verdict was properly denied, and that therefore, under section 629, Code of Civil Procedure, a motion for judgment notwithstanding the verdict should not have been granted; that no legal justification for a judgment notwithstanding the verdict can be found in the language of the Code. In Newson v.

Hawley, 205 Cal. 188, page 189, 270 P. 364, the court said: "By section 629 of the Code of Civil Procedure, enacted in 1923, it is provided that: 'When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.' If, therefore, defendants' motion for a directed verdict should have been granted, then the order of the court setting aside the verdict and directing judgment in defendants' favor was in accordance with the terms of section 629 of the Code of Civil Procedure, above quoted, and should stand."

The limits within which the trial court may exercise its power to direct a verdict have been definitely fixed and determined by decisions of this court of comparatively recent rendition. In Estate of Caspar, 172 Cal. 147, it was held, page 149, 155 P. 631, 632, that "the right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given."

In Diamond v. Weyerhaeuser, 178 Cal. 540, at page 542, 174 P. 38, 39, the court said: "If there was any substantial evidence tending to show that the collision was caused by negligence on the part of defendant's driver, the action of the court in directing a verdict was, of course, erroneous. The existence or nonexistence of negligence is ordinarily a question of fact to be determined by a jury. On the other hand, the court may withdraw the case from the jury and direct a verdict where the evidence is undisputed, 'or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.'"

[2, 3] A careful review of the plaintiffs' case, disregarding conflicting evidence and giving to plaintiffs' evidence all the value to which it is legally entitled, and the legitimate inferences, shows: That the traffic on Mission road was heavy, and that the motorcycle was traveling with the traffic on the extreme right; that there were two lines of cars on both sides of the street; that the traffic was moving at a rate of fifteen, twenty, or twenty-five miles an hour; and that the plaintiffs were not passing machines. They were traveling at about twenty miles an hour in the traffic, and, as they entered the intersection of Gallardo street, a car traveling in the same direction passed them on the left, cutting in in front of them. The motorcycle was traveling along close to the curb line, a little to the right of this last car which had just passed them immediately before the accident.

Plaintiff Glendening testified that they saw the traffic coming on the other side, but did not particularly notice the truck until it turned toward them; that the truck passed other cars; and that the driver of the truck did not signal for the turn; that the motorcycle was about eight feet away from the point of collision when he saw the truck turn; and that the truck was about twelve or fifteen feet away from the point of collision. Plaintiff said that he swerved to the right to run up on that side toward the curb line, but the car that had just passed him cut in to the right so that he could not get in between them, between the car ahead and the curb; that the front wheel of his motorcycle was just in back of the right wheel of that car, and "as he started to cut over I had to slow up, too," and that he was afraid that if he pulled over, the rear wheel of that car would have caught him (referring to the car ahead); that this car started edging over "just as soon as he passed us"; that he, Glendening, applied his brakes and had almost stopped when the crash happened, going maybe five miles an hour; that, at the time the automobile cut to the right, the defendant's truck was "cutting over towards us"; that the truck passed three or four feet behind the automobile and struck the plaintiffs; that three motorcycles were in their party, one four or five hundred feet ahead, and the other operated by Otis Cline, was following the plaintiffs.

Otis Cline testified by deposition that he was traveling behind plaintiffs some fifty or a hundred feet. "A truck came over towards them as they were in the intersection there, and Glendening turned just a little bit into the intersection to swing a little away from him, but he hit him anyhow." The driver of the truck hit the motorcycle. The motorcycle was driving on the right-hand side of the highway; that he did not see the truck until it turned and hit the motorcycle.

"Q. How fast was the truck going when it struck the motorcycle? A. Well, I would say around twenty miles an hour as it comes across there when he put on his brakes and slid.

"Q. How far did he slide? A. Oh, it looked to be about ten or fifteen feet." That the truck knocked the motorcycle about ten feet.

"Q. How far from the motorcycle was the truck when you first saw it? A. Well, it was pretty close on. The truck was almost straight across the road when I saw it. I was watching them pretty close behind them." That the two motorcycles had been traveling at the same speed and about the same distance apart all the way through Los Angeles, and "at the time there we were traveling about the same speed as other traffic on the street, we had not passed any cars."

Plaintiff Landers, who was on the seat with, and behind, Glendening, testified that they were about twelve feet from the point of collision when he first saw the truck, and that they had just gotten into the intersection; that the truck was headed down Mission road; that when they were in the intersection he saw the truck turn left; that he did not see the operator make any signal; that the truck was going pretty slow; that when it turned it was about ten feet away from the motorcycle. On cross-examination, plaintiff Landers testified that when he first saw the truck it was about twenty feet from the motorcycle, and the motorcycle about twelve feet from the point of collision, and the truck was fifteen or twenty feet from the point of collision and at the place of turning. An automobile passed the motorcycle just as the motorcycle got into the intersection, and the automobile was going in the same direction as the motorcycle; when the motorcycle was about four to six feet behind and to the right of the automobile, the automobile swerved over to the right, and the defendant's truck circled around the corner right into the side of the motorcycle, cutting behind the automobile.

Defendant Noe testified that he was driving a "Reo" truck west on Mission road, twenty to twenty-three miles per hour. At Gallardo he slowed down, and was going to make a left-hand turn; he saw a lot of cars going east, when he reached a point almost even with the "button"; slowed down to about fifteen miles per hour, when he started to make the turn. He crossed the intersection at seven or eight miles per hour; that he saw the other two motorcycles go in back of him and then this one came in front of him.

"Q. What did you do then with respect to your car, your truck? A. I let it roll on a few feet more, and I seen that these two motorcycles, the two men on the motorcycle, were not going to slow down, so I put on the brakes a little harder."

After the truck and automobile came together, the truck did not go at all; it stopped right there. The motorcycle was about ten feet away. On cross-examination, defendant Noe testified that he was traveling about fifteen miles an hour when he turned the "button"; at a point half way between the two "buttons," he was going seven or eight miles per hour, and, at the point where the collision occurred, he was going at practically no speed at all. When the truck was in the middle of this distance between the two "buttons," the motorcycle was around about thirty-five or forty feet from him and about thirty-five or forty feet from the point of collision, and the truck was twenty-five or thirty feet from the point of collision. When the truck was traveling seven miles an hour he could stop in about ten feet. After the collision, the motorcycle lay in the street. Witness showed the position of the motorcycle when it lay in the street, as about ten feet from the point of collision, at right angles to the course of the motorcycle, and in the line the truck was traveling.

The evidence of plaintiffs' witnesses, if taken as true, shows substantial proof of negligence on the part of the defendant Noe, in that he did not signal before turning, and that he could have stopped within ten feet when he was within thirty-five or forty feet of the motorcycle. He does not claim that his view of the motorcycle was obscured, but that he saw it coming, and that he saw it was not going to slow down. Plaintiff's testimony shows by clear inference that a motorcar just ahead of him was also placed in jeopardy, which escaped by cutting to the right; but, in so doing, cut off plaintiff's chance to escape by speeding up to the right. We believe there is substantial evidence to show that plaintiffs were traveling with the traffic at a reasonable rate of speed; that, after they had entered the intersection of Gallardo street with Mission road, they observed defendant turning into the traffic, and that he had not made a signal previous to, nor at the time of turning; that defendant turned his truck to cross heavy traffic, at an unreasonable rate of speed—fifteen miles per hour; that plaintiffs did everything possible, after perceiving their danger, to avoid a collision, and that defendant might have stopped his truck in time to have avoided hitting plaintiffs; that while plaintiffs had no opportunity to appreciate any danger from the truck until it was turning, defendant, knowing that he intended to cross this intersection, should have been careful not to jeopardize the traffic, through which he was crossing; that defendant was negligent in that he saw the plaintiffs approaching, and did not exercise ordinary care to avoid colliding with them; that plaintiffs were not, as a matter of law, guilty of contributory negligence, and any question of negligence was properly submitted to the jury.

The evidence of grave injury to both plaintiffs is not controverted, but as to the manner in which the accident occurred, and the negligence of the parties, there is a strong conflict in the evidence. Defendant claims to have signaled his intention to turn; that plaintiffs were traveling at a much greater rate of speed; and other witnesses presented by the defendants supported their version of the case. But, under the decisions of this state, the rule as to a directed verdict is not that a verdict may be directed whenever the evidence is such that upon motion the court would grant a new trial. The consequences which follow from a directed verdict and a new trial are so different that the rule applicable in the two instances should in reason not be the same. Estate of Caspar, 172 Cal. 147, 155 P. 631; McCarthy v. Pacific Electric Ry. Co., 82 Cal. App. 503, 255 P. 868.

The court will not grant a nonsuit if there be substantial evidence to support the necessary elements of plaintiff's case, for the same reasons a motion for a directed verdict should be denied, and, the motion for a directed verdict having been properly denied, had the court a right to give judgment notwithstanding the verdict? We think upon the authority of Newson v. Hawley, supra, if the motion for a directed verdict was properly denied, then the court should not have rendered judgment notwithstanding the verdict.

[4, 5] On appeal from a judgment notwithstanding the verdict, and in construing section 629, Code of Civil Procedure, it is the duty of the appellate court to read the testimony in a light most advantageous to the plaintiff, and, resolving all conflicts in his favor, give to him the benefit of every fact pertinent to the issues involved, which may reasonably be deduced from the evidence. The material facts were in dispute, and the consideration of oral testimony and credibility of witnesses was involved, and if under such conditions, and after a careful study of the evidence, it appears that there is substantial evidence to support every essential element of plaintiffs' case, the verdict of the jury cannot be set aside, and judgment notwithstanding the verdict is erroneous.

In Hunt v. United Bank & Trust Co., 210 Cal. 118, 291 P. 184, 188, after referring to the case of Newson v. Hawley, supra, it is said: "If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict." At page 120 of 210 Cal., 291 P. 184, 189, it is said: "The court had no power, under section 629 of the Code of Civil Procedure, to grant the motion it did, by reason of the conflict in the evidence. * * * The only relief that defendant could obtain from the result of the verdict and judgment against it was by a new trial, which the court may have granted notwithstanding the conflict in the evidence, but which it failed to do. * * * It is the established law that such a motion cannot be granted where there is a conflict in the evidence, although the conflict is such that the trial court is justified in granting a new trial notwithstanding it, as the motion must be based upon such a state of facts as will warrant the court in granting it without trespassing on the province of the jury to be judges of all questions of fact in the case. 15 R. C. L. 607. To hold otherwise would result in the abridgement of the constitutional right to a jury trial."

In Reinders v. Olsen, 60 Cal. App. 765, at page 767, 214 P. 268, 270, it is said: "It is immaterial whether the trial judge actually believes the evidence to be true or not. Plaintiff's case must be taken absolutely at face value. He is entitled to every favorable inference fairly arising from the evidence produced by him. The motion is equivalent to a demurrer to the evidence, or an objection that, admitting all the evidence introduced to be true and disregarding all inconsistencies therein, if any, the evidence is insufficient in law to entitle plaintiff to a judgment in his favor. It is only when reasonable men can draw but one inference, and that inference pointing unerringly to the negligence of the plaintiff, contributing directly or proximately to his own injury, that the law will step in and forbid a recovery. 'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury * * * that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.' "

We are satisfied that there is substantial evidence in the record to sustain the verdicts of the jury, and that the court erred in granting defendants' motions for judgment notwithstanding the verdict.

The judgments, and each one of them, are reversed, and the cases remanded to the trial court, with directions to render judgments in conformity with the verdicts. The defendants may thereafter take such proceedings as are provided by law after the entry of a judgment.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

119 Cal.App. 57

Ex parte JOHNSON.

Cr. 2169.

District Court of Appeal, Second District, Division 1, California.

Dec. 7, 1931.

Indictment and information 🔑171.

Under evidence before committing magistrate that defendant offered money to witnesses to avoid being witnesses, detention under information charging defendant with bribing witnesses to testify falsely *held* illegal (Pen. Code, §§ 136, 137).

In the matter of the application of Jack Johnson for a writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County to secure release of petitioner from custody.

Petitioner discharged.

Michael G. Luddy, of Los Angeles, for petitioner.

Frank W. Stafford, Deputy Dist. Atty., of Los Angeles, for respondent.

CONREY, P. J.

Pursuant to order of commitment after preliminary examination by a magistrate, an information was filed in the Superior Court charging the petitioner with the commission of a felony, to wit, the crime of violating section 137 of the Penal Code. Petitioner is now confined in the county jail awaiting trial on said information. In asking for the writ of habeas corpus, he contended that at said preliminary examination no evidence whatsoever was introduced tending to show probable or reasonable cause to believe that petitioner had violated said section 137 of the Penal Code.

The bribing of a witness for the purpose of influencing his testimony, or inducing him to give false or withholding true testimony, is a felony. Pen. Code, § 137. To willfully prevent or dissuade any person who is or may become a witness from attending upon any trial, proceeding, or inquiry authorized by law is a misdemeanor. Pen. Code, § 136. To receive or offer to receive a bribe for either of the above-mentioned purposes is a felony. Pen. Code, § 138. These three sections as originally enacted in the year 1872 provided for the punishment of each of said offenses as a misdemeanor. By subsequent amendment, the offenses described in sections 137 and 138 were made felonies, but section 136 was not amended. It thus appears, not only that the offense described in section 136 was originally a misdemeanor, but the subsequent legislative history to which we have referred indicates a further legislative intention that the violation of section 136 shall continue to be only a misdemeanor.

In this case the evidence before the committing magistrate tended to prove that the defendant offered to give money to certain witnesses in a criminal action pending in the Superior Court, provided that they would go out of the state and avoid being witnesses for the people in said action; but there was no evidence in any way tending to show that the defendant committed a felony by violating section 137 of the Penal Code, or at all. If he was guilty of any offense, it was a misdemeanor and triable in the municipal court, and not an offense for which he could be held to answer in the Superior Court. It follows that the present imprisonment of the defendant is illegal, and that he is entitled to his release.

It is ordered that petitioner be discharged from custody.

We concur: HOUSER, J.; YORK, J.

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118 Cal.App. 593

PEOPLE v. KINSLEY.

Cr. 223.

District Court of Appeal, Fourth District, California.

Nov. 25, 1931.

1. Indictment and information 🔑148.

Oral demurrer to information charging violation of law regulating sale and use of narcotics *held* properly overruled (Pen. Code, § 1005).

> Pen. Code, § 1005, requires a demurrer to be in writing, signed by defendant or his counsel, and filed, and it must distinctly specify the grounds of objection to the indictment or information, or it must be disregarded.

2. Indictment and information 🔑149.

All objections appearing on face of information except want of jurisdiction in court or failure to state facts constituting public offense are waived by failure to demur before plea.

3. Indictment and information 🔑110(30).

Information charging violation of law regulating sale and use of narcotics in language of statute *held* sufficient (St. 1929, p. 380).

4. Indictment and information 🔑148.

Defect in indictment charging violation of law regulating sale and use of morphine in failing to disclose to whom morphine was sold could not be raised by general demurrer.

5. Indictment and information 🔑196(5).

Defect in indictment for violation of narcotic law in failing to disclose to whom morphine was sold must be raised before trial.

6. Poisons 🔑9.

Information charging violation of narcotic law *held* not defective because of failure to disclose to whom morphine was sold.

7. Indictment and information 🔑125(47).

Information charging sale, furnishing, and giving away, and offering to sell, furnish, and give away, morphine, *held* not defective as stating separate offenses in same count (St. 1929, p. 380; Pen. Code, § 954).

Information charging sale, furnishing, and giving away, and offering to sell, furnish, and give away, morphine, charged defendant with doing of various acts, any one of which or all of which constituted a single violation of St. 1929, p. 380, and, since defendant was accused of but one offense, that of sale, the other offenses, such as furnishing and giving away, were surplusage and did not prejudice defendant.

8. Indictment and information 🔑111(1).

Information charging violation of narcotic law *held* not defective because of failure to specifically negative various exceptions contained in statute (St. 1929, p. 380).

9. Indictment and information 🔑111(1).

Exception of licensed physician acting in good faith from operation of law regulating sale and use of narcotics constitutes matter of defense (St. 1929, p. 380).

10. Criminal law 🔑1144(13).

Appellate court, in determining question of sufficiency of evidence, must presume in support of verdict that jury was satisfied with testimony covering charge.

11. Criminal law 🔑1144(16).

Every intendment must be resolved by appellate court in favor of verdict.

12. Poisons 🔑9.

Evidence *held* sufficient to sustain conviction for sale of morphine (St. 1929, p. 380).

13. Criminal law 🔑507(1).

Purchaser of morphine was not accomplice as respects conviction for sale of morphine on her uncorroborated testimony (St. 1929, p. 380; Pen. Code, § 1111).

14. Criminal law 🔑511(7).

Defendant's testimony and conflicting statements *held* sufficient corroboration of testimony of accomplice to sustain conviction for sale of morphine (St. 1929, p. 380; Pen. Code, § 1111).

15. Criminal law 🔑406(4).

Corpus delicti in respect to sale of morphine *held* conclusively established when defendant took witness stand in his defense.

16. Poisons 🔑9.

Sentence of three years on conviction for sale of morphine *held* not excessive (St. 1929, p. 380).

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

William I. Kinsley was convicted for selling morphine, and he appeals

Affirmed.

Herman Allen, of San Diego, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and John T. Holt, Deputy Dist. Atty., both of San Diego, for the People.

FREEMAN, Justice pro tem.

The defendant was charged by an information filed by the district attorney with the offense of committing a felony by violating a statute entitled, "An Act to regulate the sale and use of narcotics in the State of California, and providing a penalty for the violation thereof," approved May 4, 1929 (St. 1929, p. 380), as follows: "The said William I. Kinsley on or about the 10th day of September, A. D., nineteen hundred and thirty at the said County of San Diego, State of California, and before the filing of this information did wilfully, unlawfully and feloniously sell, furnish, and give away and offer to sell, furnish and give away a preparation of morphine containing more than ¼ grains of morphine to the avoirdupois ounce; the said William I. Kinsley was not then and there a jobber, wholesaler or manufacturer to pharmacies as defined in Section 1 of an act entitled 'An act to regulate the practice of pharmacy in the State of California and to provide a penalty for the violation thereof and for an appointment of a board to be known as the California State Board of Pharmacy,' approved March 20th, 1905, and acts amendatory thereof, and said preparation aforesaid then and there being sold, offered for sale and given away, was not being so sold, offered for sale and given away upon the written order or prescription of or to any physician, dentist or veterinary surgeon licensed to practice in the State of California." To this information the defendant demurred orally as follows: "On the ground that it does not state facts sufficient to constitute a public offense under the laws and statutes of the State of California." The court overruled this demurrer, and trial then proceeded before a jury. A verdict was rendered finding the defendant guilty of the charge stated in the information. From this verdict and the judgment of the court based thereon defendant appealed.

The defendant's grounds of appeal are: First, that the judgment of conviction is against law; second, that the information does not substantially conform to the requirements of sections 950, 951, 952, of the Penal Code of the state of California; third, that the facts stated in said information do not constitute a public offense.

[1-6] Appellant in his brief assigns as error: First, that the court erred in overruling appellant's demurrer to the information; second, that the evidence is insufficient to support the verdict. The court properly overruled the oral demurrer. Section 1005 of the Penal Code requires "a demurrer to be in writing, signed by defendant or his counsel and filed. It must distinctly specify the grounds of objection to the indictment or information or it must be disregarded." The clerk's transcript shows that on the 23d day of June, 1931, appellant entered a plea of "not guilty as charged on the information." It further appears therefrom that on July 15, 1931, the day appointed for trial, appellant, without withdrawing his plea to the information, interposed an oral demurrer at the begining of the trial. All objections which appear on the face of the information are waived by appellant's failure to demur before plea, except want of jurisdiction in the court or failure to state facts which constitute a public offense, which may be taken advantage of at any time in the course of the proceedings. Section 1012, Pen. Code; People v. Vilarino, 66 Cal. 228, 5 P. 154. The demurrer herein is only that the information does not state facts sufficient to constitute a public offense. There is no demurrer to want of jurisdiction of the court. As the information states the offense in the language of the statute, to which specific reference is made, it is sufficient. People v. King, 125 Cal. 369, 58 P. 19. Appellant complains that the information fails to disclose to whom the morphine was sold. This is a defect which must be raised by a special demurrer and cannot be raised by a general demurrer as was here attempted. Furthermore, it must be done before trial. People v. Rodley, 131 Cal. 240, 63 P. 351; People v. Welton et al., 190 Cal. 236, 211 P. 802; People v. Perfetti, 88 Cal. App. 609, 264 P. 318. Finally, even if appellant had pointed out the defect of which he now complains by special demurrer, his objection would not have been well taken. People v. Faust, 113 Cal. 172, 45 P. 261; People v. Malone, 68 Cal. App. 615, 229 P. 1000.

[7] The contention is made that the information which charges appellant with selling, furnishing, and giving away, and offering to sell, furnish, and give away, morphine, is fatally defective under the provisions of section 954 of the Penal Code, as stating separate offenses in the same count. The objection is not well taken, since it is apparent that the information charges appellant with the doing of various acts, any one of which or all of which constitute a single violation of the statute mentioned in the information. People v. Frank, 28 Cal. 507; People v. Leyshon, 108 Cal. 440, 41 P. 480. Appellant was convicted of but one offense, to wit, selling morphine. The other offenses, such as furnishing and giving away, alleged in the information, were and are surplusage and did not prejudice the defendant. The record indicates that the evidence produced and the verdict rendered were directed to a particular sale of morphine. Under such a situation the prosecution herein would bar another on this issue. People v. Steelik, 187 Cal. 361, 371, 203 P. 78.

[8] Appellant further contends that the information must specifically negative the various exceptions contained in the act, which are described in the following language: "Provided, however, that any licensed physician may prescribe for or furnish or administer to his patient as the physician of such patient employed by such patient as such physician, when such patient is suffering from some disease, ailment or injury, other than narcotic addiction, and which such physician in good faith believes requires such treatment for such disease, ailment or injury, any of the drugs mentioned in section 1 hereof in such quantity and for such length of time as may be reasonably necessary." Section 2.

[9] The act complained of in the information is the unlawful sale of morphine. The evidence showed that appellant is a physician licensed to practice in this state, which fact comes within the above-quoted exception or proviso of the statute. However, from the fact that he is a physician so licensed, it does not necessarily follow that he had the legal right under all circumstances to sell the specified narcotics. If appellant in making the sale did not act in good faith in prescribing the drug, he violated the statute. The fact that appellant is a physician does not constitute a part of the offense charged, nor is this fact a part of the description of the offense. The case of Ex parte Hornef, 154 Cal. 355, at page 362, 97 P. 891, 893, states the rule on this point applicable to the case at bar. That case holds that it is not necessary to allege or prove the exception or proviso contained in the statute, where the exception or proviso is no part of the offense alleged. It is there stated "the proviso is a statement of an exception which in no degree qualifies the offense created by the statute, but simply exempts certain persons from the operation of

such statute." In the case at bar the statute excepts licensed physicians acting in good faith. This, however, is a matter of defense. Therefore under the rule in Ex parte Hornef, supra, the objection that the information should negative the exceptions specified in the act is not well taken.

[10, 11] Appellant urges that the evidence is not sufficient to sustain the verdict, and that the verdict is against the law and the evidence. This contention requires us to consider the evidence under the familiar rules that in support of the verdict it must be presumed that the jury was satisfied with the testimony covering the charge (People v. Ferrari, 80 Cal. App. 182, 251 P. 692), and that, where there is a conflict between the testimony given on behalf of the people and that produced on behalf of the defendant, it is not within the province of a reviewing court to hold that the jury erroneously decided as to which witnesses told the truth and that every intendment must be resolved in favor of the verdict. People v. Lyons, 80 Cal. App. 257, 251 P. 648.

[12] In the case at bar it is admitted that a sale of morphine was made to Mrs. Longino by appellant. He seeks to justify this sale on the ground that he prescribed or sold to her morphine in good faith as a physician. The complaining witness testified that she went to appellant's office on several occasions and bought morphine, paying him $80 for 1,000 quarter grains at one time and $80 at another and $50 at another. These purchases extended over some eight months' time. The first and only time appellant examined her as to her condition, to discover what treatment he should give was testified to by her as follows:

"Q. And what was the occasion of your seeing him at his office on Fifth Avenue at that time? A. I went up to get some morphine.

"Q. Will you explain just exactly what happened when you went into the Doctor's office, what you said to him, and what he said to you, and what he did, and what you did? A. Well, I merely told him I was feeling very badly and needed a narcotic and told him what kind I wanted; and he asked me how much money I had. And I told him I was prepared to pay a reasonable price, anything within reason.

"Q. Were you suffering from any disease at that time? A. No, sir; not that I know of.

"Q. What did you tell him you wanted these narcotics for? A. Well, he knew—could tell I was addicted when I went up there. * * *

"Q. After you told him you wanted these narcotics, what did he say? A. He said he would get them for me.

"Q. Did he or did he not at that time give you any physical examination? A. He gave me a—what he called a physical examination.

"Q. What did that consist of? A. Well, I removed my clothing, and he listened to my heart, I believe. I think that's—

"Q. Did he use a stethoscope? A. I cannot say for sure. I believe he did use a stethoscope on my heart. I don't know. Is a stethoscope ever put on your lungs? What is it? I am kind of—I know he listened to my heart.

"Q. You know that a stethoscope is one of those things— A. I think he did put one of those things on. I can't say for certain.

"Q. And what did he say after he listened to, or examined, your heart? A. He just didn't say anything; no remarks. * * *

"Q. How long were you in the office on this first occasion? A. Probably, as best I could say, maybe thirty minutes; something like that."

Robert H. Dundas, witness for the people, testified that he was the deputy chief of the division of narcotic enforcement of the state of California; that the records of his office contain reports which physicians are required to make of prescriptions of narcotics to patients; that he had six or seven times searched the records of his office to determine whether or not appellant had made any report of the prescription of narcotics in the treatment of Louise Longino or Louise Beach (the latter name being the name by which Louise Longino was known to appellant), and that he found none. The witness further stated that he had received two telegrams from appellant relating to his arrest, one of which contained the following language: "The woman in person named is not on my books for treatment." This telegram was dated November 24th. The witness further testified that on November 3d appellant had sent a telegram which contained the following statement: "This woman has a chest case either tubercular or enphysema." The witness Whipple stated that at the hearing of appellant by the state medical board appellant stated he was treating Mrs. Longino by giving her the "Reduction cure." This witness further testified as to this examination:

"Q. Did he state whether or not he had ever given or sold narcotics to Mrs. Longino? A. He did.

"Q. What did he say in that regard? A. The attorney for the Medical Board asked him if it wasn't possible that he had given her a certain amount of narcotics, naming the amount—which I do not recall—it was a small amount. He said, 'It's possible I did.' Then he asked him: 'Isn't it a fact you gave her a thousand at a time?' He said: 'No, I do not think so; only 750.'

"Q. Did he make any statement as to any examination that he made of Mrs. Longino? A. Yes, he did.

"Q. What did he say in that regard? A. He said he made an examination of her chest and found a tubercular trouble.

"Q. And did he say for what purpose he was giving these narcotics to Mrs. Longino? A. Well, just to ease her along and keep her out of pain. * * *

"Q. Was anything said about directions being given to Mrs. Longino at the time these narcotics were supplied her? A. Yes, Dr. Phillips, I believe, asked Dr. Kinsley if he had told this—or give this woman any instructions as to her use of these narcotics. And the Doctor's reply was that he thought she knew, or words to that effect, and that he supposed she would take enough and not abuse the privilege—just enough to make her easy."

Dr. Paull, called as a witness for respondent, testified that he had examined Mrs. Longino's chest, and further testified as follows:

"Q. State what you found, Doctor, as far as any pathological condition is concerned. A. Well, I think it might be summed up by saying there was evidence of a healed tuberculosis in the right lung, at the top.

"Q. Could you determine whether or not that was of long standing? A. Well, I do not think you could be more definite than to say it is from one to twenty years—from one year up to any number of years really. We just know it's healed.

"Q. Was there any evidence in your examination of any recent disturbance? A. No, sir."

From this testimony it is apparent that morphine had been sold to Mrs. Longino several times by appellant. It is also apparent that only once did he make an examination and that there was then no evidence of hemorrhage. It is obvious that it was not necessary to prescribe morphine to her, and that a cursory examination was given only for the purpose of furnishing an excuse or in pretended compliance with the law. At the times the other sales were made no examination was given to determine the necessity of prescribing morphine. Appellant made no record nor did he report the sale to the medical board. Appellant's testimony differed as to the purpose of prescribing the morphine, and he also testified that he did not direct her as to the quantity she should take. He "thought she knew" and "thought she would take enough and not abuse the privilege." The jury on this and other evidence returned a verdict of conviction, and under the rule heretofore stated, this verdict must be sustained if there is any evidence which fairly sustains it. It is obvious that ample evidence was produced to sustain the verdict.

[13, 14] Appellant contends that the complaining witness, Mrs. Longino, was an accomplice under section 1111 of the Penal Code, and that he could not be properly convicted on her uncorroborated testimony. The witness, Mrs. Longino, to whom the morphine sulphate was sold, was not an accomplice. Section 1111 of the Penal Code reads in part: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Under this definition the witness, Mrs. Longino, was clearly not an accomplice. She was the purchaser. She did not sell, give away, furnish, etc. However, the point is of little consequence, for appellant himself took the witness stand, and his testimony corroborated in every material particular the testimony of Mrs. Longino. The testimony, admission, and conflicting statements of a defendant are sufficient corroboration of the testimony of an accomplice to sustain a conviction. People v. Sullivan, 144 Cal. 471, 77 P. 1000; People v. Watson, 21 Cal. App. 692, 132 P. 836.

[15, 16] The corpus delicti was conclusively established when appellant himself took the witness stand in his defense. People v. Kelly, 70 Cal. App. 519, at page 523, 234 P. 110. There is nothing to indicate that the sentence was excessive, when all of the evidence in the case is considered, and it must be further observed that appellant did not receive the maximum sentence of six years, but was sentenced to be confined for a period of three years.

For the reasons herein given, it is therefore ordered that the judgment of the trial court be, and the same is hereby, affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

119 Cal.App. 65

ZURICH INS. CO. et al. v. COACHELLA VALLEY HOME TELEPHONE & TELEGRAPH CO.

Civ. 200.

District Court of Appeal, Fourth District, California.

Dec. 7, 1931.

Rehearing Denied Jan. 6, 1932.

1. New trial 🔑65.

Motion for new trial on ground of insufficiency of evidence is addressed to sound discretion of trial court.

2. Appeal and error 🔑979(2).

Order of trial court granting new trial on ground of insufficiency of evidence will not be disturbed on appeal except for clear abuse of discretion.

3. Appeal and error 🔑933(1).

Presumption on appeal from order granting new trial is in favor of order and against verdict.

4. Negligence 🔑136(26).

Issue of contributory negligence presents question of fact for determination of jury under proper instructions.

5. New trial 🔑72.

Evidence respecting contributory negligence of deceased in riding on top of truckload of hay, without looking for telephone wires by which he was struck, *held* to warrant order granting new trial after verdict for damages.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Zurich Insurance Company and others against the Coachella Valley Home Telephone & Telegraph Company. Judgment for plaintiffs, and, from an order granting defendant's motion for new trial, plaintiffs appeal.

Affirmed.

J. L. Kearney, of Los Angeles, Richard Welch, Jr., of Riverside, and A. H. Blum, of Los Angeles, for appellants.

Thomas C. Yager, of Indio, and A. Heber Winder, of Riverside, for respondent.

JENNINGS, J.

The action was instituted to recover damages for the wrongful death of Frank Darcy alleged to have been caused through the negligent maintenance by defendant of certain telephone wires. Defendant's answer denied any negligence on its part in the maintenance of the telephone wires and in addition alleged that the proximate cause of the injuries which resulted in the death of Frank Darcy was the negligence of the deceased.

The evidence produced during the trial showed that on July 13, 1928, Frank Darcy was riding upon a load of hay which was being conveyed on a truck along a certain public highway in Riverside county. The load of hay was eight bales in height, and deceased sat on one of the topmost bales at the rear end of the truck facing in the direction opposite to that in which the truck was proceeding. The bale of hay on which Darcy sat was 16 feet 2 inches from the surface of the highway. As the truck approached an intersection of the highway with another road, certain telephone wires extended diagonally across the highway. These wires were the property of defendant, and comprised part of its equipment. As the truck approached the intersection and was about to pass under some of the wires, a Mexican who was also sitting on the load of hay nearer to the front part of it than was Darcy called out a warning, and Darcy leaned over until the danger of being struck by the wires was past. He then resumed his former position sitting upright on the topmost bale of hay looking towards the rear of the truck. A few minutes later other wires were encountered. The Mexican again shouted a warning. Darcy turned his head and was struck by a wire which swept him from the load of hay to the ground below, where he fell beneath the wheels of a trailer heavily loaded with hay and was instantly killed. The wire which came in contact with the deceased was the lower of two wires extending across the highway, and it was approximately 19 feet from the crown of the highway.

The case was tried before a jury, which returned a verdict of $15,000 damages in favor of plaintiffs, and judgment was entered accordingly.

Defendant's motion for a new trial was based on three grounds: (1) Excessive damages; (2) insufficiency of the evidence to justify the verdict and that the verdict was contrary to law; and (3) errors in law occurring at the trial and excepted to by the defendant. The court's order granting the motion specified that it was granted on the ground that the evidence was insufficient to justify the verdict.

[1-5] It is the rule that a motion for a new trial upon the ground of the insufficiency of the evidence to sustain the verdict and judgment is addressed to the sound discretion of the trial court and that its order will not be disturbed on appeal except in a clear case of the abuse of such discretion. Cookson v. Fitch (Cal. App.) 3 P.(2d) 27. In considering the question of the correctness of the order, the presumption on appeal is in favor of the

order and against the verdict. Wulbern v. Gilroy Express (Cal. App.) 2 P.(2d) 508; Roberts v. Southern Pacific Co., 54 Cal. App. 315, 201 P. 958, 959; Marr v. Whistler, 49 Cal. App. 364, 193 P. 600. That the foregoing principles are well established is not questioned by appellants. They, however, contend that, with respect to the negligence of respondent, no conflict in evidence is presented, and urge that the uncontradicted evidence indicates that respondent was guilty of negligence in maintaining its telephone wires at so low a height above the surface of the highway that it should have been foreseen that persons riding upon loads of hay might be struck by such wires. Assuming, without deciding, that the contention of appellants in this regard is correct and that the uncontradicted evidence shows that respondent was negligent in the maintenance of its wires, it must be observed that the evidence was ample to warrant the jury in finding that the deceased was guilty of contributory negligence that was the proximate cause of the accident which resulted in his death. The issue of contributory negligence presents a question of fact for the determination of a jury under proper instructions. It is not a question of law "save in those cases in which, judged in the light of common * * * experience, there is a standard of prudence to which all persons similarly situated must conform." Roberts v. Southern Pac. Co., supra. Bearing in mind the wide discretion permitted to the trial court in passing upon a motion for a new trial and in view of the conduct of the deceased, in sitting upright upon the topmost bale of a high load of hay, 16 feet and 2 inches from the surface of the highway, looking not towards the front of the truck, the direction from which danger might be anticipated, but keeping his gaze fixed upon the trailer attached to the rear of the truck upon which he was riding, resuming the same upright sitting position immediately after undergoing a narrow escape from being struck by a wire and continuing to look to the rear in spite of this experience which should have brought most forcibly to his mind the probability that other wires might be encountered, we must assume that the trial court was satisfied that the verdict of the jury in favor of appellants was contrary to the weight of the evidence. Work v. Whittington, 61 Cal. App. 302, 214 P. 474; Roberts v. Southern Pac. Co., supra; Shilling v. Dodge, 22 Cal. App. 517, 135 P. 299. The facts hereinabove narrated afford ample justification for the court's action in making the order from which this appeal is taken.

The order granting the motion for a new trial herein is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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119 Cal.App. 7

GRETTENBERG v. COLLMAN et al., and four other cases.

Civ. 4442.

District Court of Appeal, Third District, California.

Dec. 3, 1931.

1. Mechanics' liens ⚷281(5).

In action to foreclose mechanic's lien, evidence *held* to support finding lien was recorded more than 90 days after completion of building; owner having failed to file notice of completion (Code Civ. Proc. § 1187).

Code Civ. Proc. § 1187, provides that, where property owner fails to file notice of completion of building, all persons claiming benefit of statute shall have 90 days after completion of improvement within which to file their claims of lien.

2. Appeal and error ⚷1010(1).

Trial court's findings on trivial imperfections permitting filing of mechanics' lien cannot be disturbed unless there is no substantial evidence to support them (Code Civ. Proc. § 1187).

3. Mechanics' liens ⚷132(8).

In action to foreclose mechanic's liens, repairs made subsequent to date trial court found building was completed *held* trivial, not extending time for filing lien (Code Civ. Proc. § 1187).

Following date trial court found building was completed, lawn was cut and shrubbery trimmed, gas and electric equipment were connected, broken window panes were replaced, and rear wall was dashcoated to cover discoloration which occurred as result of a leak.

Appeal from Superior Court, Los Angeles County; Raymond I. Turney, Judge.

Suit by Hale Grettenberg against Paddock Collman and others and consolidated cases Nos. 208309, 202076, 211775, and 203594. From the judgment rendered, the Pacific Ready Cut Homes, Inc., appeals.

Affirmed.

Andrew J. Copp, Jr., and Glen Behymer, both of Los Angeles, for appellant.

Nelson D. Miller, of Santa Monica, John L. Schaefer, Howard Hemenway, and W. Cloyd Snyder, all of Los Angeles, and Leon U. Everhart, of Pasadena, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal on the part of Pacific Ready Cut Homes, Inc., from a judgment

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

which was rendered in several consolidated cases, denying the validity of appellant's alleged mechanics' lien.

The plaintiff brought suit to foreclose a mortgage on lot 4 of tract No. 4799, in the county of Los Angeles, which was executed to secure the payment of a promissory note for the sum of $9,000. The owner of the land, the appellant, and several other mechanic lienholders were made parties to the action. In November, 1925, the construction of a dwelling house was commenced on the property. Subsequent to the filing of the suit for mortgage foreclosure above mentioned, the appellant and three other mechanic lien claimants commenced separate actions to foreclose their liens. These five actions were consolidated and tried together. Findings were adopted by the court, and a judgment of foreclosure was entered in favor of each of the plaintiffs in these several actions, except the appellant, Pacific Ready Cut Homes, Inc., a corporation, which was awarded a judgment in the sum of $3,147.75, but was denied a lien upon the property as security for the payment of this debt. From this judgment the defendant Pacific Ready Cut Homes, Inc., a corporation, has appealed.

The only question which is involved in this appeal is the contention that the findings of the court to the effect that the appellant's lien was recorded under section 1187 of the Code of Civil Procedure more than ninety days after the completion of the building, is not supported by the evidence. There is some conflict regarding the actual date of completion. It is conceded the appellant delivered the materials for which judgment was rendered in its favor, that they were actually used in the structure, and that they were reasonably worth the sum which was allowed therefor. The owner of the property failed to file the notice of completion of the building which is authorized by section 1187, supra. That section provided in part: "In case such notice be not so filed, then all persons claiming the benefit of this chapter shall have ninety days after the completion of said improvement within which to file their claims of lien."

A notice of lien for the same materials which are here involved was filed in behalf of the appellant on May 7, 1926. This notice was fatally defective because it described the wrong property. The notice upon which the appellant relies to establish its lien in the present action was filed for record September 2, 1926. The court found that the building in question was completed June 3, 1926. If there is substantial evidence in the record to support this finding, then the appellant's notice of lien was filed too late to afford the relief which was sought thereby.

[1] From a careful examination of the record we are satisfied there is ample evidence to support the finding that the building and improvements were actually completed on June 3, 1926. Several witnesses testified to that effect. Mr. Hollingsworth, the contractor, said that he paid the last check for materials or labor on the contract on June 3, 1926. Mr. Wilson admitted his last time card for services on the job was dated June 3, 1926. This was for installing the gas and electric registers. It is true that the gas and electricity were not turned on and connected with the house until a month or so later. That was because the ordinance prohibited these connections from being made until the house was actually occupied. The occupant did not take possession of the premises until a month or more after the completion of the house. It is also true that Mr. Hollingsworth cut the lawn and trimmed the shrubbery after June 3, 1926. He accounted for this by saying that he was "taking care of the premises until White should take possession." Cutting the lawn and trimming the shrubbery does not controvert the finding of a previous completion of the building and improvements. In the case of Sunset Lumber Company v. Bachelder, 167 Cal. 512, 140 P. 35, Ann. Cas. 1916B, 664, it is held that "fixing up the yard and putting up some fences" did not vitiate a finding of the cessation of labor at a previous date.

It also appears in the present case that some broken panes of glass were replaced, and the rear of the building was dash-coated a second time, after June 3, 1926. These were mere repairs, the performance of which do not conflict with the assumption that the building and improvements contracted for were actually completed at a previous date. It appears that the rear wall was again dash-coated because a heavy rain which occurred some time after the completion of the building disclosed a leak which resulted in the discoloration of the outside coating. These subsequent repairs appear to have been comparatively trivial and are no essential part of the original contract to construct the building. Section 1187, supra, then provided in part: "Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, improvement or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien."

In the case of Willamette Company v. College Company, 94 Cal. 229, 238, 29 P. 629, 632, it is said: "The statute has, however, provided that a substantial completion is all that is required in any case, whether the work be done at the direct instance of the owner or under the provisions of a contract between him and an original contractor, by declaring that a 'trivial imperfection' shall not be deemed such a lack of completion as to prevent the filing of a lien."

[2] The determination as to what constitutes "trivial imperfections" depends upon the facts and conditions of each particular case. The court's findings in that regard may not be disturbed unless there is no substantial evidence to support them. Hammond Lumber Company v. Yeager, 185 Cal. 355, 197 P. 111; Shumway v. Woolwine, 84 Cal. App. 220, 225, 257 P. 898. Repairs of slight value or importance have been held not to interfere with findings to the effect that the buildings or improvements were previously completed. Thomas Haverty Company v. Jones, 185 Cal. 285, 197 P. 105; Rischard v. Miller, 182 Cal. 351, 188 P. 50. It is apparent that the appellant was not deceived regarding the completion of the building which is involved in the present case, by the repairs which were made after June 3, 1926. Evidently the appellant assumed the building was completed on or before May 7, 1926, at which time its first imperfect lien was filed. This was before the performance of the repairs which are now claimed to have been a material part of the completion of the structure.

[3] We are satisfied that the cutting of the lawn and trimming of the shrubbery, the connecting of the gas and electric equipment, the replacing of broken window panes, and the dash-coating of the wall to cover the discoloration which occurred as a result of a leak, were trivial, in the nature of repairs and of such slight consequence that they will not warrant this court in upsetting the finding of the court to the effect that the building was in fact completed June 3, 1926. The appellant's claim was therefore filed too late to entitle it to a lien.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 69

STEFANI v. SOUTHERN PAC. CO.

Civ. 7852.

District Court of Appeal, First District, Division 1, California.

Dec. 8, 1931.

1. Carriers 🔑46.

Straight nonnegotiable bills of lading so marked on face, used in interstate shipment, *held* governed by provisions of Federal Bills of Lading Act (Federal Bills of Lading Act §§ 9–12 [49 USCA §§ 89–92]).

2. Carriers 🔑94(3).

Carrier sued for not delivering freight shipped under straight bill of lading *held* entitled to show that diversion to different destination as directed by consignor was justified, where consignor was owner and not plaintiff suing for nondelivery (Federal Bills of Lading Act §§ 9–12 [49 USCA §§ 89–92]).

3. Pleading 🔑127(2).

Answer admitting allegations of complaint having reference to plaintiff's ownership by recital after direct allegation thereof was specifically denied *held* not admission of ownership.

4. Pleading 🔑17.

Matters of substance must be presented by direct averment and not by way of recital.

5. Appeal and error 🔑1011(1).

Weight to be given conflicting testimony was for trial court (Code Civ. Proc. §§ 1847, 2061).

6. Appeal and error 🔑1010(1).

Appellate court cannot disturb findings; there being substantial evidence to support them, even though it thinks different conclusions should have been reached.

7. Appeal and error 🔑1010(1).

Appellate court will not interfere with determination of trial court, unless testimony of witnesses is inherently improbable and impossible of belief.

8. Carriers 🔑94(3).

In action against carrier for nondelivery of grapes, evidence of plaintiff's ownership of grapes *held* to support judgment for plaintiff.

9. Carriers 🔑94(3).

Evidence, in action against carrier for nondelivery of grapes, *held* sufficient to support trial court's finding of value.

10. Carriers 🔑94(4).

Damages, in action against carrier for nondelivery of grapes, *held* to be market value at destination, minus transportation charges.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Joe Stefani against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals.

Judgment modified, and, as modified, affirmed.

A. A. Jones and Albert Picard, both of San Francisco, for appellant.

Dan T. Malloy, of San Francisco, for respondent.

PER CURIAM.

Appeal from a judgment rendered in favor of plaintiff for the value of a car of grapes shipped over the lines of defendant.

The complaint alleged in paragraph II thereof "that on or about the 5th day of September, 1926, and at all times herein mentioned since that date, plaintiff was the owner of and entitled to the use and possession of those certain goods and property in the next succeeding paragraph described," and by paragraph III that "on or about the 5th day of September, 1926, at Borden, Madera county, California, the L. Ravano Fruit Company delivered to the defendant for shipment those certain goods and property of the plaintiff, to-wit, 1049 lugs of Zinfandel black juice grapes." It was further alleged that on the same date defendant issued and delivered to plaintiff its original straight bill of lading therefor, designating plaintiff as the owner and Butte, Mont., as the destination thereof; that plaintiff on that date became, and ever since has been, the owner and holder for value of the bill of lading; that defendant, a common carrier, received the grapes, to be by it safely carried to the above destination, but failed and neglected to do so, all to plaintiff's damage in the sum of $1,769.62.

Defendant denied the allegations of paragraph II, and alleged that the L. Ravano Fruit Company was the owner of the grapes, that plaintiff had no interest therein, and was never entitled to the use or possession thereof. The allegations of paragraph III were admitted. The other allegations were denied, except that defendant admitted the receipt of the grapes, alleging the same, however, to have been received from the above-named fruit company for delivery to it at the above-named destination, or to such other place or person as the fruit company might designate; and that, while the grapes were in transit and before their arrival at Butte, the fruit company instructed defendant to divert the same to Marcello Fruit Company at New York City, which was accordingly done.

The court found that on September 5, 1926, at Borden, Cal., one Victor Bressen purchased the grapes from the L. Ravano Fruit Company; that on the same date plaintiff purchased the same from Bressen and deposited the sum of $1,169.62 to the latter's account in the Metals Bank & Trust Company of Butte; that on the same date at Borden the fruit company last named delivered to Bressen its receipted invoice for the grapes and loaded the same in defendant's car, whereupon the latter issued and delivered its straight bill of lading into Bressen's possession; that plaintiff was named therein as consignee, Butte, Mont., as the destination of the shipment, and the 1,049 lugs of Zinfandel grapes as the merchandise to be delivered to plaintiff as consignee; that on the same day Bressen forwarded to plaintiff the receipted invoice with the bill of lading, and that plaintiff, on or about the said date, became, and ever since has been, the owner and holder for value without notice of the bill of lading, and that defendant failed and refused to deliver the grapes to plaintiff at Butte or any other place. It was further found that the reasonable market value of the grapes at their destination was $1,769.62, and that demand for its payment was refused. As conclusions therefrom the court found that defendant had failed to establish a lawful excuse for its failure to deliver, and that plaintiff was entitled to recover in the above amount.

As grounds for its appeal, defendant contends that the fruit company never parted with title to the grapes, and that consequently plaintiff had no right of action; that it was justified in making the diversion alleged, and that the finding of the market value of the grapes is unsupported.

[1, 2] Straight nonnegotiable bills of lading, so marked on their face and used in interstate shipment, as was here the case, are governed by the Federal Bills of Lading Act of August 29, 1916 (39 Stat. 538, c. 415 [49 USCA §§ 81–124]). Section 9 (49 USCA § 89) provides that, subject to sections 10, 11, and 12 of the act (49 USCA §§ 90–92), which have no application here, a carrier is justified in delivering goods to one who is (a) a person lawfully entitled to the possession of the goods, or (b) a consignee named in a straight bill of lading, or (c) a person in possession of an order bill for the goods, etc. It was held in Bedig v. Southern Pacific Co., 84 Cal. App. 325, 258 P. 148, that a bill of lading is in the nature of a receipt for goods on the part of the carrier, and is only presumptive evidence of ownership thereof; and in Getchell v. Northern Pacific Ry. Co., 110 Wash. 66, 187 P. 707, that a bill of lading, whether naming another than the consignor as consignee, or naming the same person as both consignor and consignee, and thereafter assigned to another, is not evidence of superior title in any one other than the consignor to the property therein specified; and that it was the intention of Congress to confer upon carriers transporting merchandise in interstate commerce the right to deliver the goods to the true owner, and make such a delivery a defense to an action by a shipper who holds an order bill of lading. It was thus competent for defendant to show that the diversion of the car to the Marcello Fruit Company in New York, as directed by the consignor, was justified by the fact that the latter and not the plaintiff was the owner of the grapes.

[3, 4] Plaintiff claims that defendant's admission of the allegations of paragraph III of the complaint constituted an admission of his ownership; but, as shown above, the direct allegation of ownership in paragraph

II was specifically denied, and the reference thereto in paragraph III was merely by way of recital. Matters of substance must be presented by direct averment and not by way of recital (Denver v. Burton, 28 Cal. 549, People v. Jones, 123 Cal. 299, 55 P. 992), and the answer was consequently sufficient to place in issue the ownership of the grapes.

[5-8] It was claimed that the car was to have been paid for in cash on delivery by Bressen, but that he failed to do so; and it is the rule that upon a sale of goods for cash on delivery, the title and right of possession remain in the vendor until the price is paid (Hilmer v. Hills, 138 Cal. 134, 70 P. 1080); and, where there is a failure to pay, the purchaser acquires no title which he can convey to another (Wong Foo v. Southern Pacific Co., 41 Cal. App. 42, 181 P. 823). Upon this issue Bressen testified in substance that he had purchased from the fruit company in a previous transaction a quantity of grapes, some of which proved to be unsatisfactory; that he was to receive the car which was shipped as a gratuity to satisfy his complaint regarding the inferior condition of the grapes previously received. There were references in certain letters which passed between the fruit company and Bressen which might be so construed as to corroborate the latter's claim. As against this, there was evidence that Bressen was only to receive a car gratuitously in case he first purchased ten other cars, and that the car in question was the first one shipped under this arrangement, it being agreed that the same should be a cash transaction, the title to remain in the fruit company until paid for. The evidence on the issue was sharply conflicting, and the weight and credit to be given the testimony of the witnesses were questions for the trial court. Code Civ. Proc. §§ 1847, 2061. An appellate court cannot disturb findings where there is substantial evidence to support them, even though it may think that a different conclusion should have been reached (Clopton v. Clopton, 162 Cal. 27, 121 P. 720); nor will it interfere with the determination of the trial court, unless the testimony of the witnesses is inherently improbable and impossible of belief (Estate of Russell, 189 Cal. 759, 210 P. 249). In the present case we cannot say that the testimony of plaintiff and his witnesses in support of his claim of ownership was improbable or unbelievable.

[9] The evidence shows the net weight of the grapes to have been 26,275 pounds. The plaintiff testified that he was familiar with the market value of grapes in Butte at the time when the grapes should have arrived, and that grapes of this type were worth in the market $135 to $136 per ton. This evidence was sufficient to support the court's finding as to their value.

[10] While the fact was not called to the attention of the trial court, according to a stipulation filed by the parties in this court, plaintiff was to have paid the freight, refrigeration, and detention charges on the car from Borden, Cal., to Butte, Mont., which would have amounted to $563.37. Consequently the damage would have been the market value of the grapes at Butte less these charges, or $1,206.25.

The judgment is accordingly modified by deducting therefrom the sum of $563.37, and, as so modified, is affirmed. It is further ordered that each party bear his own costs of appeal.

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119 Cal.App. 40

ADAMS v. CHRISTOPHER et al.

INDEMNITY INS. CO. OF NORTH AMERICA v. BURGESS.

Civ. 4422.

District Court of Appeal, Third District, California.

Dec. 5, 1931.

Rehearing Denied Jan. 4, 1932. Hearing Denied by Supreme Court Feb. 1, 1932.

1. States ⚷108½.

Subcontractor's action against surety for compensation for labor on state building, brought within six months after time for filing verified claims, was not barred (Code Civ. Proc. §§ 579, 1184a; St. 1919, p. 487, § 2, as amended by St. 1925, p. 538).

2. States ⚷108½.

Subcontractor performing labor on state building was authorized to maintain suit for compensation against surety without joining contractor (St. 1919, p. 487, § 2, as amended by St. 1925, p. 538).

3. States ⚷108½.

Cross-complaint by subcontractor required to interplead in action against contractor, sureties, and state, was commencement of action against surety as respected limitation (St. 1919, p. 487, § 2, as amended by St. 1925, p. 538; Code Civ. Proc. § 1184a).

4. Appeal and error ⚷877(2).

Surety was not prejudiced by severing subcontractor's action for compensation from action of other subcontractors authorized to maintain proceedings to enforce lien (Code Civ. Proc. § 579).

> Surety was party to original action wherein subcontractors were required by state to interplead, and issues were duly framed therein and tried giving surety every opportunity to present any legitimate defense.

5. Attorney and client 🔑141.

Allowance of $400 as attorney's fee in action by subcontractor to recover against surety for services on state building *held* not excessive (St. 1919, p. 487, § 2, as amended by St. 1925, p. 538).

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by H. O. Adams against John Christopher, the Indemnity Insurance Company of North America, and others, wherein on motion of the state D. E. Burgess and others were required to interplead, and wherein interpleader named filed an answer and cross-complaint. From a judgment for interpleader named against defendant last named, such defendant appeals.

Affirmed.

See, also, 296 P. 85.

R. C. Pardoe, of Stockton, for appellant.

Herbert H. Briggs, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment which was rendered in favor of a subcontractor for labor performed in painting a state building at the Napa State Hospital. The judgment is against the surety on an indemnity bond which was filed by the general contractor as required by law. The respondent was an intervener in an action which was brought by another subcontractor. The issues which are involved herein were presented by means of a cross-complaint.

The defendant Christopher held a contract with the department of public works of California for the construction of a building at Napa State Hospital. A bond for the faithful performance of the contract was filed as required by law. The appellant Indemnity Insurance Company of North America was the sole surety on this bond. It was executed as security for the total sum of $17,242.50. The plaintiff and several other subcontractors were employed in erecting the structure. The building was completed and accepted January 19, 1929. The materialmen and laborers were not all paid. The sum of $7,826.76 remained in the custody of the state controller for the payment of valid approved claims.

This action was commenced by the plaintiff, Adams, who was also a subcontractor, against the general contractor, the indemnity company, the department of public works, and others. On motion of the state department, pursuant to section 386 of the Code of Civil Procedure, this respondent and other subcontractors were directed to interplead. The respondent thereupon filed an answer and cross-complaint. The answer controverted the essential allegations of the complaint. The cross-complaint affirmatively alleged a cause of action against the contractor and his surety and the department of public works, for services performed in painting the building which is involved in the original contract. The respondent also sought to establish a lien upon the state fund to secure the payment of his claim. The plaintiff demurred to the cross-complaint on the ground that it failed to state facts entitling the respondent to a lien on the state fund. This demurrer was sustained, and the court held that the respondent had forfeited his right to a lien for failure to commence his action within the time allowed by law. This ruling had no application to the right of the respondent to maintain an action for compensation for services performed, as distinguished from his effort to establish a lien to secure the payment thereof.

The appellant also filed a separate demurrer to the respondent's cross-complaint on the ground that it fails to state facts sufficient to constitute a cause of action against the surety company. The statute of limitations was also invoked. This demurrer was overruled. In so doing, the court declared pursuant to section 579 of the Code of Civil Procedure that "said cross-complaint of D. E. Burgess, * * * be regarded and treated as an independent original complaint."

By stipulation of respective parties, a judgment was rendered in the original action in favor of the various subcontractors, other than the respondent, whose stop notices had been filed as required by law, for the several amounts found to be due to them. The satisfaction of this judgment exhausted the fund which was reserved by the state controller for the payment of obligations incurred pursuant to the original contract. The respondent's cause of action against the surety company, as it is alleged in the cross-complaint, was separately tried by the court. Findings of facts were adopted. A separate judgment was accordingly entered against the surety company and in favor of the respondent for the amount of $1,418, and the further sum of $400 attorney's fees. From this last-mentioned judgment the surety company has appealed.

The appellant asserts that the sustaining of the plaintiff's demurrer to the cross-complaint eliminated the respondent from the action, and that the court was without jurisdiction to render a judgment upon the cross-complaint against the surety company, that the cross-complaint fails to state a cause of action, and that section 1184a of the Code of Civil Procedure limits the right to commence a suit of this nature to ninety days from the time allowed by law for filing a notice of lien, and that the respondent's cause was therefore barred.

[1] This action was originally brought by the plaintiff against the contractor and his surety and the department of public works of the state of California, pursuant to the provisions of "An act to secure the payment of the claims of persons employed by contractors upon public works," etc. (St. 1919, p. 487), as amended by Statutes of 1925, at page 538.

The respondent's action for compensation for services performed, was not barred by the statute of limitations. The statute specifically authorized him to commence this suit at any time within six months from the time allowed for filing verified claims therefor. This time within which the action was authorized to be commenced did not expire until April 19, 1929. His cross-complaint was filed October 15, 1929.

Section 2 of this amended act provides that: "Actions against the state, public board, commission, or officer thereof, or the political subdivision of the state, or the disbursing officer whose duty it is to make payments under the provisions of the contract for the public improvement in question, brought by any claimant who has filed claim under this act, or his assign, shall be governed by the provisions of sections" 1184 to 1184c of the Code of Civil Procedure.

Section 1184a, supra, provides: "No action to enforce the payment of any such claim shall be commenced * * * prior to the expiration of the period within which claims of lien must be filed for record, as prescribed by section one thousand one hundred eighty-seven of this code, nor shall any such suit be commenced later than ninety days following the expiration of such period."

It is true that evidence of the acceptance of a building by the owner is deemed to be equivalent to the completion thereof. Section 1187 provides in part: "In case such notice [of completion] be not so filed, then all persons claiming the benefit of this chapter, shall have ninety days after the completion of said work of improvement within which to file their claims of lien."

In the present case it is conceded the building in question was accepted January 19, 1929. The respondent, Burgess, filed his notice of claim January 25, 1929. He did not commence his action, however, until his cross-complaint was filed October 15, 1929. Section 1187, supra, requires verified claims for lien to be filed within ninety days from the date of acceptance of the structure. This time for filing notices of lien in the present case therefore expired April 19, 1929. Pursuant to that portion of the section last mentioned it is provided, "No action to enforce the payment of any such claim shall be commenced * * * later than ninety days following the expiration of such period" (Code Civ. Proc. § 1184a), for filing verified claims. It follows that July 18th was the last day upon which a suit to establish a lien to enforce the payment of a claim, in this case, was authorized to be commenced. Since the respondent did not commence his suit until October 15, 1929, he lost his right to enforce a lien for the payment of his claim. The court therefore properly sustained the plaintiff's demurrer to the respondent's cross-complaint. This order affected the cross-complaint only to the extent to which it sought to establish a lien upon the state fund for the payment of his claim. This does not mean that he also forfeited his right to maintain an action for compensation for the services which he performed. Clearly the foregoing provision of the Code merely limits the time within which a claimant may commence an action to establish a lien to secure the payment of his claim. Moreover, section 2 of the amended statute first above referred to specifically authorizes a claimant for labor performed or materials furnished to commence his action for compensation therefor, at any time within six months after the time allowed for filing verified claims. That section reads: "Suit against the surety or sureties on the bond of the contractor required under section one hereof, may be brought by any claimant, or his assign, at any time after the claimant has ceased to perform labor or furnish material or both and until the expiration of six months after the period in which verified claims may be filed as provided herein. The filing of a verified claim shall not be a condition precedent to the maintenance of such action against the surety or sureties on the bond and an action on such bond may be maintained separately from and without the filing of an action against the board, commission, officer or other body by whom such contract was awarded. And upon the trial of any such action, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in the judgment therein rendered."

The court was warranted in adopting its finding that, "in and by the terms of the contractor's bond given in said matter, a period of six months was provided in which to bring the action thereon, which period did not expire until the 19th day of October, 1929." The record amply supports this finding. Both the law and the stipulation of the bond authorized the commencement of respondent's action on or before October 19, 1929. The action was therefore not barred by the statute of limitations.

[2] By the provisions of the statute last above quoted, the respondent was authorized to maintain this suit for compensation for services rendered against the surety without joining the contractor, the department of public works, or any of the officers thereof, and

without having first filed a verified notice of claim therefor.

[3, 4] Under the circumstances of this case the respondent's cross-complaint may be deemed to be the commencement of his action against the Indemnity Insurance Company of North America, as surety for the original contractor, for whom he rendered services. Both were parties to the original action. The issues were duly framed and tried. The appellant had every opportunity to present any legitimate defense to the action which it possessed. The appellant was not prejudiced by severing the respondent's suit for compensation from the action of the other subcontractors who were authorized to maintain proceedings to enforce their liens. Section 579 of the Code of Civil Procedure authorizes this severance. It provides: "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

This procedure is the precise process which was adopted by the court in the present case. The appellant was not harmed by this separation of the causes.

In the absence of a special demurrer, we deem that the allegations of the cross-complaint sufficiently state a cause of action against the appellant for compensation.

[5] The language of the statute above quoted also authorizes the allowance of a reasonable attorney's fee in a suit of this nature. We are unable to say the sum of $400 which was allowed for that purpose is an unreasonable amount under the circumstances of this case. This allowance finds ample support in the record.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 27

CITY OF SAN BRUNO v. NATIONAL SURETY CO.

Civ. 7839.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1931.

Rehearing Denied Jan. 4, 1932.

1. Pleading 🔑8(3).

In city's action on city clerk's official bond, allegation that there was embezzlement of taxes by city clerk, being, in view of facts, but legal conclusion it tendered no issue, and was demurrable (Deering's Gen. Laws 1923, Act 5233, § 878).

> Under Deering's Gen. Laws 1923, Act 5233, § 878, dealing with duties of city clerk, he was not authorized to collect taxes which he was alleged to have embezzled, but an ordinance had been adopted authorizing marshal to appoint city clerk as deputy to act in his place in matter of collection of taxes.

2. Municipal corporations 🔑173(2).

Mere dereliction by city clerk in making falsified statement without damage was insufficient to sustain action on official bond.

3. Officers 🔑129.

Liability on official bond extends only to cases where neglect or misconduct is proximate cause of loss.

4. Officers 🔑131.

Where person holds two distinct offices, bond of one does not cover his duties in the other.

5. Officers 🔑131.

Where person holds two distinct offices, bondsmen are not answerable for dereliction of duties not pertaining to office for which bond was given.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the City of San Bruno against the National Surety Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

R. A. Rapsey, City Atty., of San Bruno, for appellant.

R. P. Wisecarver, of San Francisco, for respondent.

PER CURIAM.

This is an action by the city of San Bruno, a municipal corporation, to recover upon the official bond of its city clerk. A demurrer, both general and special, was sustained to the complaint, and, plaintiff having failed to amend, judgment was entered in favor of defendant Surety Company. From this judgment, plaintiff has appealed.

The complaint alleged that until April 16, 1928, Nettie A. Willits was the duly elected, qualified, and acting city clerk and assessor, and the duly appointed, qualified, and acting deputy marshal and deputy tax collector of the municipality; that on April 7, 1927, defendant, as surety for said Willits, executed its bond to plaintiff, reciting the fact that Willits had been elected city clerk of the municipality; the condition of its obligation being that, "if said Nettie A. Willits shall well, truly and faithfully perform all official duties required by law, and all such additional duties as may hereafter be imposed upon her as such officer by any law of the state of California, then the above obligation to be void; otherwise to remain in full force and effect"; that plaintiff's board of trustees on or about June 15, 1918, adopted an ordinance, numbered 40, which authorized the marshal to appoint the city clerk his deputy to act in his place and stead in the matter of the collection of taxes, and the city clerk to accept the appointment; that, at the time of the execution of the bond in question, "said Nettie A. Willits was and is duly and regularly appointed, qualified and acting as and is duly and regularly authorized by the city marshal of the City of San Bruno to act as the deputy marshal of the City of San Bruno for the purpose of acting in the place and stead of said marshal in the matter of the collection of taxes; that at the time of the execution and delivery of said bond * * * said Nettie A. Willits, pursuant to Ordinance number 40 * * * duly and regularly accepted the aforesaid appointment of said city marshal for the purpose of acting in the place and stead of said city marshal in the matter of the collection of taxes. * * * That following the execution of said bond * * * and during the time for which said bond was given * * * said Nettie A. Willits did in her official capacity as city clerk, city assessor, and ex-officio deputy marshal and deputy tax collector, receive for the account and use of said City of San Bruno sums of money amounting to $2,724.06." These sums were collected from certain taxpayers, and the complaint further alleged that they were received and embezzled by Willits in the month of December, 1927. It was further alleged that on or about December 31, 1927, Willits, as city clerk, filed in that office a statement purporting to be a full statement of the receipts and expenditures and a full statement of the financial condition of the city, as required by law, but from which any mention of the above collections was omitted; also that she subsequently failed and refused to make a quarterly statement for the quarter ending March 31, 1928, as required by law, showing the receipts and expenditures of the city for that quarter, and that she has failed and neglected to account for any part of the above sum; also it was further alleged that, due to her failure to file a correct statement on December 31, 1927, and to make the quarterly statement mentioned, the city was unable to prevent the embezzlement charged.

As stated, the alleged embezzlement occurred before it became her duty to file the statements, and no facts are alleged showing that the city suffered loss or damage by reason of her failure to do so.

Section 880 of the Municipal Corporation Act (Act 5233, Deering's General Laws) prescribes the powers and duties of the marshal in municipalities of plaintiff's class. It provides that he shall collect all taxes levied by the board of trustees except as therein provided, and receive from the clerk all licenses and collect the same. It is also his duty at the expiration of any month to pay to the treasurer all taxes and other funds of the city collected by him during the month, and upon the receipt of any tax list give his receipt for the same to the clerk, and, upon depositing with the clerk the delinquent tax list, to take the latter's receipt therefor; also that he "may appoint, subject to the approval of the board of trustees, one or more deputies, for whose acts he and his bondsmen shall be responsible."

Section 878 of the same act deals with the duties of the city clerk. This officer is not authorized to collect taxes or licenses, nor is provision made for the payment to him of any moneys for the use of the city. He is required, however, to keep records of all sums received by the city for licenses and taxes, with the commissions deducted, and of all warrants drawn on the treasury, showing all transactions between the city and its marshal and treasurer, it being the duty of the latter to file with the clerk duplicates of receipts given for all moneys paid into the treasury. This section also provides for the filing by the clerk of the quarterly statements which the complaint alleged that the clerk failed and refused to file; and that "he shall perform such other services as this act and the ordinances of the board of trustees shall require."

Except as above, the act requires no other duties from the clerk. Ex officio no duty to act as deputy marshal rested upon the incumbent, and that duty could only be imposed by an ordinance of the city; and no requirement was made by the ordinance that such officer accept appointment as deputy marshal, nor were any of the duties of the latter office imposed upon the clerk as such.

[1] The provisions of the statute and ordinance contradict plaintiff's allegations that there was an embezzlement by the city clerk; and this averment, being, in view of the facts, but a legal conclusion, tendered no issue, and was therefore demurrable. Callahan v. Broderick, 124 Cal. 80, 56 P. 782.

[2-5] While it is clear that the alleged embezzlement was by Willits in her capacity as deputy marshal, and not as city clerk, plaintiff nevertheless contends that "the complaint sets forth guilty knowledge by the city clerk of her own embezzlement in her various characters, and the suppression of that knowledge by a falsified statement, to the damage of plaintiff."

As before stated, the false statement caused no damage to plaintiff, the loss having previously occurred, and no fact is alleged supporting the conclusion that the loss could have been retrieved had a true statement been filed. It is well settled that a mere dereliction without damage is insufficient to sustain an action on an official bond, and that the liability on such bond extends only to cases where the neglect or misconduct is the proximate cause of the loss. Oakland Bank, etc., v. Murfey, 68 Cal. 455, 9 P. 843; Riverside, etc., Cement Co. v. Maryland Casualty Co., 46 Cal. App. 87, 189 P. 808. Also that, when a person holds two distinct offices, the bond of one does not cover his duties in the other (People v. Edwards, 9 Cal. 286; People v. Ross, 38 Cal. 76), even though the holder of the first office is ex officio the holder of the second (People v. Burkhart, 76 Cal. 606, 18 P. 776), nor are his bondsmen answerable for the dereliction of duties not pertaining to the office for which the bond was given (San Luis Obispo v. Farnum, 108 Cal. 562, 41 P. 445).

In view of the facts alleged and the authorities cited, the demurrer was properly sustained.

The judgment is affirmed.

WALKER v. HOUSTON et al. *

HOUSTON et al. v. EASTERN OUTFITTING CO.

Civ. 4310.

District Court of Appeal, Third District, California.

Nov. 30, 1931.

Rehearing Denied Dec. 30, 1931. Hearing Granted by Supreme Court Jan. 28, 1932.

1. Sales 🔑476.

Upon refusal of tender of amount due on conditional sale contract by holder of chattel mortgage, deposit in bank of money tendered was unnecessary (Civ. Code, §§ 1500, 1504, 2905).

2. Sales 🔑476.

Refusal of tender of amount due on conditional sales contract and of demand for possession is conversion of chattels covered by contract.

3. Chattel mortgages 🔑177(4).

Where holder of conditional sales contract refused tender of amount due and thereafter sold chattels, measure of mortgagee's damages is amount of claim up to value of chattels at time of conversion (Civ. Code, §§ 3336, 3338).

4. Judgment 🔑252(3).

In action to foreclose first mortgage, where holder of second chattel mortgage did not ask for judgment against converter of chattels, judgment in his favor against converter *held* error.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Bertha M. Walker against A. Houston and others. From judgment for plaintiff, defendant Eastern Outfitting Company appeals.

Modified and affirmed.

Benjamin & Benjamin, of Los Angeles (Aaron Elmore, of Los Angeles, of counsel), for appellant.

E. A. Lane, R. R. Sleeper, Koenig & Brunton, and William Ellis Lady, all of Los Angeles, for respondents.

PRESTON, P. J.

Action to foreclose a chattel mortgage. Judgment was rendered in favor of the plaintiff and respondent Bertha M. Walker from which the defendant Eastern Outfitting Company, a corporation, alone appeals.

The facts, while not in dispute, are somewhat involved, but those necessary to a correct understanding of the questions presented on this appeal are briefly these:

Between January 2, 1924, and March 8, 1924, defendants Houston purchased from appellant Eastern Outfitting Company, on conditional sale contracts, certain household furniture, and agreed to pay therefor the sum of $9,150, in installments of $2,000 upon the execution of the contracts, and $250 per month thereafter. Said defendants Houston paid thereon the initial payment and certain installments making total payments of $5,450; they also received credit in the sum of $750 for certain furniture returned. The last payment thereon was the monthly payment made on October 2, 1925, after which, including interest to said time, there remained a balance due appellant of $3,166.89. On May 31, 1924, defendants Houston made, executed, and delivered to respondent their joint and several promissory note in the sum of $2,500 payable in installments. This note was secured by a chattel mortgage of even date, on all the furniture and fittings located in a certain apartment house building at 623 South Parkview avenue, in the city of Los Angeles, and among the furniture thereby mortgaged was included all of the property purchased from appellant on said conditional sale contracts. In fact, the property sold to defendants Houston comprises the bulk of the furniture in the apartment house.

Said chattel mortgage provided in part as follows: "* * * It being expressly under-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 12 P.2d 952.

stood that a portion of the furniture, furnishings, fittings and fixtures therein contained have been purchased by the mortgagors under conditions and lease sale contracts, and that the mortgagors are the owners of an equitable interest therein and that they hereby mortgage only their equitable interest in and to said furniture, furnishings, fittings and fixtures, as hereinabove described, and to that and all future payments that may be made therein, and the mortgagee shall receive the benefit of all such payments, and that should the mortgagors fail to make the payments due on any of said conditional and lease contracts, then and in that event the mortgagee shall have the right to pay the same when due and shall be entitled to repayment from the mortgagors forthwith, with interest thereon at the rate of 7% per annum, from the date of payment until paid."

Said chattel mortgage contained the usual good-faith clause, and was in due course recorded on June 4, 1924. Said defendants Houston paid no part of the principal of said note, but paid the interest thereon to and including September 1, 1925.

On July 17, 1924, defendants executed another chattel mortgage on all the furniture and furnishings situated in said apartment house to defendants and respondents Ellis C. Howe and Fern E. Howe to secure payment of certain rent that would become due to respondents Howe from Houston, under and by virtue of a lease on said apartment house. This chattel mortgage was thereafter and on August 2, 1924, duly recorded. At the time of the execution of this chattel mortgage, the Howes had actual knowledge of the existence and execution of the prior chattel mortgage given by respondents Houston to respondent Walker.

Houstons entered into possession of the apartment house under said lease, and, on their default in the payment of rent, the defendant Howe commenced an unlawful detainer suit in the lower court, and on September 23, 1925, obtained judgment against them for $1,206.75, together with restitution of the apartment house and the forfeiture of said lease, no part of which judgment has been paid.

On September 30, 1925, Houstons removed all of said mortgaged furniture without Mrs. Walker's consent from said apartment house and delivered the same to the warehouse of appellant Eastern Outfitting Company. Thereafter and on October 8, 1925, Mrs. Walker tendered and offered to pay appellant Eastern Outfitting Company the balance then remaining due on said conditional sale contracts from Houstons, and demanded possession of all of said property. The appellant, however, refused to accept said tender or yield possession of said furniture, and retained the same, and some months thereafter, and after this action was begun, sold all of said furniture and retained the proceeds thereof.

It must be remembered that Houstons made all the payments due appellant at the time the furniture was stored with it, and was not in default on said conditional sale contracts. They were, however, in default in their payments to Mrs. Walker when she made the tender to appellant. Thereafter on October 19, 1925, Mrs. Walker commenced this action to foreclose her mortgage.

[1] Appellant first contends that "the tender by respondent Walker of the balance due on the conditional sale contracts not having been kept good, its effect was only to stop the running of interest; there was, consequently, no divestiture of title from appellant and no conversion." We are unable to agree with this contention. The tender made by respondent Walker on behalf of defendants Houston was admittedly sufficient in every respect, and the trial court so found. Therefore we have only this question to determine: Was it necessary, as a matter of law, after tender had been made and refused to keep the tender good by depositing the money in the bank and comply with section 1500 of the Civil Code? We think not. The law is well established that it was not necessary for respondent Walker or defendants Houston to keep the tender good for the purpose of this foreclosure action. It was the tender itself and its refusal which instantaneously divested appellant of all right and ownership to said furniture and vested the complete title thereto in defendants Houston. Leet v. Armbruster, 143 Cal. 663, 77 P. 653, 655; Loughborough v. McNevin, 74 Cal. 250, 14 P. 369, 15 P. 773, 5 Am. St. Rep. 435; Keifer v. Myers, 14 Cal. App. 338, 111 P. 1038; Section 1504, Civ. Code; Wiemeyer v. Southern T. & C. Bank, 107 Cal. App. 165, 290 P. 70; section 2905, Civ. Code.

In the case of Leet v. Armbruster, supra, the court said: "The effect of the tender did not, of course, operate as a payment of the debt for all purposes. The debt still remained due, but the sole right that remained in the purchaser was an action at law for the recovery of the money. For the purpose of paying the debt, or stopping the running of interest, or maintaining a suit to redeem, it is, of course, necessary to keep the tender good; but the lien is extinguished and the title divested without this. This is the general rule, recognized in Hershey v. Dennis, 53 Cal. 77, and in the decisions of our sister states. * * * In Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145, it is said: 'A tender of the principal and interest of a mortgage debt, at any time before foreclosure, though after the day appointed for the payment thereof, discharges the lien of the mortgage; but the debt remains. In such case, it is not necessary that the tender should be kept good; nor in a foreclosure suit is it requisite to bring the money into court, since the land is discharged.' And again, in Adair v. Cummin, 48 Mich. 383, 12 N. W. 495, it is said: 'When the tender was refused, the lien was discharged, and the mortgage gave no right thereafter to disturb her possession. Her right to the property was rendered plenary, and was not dependent at all on the tender being kept good.' And the Circuit Court in Mitchell v. Roberts [17 F. 776], supra, says: 'The rule is settled that a tender of the debt for which the property is pledged as security extinguishes the lien, and the pledgor may recover the pledge or its value in any proper form of action without keeping the tender good or bringing the money into court, because, like a tender of the mortgage debt on the law day, the tender having once operated to discharge the lien, it is gone forever.'"

[2] The above cases are also authority for the rule that, after a proper tender and demand for possession of the chattels is made and refused, a conversion takes place. A refusal to deliver the property on demand, after proper tender, is an exercise of dominion over the property of another in defiance of the other's rights, which is conversion.

If Mrs. Walker had sought to extinguish the debt owing from the Houstons to appellant, then it would have been necessary for her, upon appellant's refusal to accept the money tendered, to go one step further and comply with section 1500 of the Civil Code; but, as we have already seen, this was wholly unnecessary, because the property was released from the dominion of appellant and the title passed to Houstons by its refusal to accept the tender.

Section 1500, Civil Code, does not prescribe the mode of tender, but rather a method of extinguishing an obligation. Sheller v. Livingston, 25 Cal. App. 572, 144 P. 547.

[3] Appellant next contends that the court applied the wrong measure of damages in this case. The court found the value of the furniture mortgaged to Mrs. Walker and converted by appellant was at the time of the conversion of the value of $3,945.25. The court also found that the total indebtedness due from the Houstons to Mrs. Walker, including interest, attorneys' fees, and charges, was the net sum of $2,987.83.

The court also found, as above stated, that the Houstons owed appellant a balance of $3166.89 on the purchase price of said furniture.

It is appellant's contention that the $3,166.89 should have been deducted from the value of the property at the time of the conversion and judgment rendered against it only for the difference.

Appellant alleged in its answer that it received the furniture for "storage and safekeeping." In that case, the measure of damages for the conversion or wrongful disposal of the chattels is found in sections 3336 and 3338 of the Civil Code, which was followed by the trial court in this case.

There was no privity between appellant and Mrs. Walker. Appellant's right to have the balance of the purchase price paid before the Walker mortgage must rest upon a superior right to the furniture.

We have already shown that appellant lost its title by refusing the tender of the balance of the purchase price. Furthermore, appellant sold said furniture, and hence could not deliver the same to the owners thereof, thereby making itself liable for the value of the furniture disposed of. Mrs. Walker had a right to satisfy her claim out of the value of the property at the time of the conversion. It must be remembered that the Houstons owed appellant the balance due on the furniture, and not Mrs. Walker.

[4] Appellant also contends that part of the judgment, in favor of respondents Howe against appellant is void. We think this contention must be sustained.

The court found that the Howes' claim was secured by a chattel mortgage on the property converted by appellant, and that the Howes are entitled to recover from the appellant the total sum of $1,450.79. The court also found that the total liability of the appellant being the value of the goods converted of $3,945.25, together with 7 per cent. interest thereon from the date of the commencement of this action, making a total liability of $4,727.67 against appellants, and that after Mrs. Walker should be paid the amount due her, then Howes to be paid $1,450.79, and that the balance of $4,727.67 be credited to defendants Houston against the appellant, and the court further found that appellant have judgment against the Houstons for the balance of the purchase price of said furniture, and rendered a final judgment according to all the above mentioned findings.

The effect of the final judgment was to render in favor of the Howes against appellant an affirmative money judgment for the indebtedness due them from defendants Houston. No pleadings were filed against appellant by the Howes, nor was any relief asked against it. The only pleadings filed by said respondents Howe were the answer to the second amended complaint, the second amendment to their answer to the second amended complaint, and their cross-complaint against the Houstons. Their answer to the second amended complaint is nothing more than a denial of certain allegations therein, with a prayer that plaintiff, Mrs. Walker, take nothing, and that judgment be for the defendants with costs. The second amendment of their answer also incorporates the allegations of their first amendments, sets up certain facts in connection with a mistake of fact in releasing their chattel mortgage of record, with which we are not concerned here, and concludes with a prayer for the same relief as prayed for in their answer, and, that being ordered, pay to them to discharge their chattel mortgage, and judgment against defendants Houston such sums remaining after payment of the claim of Mrs. Walker. Their cross-complaint specifically sets forth that it is against the defendants Houston. It sets up the same matters which are set up in the second amendment to the answer, and concludes with a prayer for the same relief. No relief is asked in any of the Howe pleadings against appellant, nor is appellant even mentioned in any of them.

We find therefore no basis for entering a judgment against appellant in favor of the Howes.

We are of the opinion therefore that the final judgment must be modified by striking therefrom all reference to a judgment in favor of the Howes against appellant Eastern Outfitting Company, and, as so modified, the judgment should be affirmed; and it is so ordered. Appellant to recover its costs on appeal.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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118 Cal.App. 716

BANK OF ITALY NAT. TRUST & SAVINGS ASS'N v. SYMMES et al.

Civ. 7830.

District Court of Appeal, First District, Division 1, California.

Dec. 1, 1931.

Rehearing Denied Dec. 31, 1931. Hearing Denied by Supreme Court Jan. 28, 1932.

1. Receivers ⚷186.

Where federal court, having appointed receiver, granted creditor leave to sue on claim rejected by receiver, no personal judgment could properly be awarded against receiver.

> Since receiver was not personally liable, judgment could properly be awarded against him only in his official capacity, to be paid in due course of administration of his trust.

2. Bills and notes ⚷246.

Person writing on back of corporation's notes that he guaranteed payment and waived presentation, demand, protest, and notice, sufficiently indicated intention to be bound as guarantor, not indorser (Civ. Code, § 3144).

> Civ. Code, § 3144, provides that person signing instrument otherwise than as maker, drawer, or acceptor, is deemed to be indorser, unless clearly indicating intention to be bound in some other capacity.

3. Guaranty ⚷34.

Remedy against guarantor, being dependent on separate contract rather than on terms of instrument, is secondary, not primary (Civ. Code, §§ 3201, 3266a).

4. Bills and notes ⚷256.

Guaranty ⚷64, 65.

Person writing on corporation's notes that he guaranteed payment, whether becoming guarantor or indorser, or both, *held* not discharged by payee's dismissing action as to corporation's receiver; right to proceed against such person being expressly reserved (Civ. Code, §§ 3144, 3201, 3266a).

5. Bills and notes ⚷146.

Object of Negotiable Instruments Law is to secure uniformity in law of negotiable paper (Civ. Code, § 3082 et seq.).

6. Bills and notes ⚷146.

Negotiable Instruments Law, since it covers entire subject, must control if applicable (Civ. Code, § 3082 et seq.).

7. Statutes ⚷158.

Implied repeal of statutes is not favored.

8. Statutes ⚷181(1).

Every statute must be construed according to what appears to be Legislature's intent.

9. Statutes ⚷161(1).

Later act, if clearly intended to prescribe sole rule governing case provided for, or to establish new and complete scheme concerning subject-matter, repeals pro tanto earlier inconsistent act.

10. Guaranty ⚷50.

Respecting negotiable instruments, Negotiable Instruments Law regulating discharge of those secondarily liable *held* controlling over earlier statute concerning guarantors (Civ. Code, §§ 2819, 3201, 3266a).

11. Guaranty ⚷64, 65.

Payee's dismissing action on corporation's notes solely as against corporation's receiver, who stipulated that he would allow payee's claim, did not alter principal obligation, or impair codefendant guarantor's rights against corporation, and did not discharge guarantor (Civ. Code, §§ 2819, 3201, 3266a).

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Since judgment against receiver would have resulted in no more than adjudication that payee's claim should be allowed in that amount, no advantage would accrue, either to payee or to guarantor of payment of corporation's notes, merely by entry of judgment after claim had been voluntarily allowed, nor did stipulation in question or dismissal of action as against receiver release corporation or impair or suspend remedies of guarantor against it.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Bank of Italy National Trust & Savings Association, a national banking association, against Whitman Symmes and another. Judgment for plaintiff against defendant named, and such defendant appeals.

Modified and affirmed.

Sterling Carr, of San Francisco, for appellant.

Louis Ferrari, J. J. Posner, and Cullinan & Hickey, all of San Francisco, for respondent.

PER CURIAM.

This action was brought by the Bank of Italy Trust & Savings Association (hereinafter referred to as the bank) against Claude R. King, as temporary receiver for Thomas Day Company, a corporation, and Whitman Symmes, who is the appellant here. It was based on two promissory notes, both negotiable in form, executed by the corporation to the bank. One note, dated November 5, 1925, was for the principal sum of $15,000, and the other, dated December 17, 1927, was for the sum of $6,000. Before their delivery to the bank appellant wrote on the back of each instrument the following: "For value received I hereby guarantee payment of the within obligation and all renewals or extensions thereof, and I hereby waive presentation, demand, protest, notice of protest and notice of nonpayment. Whitman Symmes." Prior to the commencement of the action the sum of $1,000 was paid on the latter note, leaving a total of $20,000 of principal and interest unpaid on both instruments. Receiver King was appointed as such by the United States District Court of the Northern District of California, and the bank filed with him a claim for the amounts unpaid on the notes. The claim was rejected, whereupon the above court granted the bank leave to sue thereon.

[1] In such a case no personal judgment could properly be awarded against the receiver, who is not personally liable, but only against him in his official capacity, to be paid in the due course of the administration of his trust. Painter v. Painter, 138 Cal. 231, 71 P. 90, 94 Am. St. Rep. 47; 53 Cor. Jur., Receivers, pp. 362, 363.

Both appellant and the receiver set up in their answers certain transactions which were alleged to entitle them to credits on the notes in suit. Before the trial the bank entered into a stipulation with the receiver which read as follows: "For and in consideration of the allowance of the claim of the Bank of Italy National Trust and Savings Association against the receiver of the Thomas Day Company in the sum of seventeen thousand five hundred ($17,500.00) dollars, in which amount said receiver agrees to allow said claim, said Bank of Italy National Trust and Savings Association hereby agrees to dismiss as against said receiver the above entitled and numbered action. * * * Said Bank of Italy National Trust and Savings Association hereby expressly reserves its right of recourse against Whitman Symmes, one of the defendants in said action, said Whitman Symmes being an endorser on the note which is the subject of said action; and this stipulation to dismiss the above action as to said receiver is not to affect said suit against said Whitman Symmes in any way whatsoever."

Following this a dismissal was filed, which reads as follows: "The above cause of action having been fully settled as to defendant Claude R. King, receiver, is hereby dismissed as to said defendant Claude R. King. This dismissal does not in any respect affect said action as against defendant Whitman Symmes."

By a supplemental answer filed by appellant it was alleged that the above stipulation and dismissal operated to exonerate him from all liability on the notes.

The court found that there should be credited on the notes the sum of $3,064.59, the net amount realized by the bank from the sale of certain property on June 20, 1928, with interest thereon in the sum of $428.06, a total of $3,493.55. It further appears that the receiver subsequent to the dismissal paid to the bank on account of the claim $1,750, of which $1,653.35 was applied as interest and $96.65 upon the principal. The court accordingly allowed the latter sum as an additional credit, the total credits as found being $3,590.20.

Notwithstanding its findings as above, the court entered judgment against appellant for $17,500, and as grounds for the appeal it is contended that appellant was a guarantor merely, and that the court erred in its conclusion that the effect of the stipulation and dismissal was not to exonerate him, and that the judgment in the respects above mentioned is not supported by the findings.

Section 3144 of the Civil Code, which was adopted in 1917 (Stats. 1917, pp. 1531, 1542) as part of an enactment making the law of negotiable instruments of the state of California uniform with the law of other states, provides that "a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." And it has been held in numerous cases—although there is some conflict—that where the payee of a note, for the purpose of negotiating the same, indorses a guaranty thereon combined with a waiver of demand, notice, and protest, he becomes an indorser with enlarged liability. 8 Cor. Jur., Bills and Notes, § 533, p. 354; First National Bank v. Cummings, 69 Okl. 216, 171 P. 862, L. R. A. 1918D, 1099; Rawlins County State Bank v. Rummel, 114 Kan. 597, 220 P. 255; Hendrix v. Bauhard Brothers, 138 Ga. 473, 75 S. E. 588, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, 688; Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331; First National Bank v. Shaw, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342; Hutson v. Rankin, 36 Idaho, 169, 213 P. 345, 33 A. L. R. 91. On the other hand, it has been held that a stranger to the instrument who wrote thereon, "For value received I hereby guarantee the payment of the within note at maturity, and hereby waive, demand, protest and notice of nonpayment, * * *" was not an "indorser," having indicated by the appropriate word "guarantee" his intention to be bound in that capacity and not as an endorser. While it has been held that the word "guarantee" does not always import a contract of guaranty (Meyer v. Moore, 72 Cal. App. 367, 237 P. 550), yet in cases involving the same question as in the case at bar it was held that the use of the word clearly indicated the nature of the obligation (First National Bank v. Drake, 185 Iowa, 879, 171 N. W. 115; Noble v. Beeman, etc., Co., 65 Or. 93, 131 P. 1006, 46 L. R. A. (N. S.) 162; Northern State Bank, etc., v. Bellamy, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. [N. S.] 149; Square Butte State Bank v. Ballard, 64 Mont. 554, 210 P. 889).

[2] We think it sufficiently appears that appellant intended to be bound as a guarantor and not as an indorser. But, however this may be, section 3266a of the Civil Code provides that "the person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable." And, according to section 3201 of the same Code, "a person secondarily liable on the instrument is discharged * * * (5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

[3, 4] In this connection it appears to be well settled that the remedy against a guarantor, depending, as it does, upon a separate contract and not on the terms of the instrument, is not primary but secondary. 8 Cor. Jur., Bills and Notes, § 113, p. 72; Northern State Bank v. Bellamy, supra; Briscol v. American Southern Trust Co., 176 Ark. 401, 4 S.W.(2d) 912. And the same has been held with respect to the obligation of an indorser. Hudson Trust Co. v. Elliott, 194 Ala. 441, 69 So. 631; Westinghouse Elec., etc., Co. v. Hupp, 211 Mich. 698, 179 N. W. 286; Clarke v. Stumpf, 190 App. Div. 538, 180 N. Y. S. 125; Deahy v. Choquet, 28 R. I. 338, 67 A. 421; Grapes v. Willoughby, 93 Vt. 458, 108 A. 421; Davis v. Gutheil, 87 Wash. 596, 152 P. 14.

In view of the above it seems that regardless of whether appellant was a guarantor or an indorser, or assumed the obligations of both, the fact that plaintiff expressly reserved the right to proceed against him would bring the case within the provisions of section 3201 of the Civil Code, and the stipulation and dismissal would not result in his discharge.

Appellant contends, however, that the provisions of section 2819 of the Civil Code, and not the sections quoted, apply. This section reads as follows: "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." It is claimed that section 3201 of the Civil Code, which was adopted as part of the Uniform Negotiable Instruments Act, has reference solely to indorsements, and did not repeal by implication any section of the Code dealing with the rights of guarantors.

[5-9] It was the object of the Negotiable Instruments Law (Civ. Code, § 3082 et seq.) to secure uniformity in the law of negotiable paper (Utah State Nat. Bank v. Smith, 180 Cal. 1, 179 P. 160); and as it covers the entire subject it must control in all cases in which it is applicable (Elsey v. Peoples' Bank, 168 Ky. 701, 182 S. W. 873). While the repeal of statutes by implication is not favored (Railroad Commission v. Riley, 192 Cal. 54, 218 P. 415), nevertheless every statute must be construed according to what appears to be the intent of the Legislature (Dillingham v. Welch, 179 Cal. 656, 178 P. 512); and if the later act was clearly intended to prescribe the only rule which should govern in the case provided for, or to establish a new and complete scheme with reference to the subject-matter. (Harris v. Cooley, 171 Cal. 144, 152 P. 300), it will be held to have repealed pro tanto an earlier act inconsistent therewith (Ex parte Cannon, 167 Cal. 142, 138 P. 740).

[10] The purpose of the act being as stated and section 3201 of the Civil Code having provided for the discharge under certain circumstances of all those secondarily liable upon negotiable instruments, but expressly denying the right in case of a release of the principal debtor where recourse against those secondarily liable is reserved, it must be held with respect to such instruments that this section controls.

[11] There is still another reason for sustaining the conclusion of the trial court. If it be assumed that section 2819 of the Civil Code applies, the act of plaintiff worked no alteration in the obligation of the principal, nor were the remedies or rights of the appellant against the principal impaired or suspended. It is clear from the evidence that after applying the amounts received by the bank the amount of the claim as allowed by the receiver was correct. As stated, a judgment against the receiver would have resulted in no more than an adjudication that the claim should be allowed in that amount; and after its voluntary allowance no advantage would accrue to either the plaintiff or appellant by the entry of judgment; nor did the stipulation or the dismissal release the Thomas Day Company or impair or suspend the remedies of appellant against it. Richmond Paper Co. v. Bradley, 115 Miss. 534, 76 So. 544.

Plaintiff concedes that contrary to the findings appellant was not allowed in the judgment the full amount of the credits, and consents that the judgment be modified by deducting this difference. The judgment is accordingly modified by deducting therefrom the sum of $1,090.20, and as so modified is affirmed. It is further ordered that each party bear his own costs of appeal.

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119 Cal.App. 15

SIMONTON v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7998.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1931.

Rehearing Denied Dec. 30, 1931. Hearing Denied by Supreme Court Feb. 1, 1932.

1. Master and servant 🔑417(7).

Commission's finding on conflicting evidence that employee's refusal to change hospital was unreasonable is conclusive (St. 1917, p. 842, § 11 (e), and p. 836, § 9 (a), as amended by St. 1929, p. 420).

2. Master and servant 🔑385(16).

Employee did not forfeit right to treatment at employer's expense by refusal to change from satisfactory hospital, selected by employer, on insurance carrier's request against attending physician's advice (St. 1917, p. 842, § 11 (e), and p. 836, § 9 (a), as amended by St. 1929, p. 420).

> Right to treatment was not forfeited under Workmen's Compensation Act, St. 1917, p. 842, § 11 (e), since the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, p. 836, § 9 (a), as amended by St. 1929, p. 420, plainly evince the desire of the law that the injured man shall have latitude in his choice of physicians to treat him.

Proceeding under the Workmen's Compensation Act by Edwyn E. Simonton, employee, for personal injuries, claimant, opposed by the Bay Cities Transit Company, employer, and the Pacific Employers' Insurance Company, insurance carrier. From the ruling of the Industrial Accident Commission denying allowance for certain medical expenses, claimant brings certiorari.

Award annulled.

Samuel J. Crawford, of Santa Monica, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

F. Britton McConnell, of Los Angeles, for respondents Pacific Employers' Ins. Co. and Bay Cities Transit Co.

BISHOP, Justice pro tem.

An injured employee is the petitioner in this proceeding, complaining of the respondent commission's ruling that he was not entitled to the reasonable expenses incurred for medical, surgical, and hospital treatment after June 10, 1930. We are of the opinion that the commission exceeded its jurisdiction in making the ruling complained of.

On the evening of June 4, petitioner had both his legs crushed while at work. His employer promptly sent him to the Santa Monica hospital, and employed two doctors to treat him. Between the accident and June 10, two general anæsthetics were administered to petitioner, and twice they set the bones in his legs and set his legs and body in a cast. Two or three days later, the respondent insurance carrier requested that petitioner be transferred to its hospital in Los Angeles; sending out an ambulance to effect the transfer, next day. Not only his family physician, but the doctors engaged by his employer as well, advised petitioner that it would be dangerous to his health and proper recovery to make the move, and he declined to go. A formal written request was made on him by the carrier, June 10, that he go or forego all claim on the carrier for hospital expenses or compensation. He continued for some time under the care of the doctors first called in, and a very satisfactory recovery has been made.

[1, 2] The respondent commission considered that an issue submitted to it was whether or not the transfer could have been made in safety, and, because there is a conflict in the evidence touching the point, and the commission evidently, though not expressly, found that petitioner's refusal to be transferred to the Los Angeles hospital was unreasonable, we must accept that conclusion as a fact. Building on this foundation, respondents have erected two arguments in support of the award. The first advanced by the commission and debated by the petitioner is that the fact found justifies the denial of relief, other than that given, because of the provisions of section 11 (e) of the Workmen's Compensation, Insurance and Safety Act of 1917, p. 842 (hereinafter called "the act"). By section 11 (e) it is declared that no compensation shall be paid an injured employee so far as the injury is continued or aggravated by an unreasonable refusal to submit to medical or surgical treatment. But, in the situation under review, the injured employee did not refuse to submit to the medical and surgical treatment offered by his employer, and his injury was not continued nor aggravated by reason of any act or omission of his. Plainly, the provisions of section 11 (e) play no part in this proceeding.

To understand the other position taken, the pertinent portions of section 9 (a) of the act (as amended by St. 1929, p. 420) should be before us. They read as follows:

"Compensation shall be furnished or paid by the employer and be as provided in the following schedule:

"(a) Such medical, surgical and hospital treatment * * * as may reasonably be required to cure and relieve from the effects of the injury, the same to be provided by the employer, and in case of his neglect or refusal seasonably to do so, the employer to be liable for the reasonable expense incurred by or on behalf of the employee in providing the same; provided, that if the employee so requests, the employer shall tender him one change of physicians and shall nominate at least three additional practicing physicians competent to treat the particular case, or as many as may be available if three can not reasonably be named, from whom the employee may choose; the employee shall also be entitled, in any serious case, upon request, to the services of a consulting physician to be provided by the employer; all of said treatment to be at the expense of the employer. * * * Controversies between employer and employee, arising under this section, shall be determined by the commission, upon the request of either party."

With these provisions in mind, the respondent insurance carrier, in its brief, puts the problem in these words: "The question involved in this case is therefore only this: did the employer neglect or refuse seasonably to provide medical treatment?" Here again we think respondents have missed the point involved in this proceeding. Of course, the answer to respondents' question must be "No"; but that answer does not end the matter, any more than did the doing of the act which requires the answer end the activities shown by the evidence. As we view it, the question is this: Having seasonably provided medical treatment, does the employer escape liability for the expense of continuing the treatment, because the injured employee declines to change it under the conditions revealed in this case? Among these conditions should be noted the following: (a) The treatment was satisfactory to the employer and employee; (b) the change was proposed, not by the employer, but by the insurance carrier, who, so far as appears, had not been subrogated to the rights of the employer in the manner contemplated by section 30 (e) (1) of the act (as amended by St. 1929, p. 1167); (c) the change had not been ordered by the Commission, upon request of the carrier, as could have been authorized by the act (O'Neill v. I. A. C. [1928] 91 Cal. App. 121, 266 P. 866); (d) the change was not approved by the doctors who had been engaged by the employer and under whose care petitioner continued. We think the act does not give, nor justice permit, an affirmative answer to our question. The provisions of the section plainly evince the desire of the law that the injured man shall have latitude in his choice of physicians to treat him. He it is who is authorized to require a change in physicians, and in case of a change he shall have some freedom of selection. Without determining that the employer is limited to his first choice of a physician and method of treatment, we do hold that the employee does not forfeit his right to treatment at his employer's expense by refusing to make a change under the conditions presented in this proceeding.

The award is annulled.

We concur: CONREY, P. J.; HOUSER, J.

119 Cal.App. 31

DURRELL v. BACON et al.

Civ. 8056.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1931.

Rehearing Denied Jan. 4, 1932.

1. Appeal and error 🔑1010(1).

Appellate court cannot disturb findings substantially supported by evidence.

2. Husband and wife 🔑262(1).

Presumption is that title to property described in deed taken in name of wife vested in grantee as her separate property (Civ. Code, § 164).

3. Appeal and error 🔑1050(1).

Any error in admitting testimony of self-serving declarations of deceased respecting ownership of property involved in quiet title action *held* not prejudicial, where complaining party testified to same facts.

4. Evidence 🔑271(17).

Admission of declarations of deceased respecting ownership of property involved in quiet title action *held* erroneous as being self-serving declarations.

5. Husband and wife 🔑264.

Competent evidence in action to quiet title *held* insufficient to sustain finding that husband had only life estate in deceased wife's real estate (Civ. Code, § 164).

6. Appeal and error 🔑173(10).

Point in respect to laches not made in trial court cannot be considered on appeal.

7. Appeal and error 🔑878(1).

Party not appealing from judgment of lower court cannot avail of any alleged errors in trial.

8. Quieting title 🔑44(3).

Husband seeking to quiet title to property held by deceased wife did not prove himself out of court by offering in evidence deed conveying property to decedent.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by E. J. Durrell against Leonard Lewis Bacon, as administrator of the estate of Anna E. Durrell, deceased, and others. From the judgment, plaintiff appeals.

Reversed.

William L. Waters, of Fullerton, and Anderson & Anderson, of Los Angeles, for appellant.

Lucius K. Chase and Chase, Barnes & Chase, all of Los Angeles, for respondents.

STURTEVANT, J.

In an action to quiet title to four parcels of land, the trial court rendered judgment in favor of the plaintiff as to three parcels, but held he owned only a life estate in parcel number one. From that judgment, the plaintiff appealed.

[1, 2] He contends that the evidence does not sustain the findings. If the writer were sitting as trial judge and the plaintiff presented the same facts supported by the same authorities, the writer would be compelled to say that the case of the plaintiff was most plausible. But this court is a court of review, and, if there is evidence in the record giving substantial support to the findings under attack, this court may not disturb those findings. Turning to the record, we find that parcel number one included two lots and a part of a third lot in the Hardin tract in the city of Los Angeles. At the time of her death, that parcel stood of record in the name of the plaintiff's wife. The deed recites "To have and to hold all and singular the said premises * * * as her sole and separate estate." That deed was recorded December 8, 1898. The presumption is that the title to the property described in said deed then vested in the grantee as her separate property. Civ. Code, § 164. After his wife died, the plaintiff applied for letters testamentary. In his petition for letters, the plaintiff alleged that his wife left property in Los Angeles county and that said property included the property which we have described above. In support of his case, the plaintiff introduced evidence that is quite convincing, and which tended to prove that his wife took the title in her own name as an act of convenience only, and that in truth and in fact the property was purchased with funds, some of which were the wife's separate property, some of which were the husband's separate property, and some of which were community property and all of which were, by the contract of the spouses, converted into community property. He called a number of disinterested witnesses who gave testimony corroborating that given by him. But, because of section 164 of the Civil Code, there was a substantial conflict in the evidence; the solution of which rested with the trial court, and not a court of review. Smellie v. Southern Pacific (Cal. Sup.) 299 P. 529.

[3-5] Before taking up the next point, it should be noted that parcel one included lot 1, lot 2, and the northerly ten feet of lot 6. It was the theory of the plaintiff that said parcel was acquired by three separate purchases. The plaintiff testified that the pur-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

chase price of lot 1 was $2,000. Mrs. Elizabeth Bacon, the mother of Mrs. Durrell, drew her check for $800, which sum the plaintiff testified was paid not as a gift, but in payment for her maintenance in the house of the Durrells for a period of time including four years prior to the date of payment, and to extend to the date of her death. The plaintiff testified that $1,000 of the purchase price was money which Mrs. Durrell inherited from her brother William Bacon. The remaining $200 of the purchase price was not accounted for. Lot 2 was purchased with $1,000 which was given to the plaintiff by his sister. The fraction of lot 6 was paid for out of the proceeds of a judgment rendered in favor of the plaintiff. Excepting the presumption of law (Civ. Code, § 164), there was no evidence tending to contradict what has just been recited, except the evidence we are about to discuss. The plaintiff complains because the trial court admitted certain evidence, some of which he claims was hearsay and some of which he claims consisted of self-serving declarations of the decedent Mrs. Durrell. Mrs. Emma Olsen, one of the defendants and beneficiaries, testified that the decedent stated to her that decedent received $800 from her mother, and that that sum went into "this place." Conceding the admission of the evidence was error, it was not prejudicial because the plaintiff testified that $800 was received from the decedent's mother, Mrs. L. L. Bacon. Another defendant and beneficiary testified that decedent said: "This property came to me down through the Bacon side of the house and I want it to always stay in the Bacon family." Mrs. Mable Bacon, wife of L. L. Bacon, gave similar testimony. So did L. L. Bacon, a nephew of the decedent. Mr. E. E. Bacon, another defendant and beneficiary, did the same thing. The last-named witness was one of the brothers of the decedent. He was an attorney at law. During all the times covered by the story of this action, he was the attorney of both Mr. and Mrs. Durrell. After Mrs. Durrell died, he acted as attorney for Mr. Durrell in filing the petition for letters testamentary hereinabove referred to. He also signed as Mr. Durrell's attorney when this action was filed. He, so the record shows, was the only living witness besides the plaintiff who participated in any of the business transactions which were involved in the case on trial. He was, at the time of the trial, 84 years of age. Presumptively he was a member of the bar in good standing. All of the evidence so complained of was erroneously admitted. 10 Cal. Jur. 1000. The record shows affirmatively that the trial judge was laboring under a misconception of the true rule, and that he believed he was bound to receive the testimony so objected to, and that he was bound to use it as a part of the res gestæ, as part of the circumstances, and as showing the intention of the parties as to whether the spouses agreed that all of their holdings were to be and become community property. Trans., 359–362. When all of the evidence was in, the plaintiff had proved a complete case. The defendant had shown by Mrs. Prince that at one time Mr. Durrell had stated to her that in a conversation with his wife he claimed a half interest in the lots and asked her to deed one to him. Mrs. Durrell replied, "No," he could take other property; that located in Fresno. That statement was not a denial of his interest, but a mere suggestion of a different manner of dividing in kind. The defendants had shown that the plaintiff had filed an application for letters testamentary in which he mentioned the property as belonging to his wife. But in that connection it also appeared that the plaintiff is a janitor by occupation, and that the application for letters was prepared by Mr. E. E. Bacon, one of the defendants, and the man who had been acting as the attorney for both spouses for over thirty years. There was also the dry presumption (Civ. Code, § 164), which as a matter of fact had been almost, if not entirely, dispelled in the mind of any fair arbitrator. Therefore, we think it is clear that, in so far as the judgment was against the plaintiff and in favor of the defendants, the trial court rested its judgment wholly on the evidence so erroneously received. It follows that the error was prejudicially erroneous, and that there has been a miscarriage of justice.

The defendants state that, notwithstanding the court may have erred in admitting the self-serving declarations, the error was harmless because the holder of the equitable title may not maintain an action to quiet title against the holder of the legal title. Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 P. 158, and cases there cited. The plaintiff replies that defendants have in their brief cited cases in which one spouse holding an equitable title brought an action to quiet title against the other spouse who held the legal title, and that the courts took jurisdiction and determined the rights between the parties. Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180. The plaintiff also shows that the cases which the defendants cite and rely on are not in point, but may be classed as falling under the rule that one without any title or interest in property cannot maintain the action. 22 Cal. Jur. 113.

[6, 7] Again the defendants assert that the plaintiff is barred by laches. The point is made in this court, but was not made in the trial court, and therefore may not be considered. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 433, 137 P. 21. A further claim is asserted that the testimony under consideration was offered because the plaintiff had been allowed to introduce similar evidence that should have been excluded. But the defendants did not appeal, and such errors, if any, are not before us.

[8] Finally, it is claimed that because the plaintiff offered in evidence the deed conveying the property to the decedent he thereby proved himself out of court. He did not. His act was but one step in the proof of his case and in response to the allegations of the complaint.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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119 Cal.App. 21

HOLLYWOOD HOLDING & DEVELOPMENT CORPORATION v. OSWALD.

Civ. 4446.

District Court of Appeal, Third District, California.

Dec. 4, 1931.

Rehearing Denied Jan. 2, 1932. Hearing Denied by Supreme Court Feb. 1, 1932.

1. Principal and agent 🔑145(2).

Contract of agent who deals in his own name without disclosing that of his principal is contract of principal.

2. Brokers 🔑94.

Agent's agreement to pay for improvements on land purchased for undisclosed principal, being approved by purchaser's broker, *held* binding on purchaser.

3. Principal and agent 🔑137(1).

Principal placing agent in position to mislead innocent parties is responsible to them for unauthorized acts agent performs on behalf of principal.

4. Vendor and purchaser 🔑214(3).

Assignment of agent's contract to pay for improvements on land purchased for undisclosed principal *held* unnecessary to continue contract in force on substitution of agent.

5. Vendor and purchaser 🔑214(3).

Where agent purchasing land for undisclosed principal intends to pass interest to agent substituted by principal, acceptance by substituted agent constitutes equitable assignment of contract.

6. Principal and agent 🔑145(4).

Third party, on learning person he dealt with as principal was agent of undisclosed principal, may recover from either agent or undisclosed principal.

7. Principal and agent 🔑160½.

Loss through confidence placed by principal in agent should not be borne by those who were led to deal with agent by principal's acts (Civ. Code, § 3543).

Appeal from Superior Court, Los Angeles County; Elias V. Rosencranz, Judge.

Action by the Hollywood Holding & Development Corporation against George H. Oswald. From a judgment for plaintiff, defendant appeals.

Affirmed.

George D. Blair, of Los Angeles, for appellant.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and John H. Mathews, all of Los Angeles, for respondent.

Mr. Justice pro tem. JAMISON delivered the opinion of the court.

This action was brought by plaintiff to recover from defendant, an undisclosed principal, the cost of certain street and curb improvements installed by plaintiff in connection with the sale to defendant of a certain tract of land owned by plaintiff; the sale being effected through M. E. Oswald, who acted as defendant's agent, and through G. S. Chapin and E. O. Earle, who acted as dummies in the transaction. Defendant being desirous of purchasing said tract, sent his brother, M. E. Oswald, to plaintiff to consummate the deal. Plaintiff refused to sell said tract to defendant, and thereupon M. E. Oswald, with the consent of defendant, procured Chapin to purchase same in his name for defendant, authorizing him to pay $51,000 for it. Chapin made a deal with plaintiff for said tract and entered into a contract of the purchase of same, in which he agreed to pay $51,000 for said tract, $25,000 to be paid within 30 days and for the remainder a mortgage to be executed by him; $2,000 cash being paid at the time of signing the said contract. He also embodied in said contract an agreement to pay plaintiff for certain improvements to be made by plaintiff for the benefit of said tract. The said agreement is as follows: "It is understood that the seller shall improve one-half of the width of Carson Drive and Alden Drive and the entire width of San Vicente which said streets adjoin the said property, and that the buyer agrees to pay for said improvements at the cost thereof. It being further understood that the seller agrees to pave the remaining portion of said aforementioned streets at the expense of owners of abutting property."

The contract further provided that $2,000 had been received by the Title Insurance & Trust Company, as escrow holder, from Chapin, and the remainder of said purchase price, as above stated, would be paid and secured by mortgage. A deed conveying said property to Chapin, and a mortgage executed back by Chapin to plaintiff, were prepared and held by said company in escrow. This contract was executed on January 14, 1925, and the said deed and mortgage were deposited in escrow the same day. Some five or six days after the date of the escrow, Chapin was informed by defendant that he had been adjudged a bankrupt, and therefore defendant did not want him to continue to act as the purchaser of said tract, and named Earle to replace him as such purchaser. Earle was then substituted as the purchaser of said tract for defendant.

On February 7, 1925, Chapin notified the Title Insurance & Trust Company that it would receive an order from plaintiff authorizing a conveyance of said tract to Earle, and directing it to place the $2,000 to Earle's credit, and on this same day plaintiff directed the said company to issue the deed to Earle for said tract, upon payment of $25,000 in cash and the execution of a mortgage by him for the remaining $26,000, and on said last-named date Earle paid to said company the sum of $25,000, including the $2,000, and deposited his note and mortgage for the remaining $26,000.

At the time of the substitution of Earle for Chapin as the purchaser of said tract, plaintiff prepared an agreement to pay for said improvements, and gave it to Chapin for the purpose of procuring Earle's signature thereto, but Earle never signed it, and denied that he had ever agreed to pay for any improvements. Judgment was rendered for plaintiff for the costs of said improvements, and from this judgment defendant appeals.

Appellant contends that the evidence is not sufficient to support the findings. The court found that Chapin entered into an agreement with plaintiff to purchase the said tract; that he was at all times acting as the agent for the undisclosed principal, the appellant, and that at all times the appellant was the only person interested in the said contract as purchaser; that respondent was not advised of the fact that Chapin was not the principal in said transaction, and did not know said fact until a short time prior to October 1, 1927; that on or about the 9th day of February, 1925, said contract was assigned by said Chapin to Earle, and thereafter said tract was conveyed by plaintiff to said Earle; that the $25,000 was paid by appellant through Chapin and Earle; that the mortgage for $26,000 executed by Earle was paid by appellant, and that said Earle was at all times acting as the agent of appellant, and such fact was concealed from plaintiff until about the 1st of October, 1927; that the contract signed by Chapin was executed by the appellant acting through his authorized agent Chapin, and that M. E. Oswald was the agent of appellant.

One of the main contentions of appellant is that he never authorized the agreement to pay for the improvements. Appellant testified that he was anxious to purchase this tract of land; that he was informed that the purchase price was $51,000; that he instructed his brother, who was a real estate broker, to buy it for him, and, when he learned, through his brother, that the respondent would not sell to him, he instructed his brother to purchase the tract for him in the name of a dummy. Thereupon the brother secured Chapin to act as a dummy in purchasing the tract for appellant. Chapin testified that in making the purchase he submitted every paper to be signed by him as such purchaser to M. E. Oswald and secured his approval to same before signing, including the contract for the purchase of said tract which contained the agreement to pay for said improvements; that, when the substitution of Earle as purchaser for said tract took place, Chapin informed M. E. Oswald that respondent desired Earle to sign the agreement to pay for the improvements, and at that time he was assured by M. E. Oswald that appellant would pay for said improvements.

It also appears from the evidence that appellant knew at and before the purchase of said tract that it was raw unimproved property.

[1] After the contract of purchase was entered into by Chapin, respondent let the contracts for said improvements, and the same were being made at the date of the substitution of Earle, and were completed about May, 1925. M. E. Oswald knew that the said improvements were being made, but did not at any time inform respondent that appellant would not pay for them. Respondent believed, and under the facts of this case had the right to believe, that he was dealing with the actual purchaser when it contracted to sell the property to Chapin, and that he had authority to enter into the contract to pay for the improvements. The rule is well established that the contract of an agent who deals in his own name without disclosing that of his principal, is the contract of the principal. Schnier v. Percival, 83 Cal. App. 470, 256 P. 1109; 1 Cal. Jur. 856. The theory upon which the actual purchaser is held liable is based upon the fact that, by permitting the agent to hold himself out as the principal with full power to contract, and thereby innocent third parties are thus led into dealing with such apparent principal, they will be protected. Their rights under such circumstances do not depend upon the actual authority of the party with whom they directly deal, but are derived from the act of the real principal, which precludes him from disputing, as against them, the existence of authority, which through negligence or mistaken confidence he has allowed to be vested in the party with whom they are dealing. Conklin v. Ben-

son, 159 Cal. 785, 116 P. 34, 36 L. R. A. (N. S.) 537; Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P. 1001; Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P. 405; Hubbard v. Ten Brook, 124 Pa. 291, 16 A. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585.

[2, 3] As was said by the Supreme Court in Hicks v. Wilson, 197 Cal. 269, 240 P. 289, 290: "It is equally well settled, however, that a principal is bound, not only by the acts which he has actually authorized an agent to perform, but also by those which he has allowed third persons to believe him to be authorized to do." When an agent, on behalf of his principal, performs an unauthorized act, yet if the principal has put the agent in a position to mislead innocent parties, he is responsible to them. Davidson v. Dallas, 8 Cal. 227. We are of the opinion that the agreement of Chapin to pay for the improvements is binding upon appellant.

[4, 5] Appellant contends that the contract for improvements was canceled when Chapin withdrew from the deal, and that the finding of the court that the said contract was assigned by Chapin to Earle is not supported by the evidence. By agreement Earle was substituted for Chapin; neither he nor Chapin had any real interest in the deal; they were mere figureheads. Under these circumstances an assignment of the said contract was not necessary to continue it in force after the substitution of Earle, but, assuming that an assignment was necessary, it clearly appears that it was the intention of Chapin, in his letter of February 7, 1925, to pass to Earle his interest in said tract, that is to say, such rights as he had acquired therein by said contract, and that Earle's acceptance of said transfer constituted an equitable assignment of Chapin's rights and liabilities under said contract. Los Angeles City School Dist. v. Tucker, 99 Cal. App. 390, 278 P. 507, and authorities cited.

[6] Appellant claims that if respondent's contention is correct that the contract with Chapin is not canceled, its remedy is against Chapin. This claim is without merit. Where one deals with another, believing him to be the principal, on subsequently learning that he was dealing with an agent of an undisclosed principal, he may recover either from the person he dealt with or from the undisclosed principal. Duerr v. Sloan, 40 Cal. App. 653, 181 P. 407; Colquhoun v. Pack, 32 Cal. App. 97, 161 P. 1168; Hulsman v. Ireland, 205 Cal. 345, 270 P. 948; Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539.

In the action under consideration, while appellant denied authorizing Chapin to make any agreement to pay for said improvements, he clothed him with apparent authority so to do by concealing the fact that Chapin was merely an agent, and having him appear as the bona fide buyer.

[7] Where one of two innocent persons must suffer by the act of the third, he by whose negligence it happened must be the sufferer. Section 3543, Civ. Code. A loss through the trust and confidence placed by a principal in his agent should not be borne by those who were led to deal with the agent through the acts of the principal. Where one of two innocent persons must suffer, the loss should be borne by him whose acts made the loss possible. Henry Cowell Co. v. Santa Cruz Bank, 82 Cal. App. 519, 255 P. 881; Anglo-California Trust Co. v. Pacific Acceptance Corp., 70 Cal. App. 41, 232 P. 489.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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118 Cal.App. 613

KLEBORA v. KLEBORA et al.

Civ. 7966.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1931.

Rehearing Denied Dec. 26, 1931. Hearing Denied by Supreme Court Jan. 25, 1932.

1. Divorce 🔑83.

Spouse's death before time for final decree renders interlocutory divorce decree dealing solely with marital status and silent as to property rights functus officio.

2. Divorce 🔑255.

Interlocutory divorce decree, not appealed or attacked, was conclusive on spouses' property rights, although husband died before time to attack decree expired (Code Civ. Proc. § 473).

3. Divorce 🔑156.

Interlocutory divorce decree is "contract," although not based on agreement.

[Ed. Note.—For other definitions of "Contract," see Words and Phrases.]

4. Divorce 🔑255.

Interlocutory divorce decree, based on theory property was community property, although found erroneous in wife's action to quiet title, was res judicata of character of property.

5. Divorce ⚷255.

Acceptance of satisfaction of part thereof beneficial to her estopped plaintiff from attacking interlocutory divorce decree.

6. Divorce ⚷254.

Cancellation of interlocutory divorce decree because property involved was declared community property through fraud and mistake *held* unjustified, where error resulted from complaining party's fraudulent allegation that property was community property.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Vera Klebora against Charles J. Klebora and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Anthony S. Devoto and Devoto & Richardson, all of San Francisco, for appellant.

Thomas W. Forsyth, of San Francisco, for respondents.

GOODELL, Justice pro tem.

The appellant sued to quiet title to an undivided half interest in a piece of improved real estate in San Francisco. The respondent Charles J. Klebora answered, asserting his ownership of an undivided three-quarters of the whole, and the respondent Martha Baugh answered, claiming an undivided quarter of the whole. Judgment went for said respondents decreeing their interests to be vested in the proportions they claimed, and consequently that the appellant had no interest. From that judgment this appeal is taken.

The present litigation is the outgrowth of a contested divorce case brought by the appellant, Vera Klebora, against her husband Joseph Klebora, wherein the husband prevailed on his cross-complaint. The interlocutory decree therein awarded the property here involved to the husband; the court characterizing it as community property. There was no appeal from the interlocutory decree, and the husband died within six months after its entry. About six months after his death, the appellant brought this suit to quiet her title against Charles J. Klebora and Martha Baugh, who are children of her deceased husband by a former marriage, to whom conveyances of the property had been made by their father after his separation from appellant. The present action attacks the adjudication of property rights which was made in the interlocutory decree. In the present case, the trial court found, contrary to the finding in the divorce case, that the property was not community property.

The land in question was acquired many years before the death of Joseph Klebora's first wife, who was the mother of the two respondents, and the house upon it was built by the labor of Joseph Klebora and his son, the respondent. The earnings as well as the labor of the son contributed largely to the building of the house, which became the family home. After the mother's death, the children continued to live there with their father. In 1924 the appellant came to San Francisco with a letter of introduction from a relative of Joseph Klebora in New York, immediately took up her residence in the Klebora home, and, on August 30, 1924, within six weeks after her arrival, married Joseph. The record shows that during these six weeks she continually importuned him to marry her. The newly married couple and Charles and Martha continued to live in the home. In about two years it seems to have become desirable to quiet title against the first wife's estate, and thereupon Joseph and his wife Vera, as plaintiffs, sued Charles and Martha, and Charles as administrator of his mother's estate. All defendants suffered default, and in December, 1926, a decree was entered adjudging that Joseph and Vera were the owners of the property in joint tenancy, and that neither of the children by the first marriage, nor the first wife's estate, had any interest in it. In the following May, after domestic differences had arisen between the spouses, they separated. On July 14th following Joseph made a deed of gift of a half interest in the property to his said children, which deed was recorded two days later. On the 27th of the same month Vera filed suit against Joseph for divorce on the ground of extreme cruelty. Joseph filed an answer and cross-complaint on the two grounds which, under section 146 of the Civil Code, warrant an award of more than half the community property, and in October the case was tried. Considerable time was permitted to elapse between the taking of the testimony and the findings for the purpose of having the property rights settled. On December 12, 1927, findings and an interlocutory decree were signed in favor of the husband on both grounds, and awarding him the property in suit as "community property," but requiring him to pay to the appellant $250 for herself and $65 for her counsel fee. Two days later Joseph made another gift deed of the property, this time of the whole thereof and to the son alone. The appellant moved for a new trial of the divorce case, which was denied on January 23, 1928, and on February 2, 1928, the $315 awarded her was paid and a satisfaction filed. On June 4, 1928, Joseph Klebora died.

The appellant's first point is that the property was not community property at the time of the divorce case because the deed of June 14, 1927, whereby Joseph conveyed a half interest to his two children, destroyed the joint tenancy of Joseph and Vera (Green v. Skinner, 185 Cal. 435, 197 P. 60), and left Vera, Charles, and Martha tenants in common, with an undivided one-half vested in Vera of which, it is claimed, she has never been divested; that this continued up to the time of the interlocutory decree, and that the court in the divorce case had no jurisdiction to award as community property that which was not. The trial court in the instant case found that the property in question "was not the community property of said marriage nor had Joseph Klebora on said 27th day of July, 1927, or at the time of the * * * interlocutory decree * * * any right, title or interest therein." But it also found that the subject-matter hereof was "fully and finally adjudicated" in the divorce action.

The question is, conceding the judgment in the divorce case to have been erroneous in awarding this property, was such judgment, nevertheless, final and conclusive? The appellant's time to appeal from that judgment expired on March 25, 1928, at which time her husband was alive. The time to attack such decree under section 473, Code of Civil Procedure, however, would not expire until six months after its entry (Bancroft v. Bancroft, 178 Cal. 367, 173 P. 582), which in this case was June 12, 1928, or eight days after the husband died.

The appellant claims: (1) That Joseph's death dissolved the marriage and left the appellant his widow with all a widow's rights; (2) that the interlocutory decree would have become final on June 12th "had Joseph Klebora not died on June 4, 1928," and that no title vested in him under that decree since it lacked eight days of becoming final; (3) that "title would have vested in Joseph Klebora only upon the entry of the final decree and *not before*"; (4) that "the property rights of the parties, until the entry of the final decree, in the absence of a property settlement between them, remained as they were before the entry of the interlocutory decree"; and (5) that Joseph's death abated the divorce action and put an end to all further legal proceedings, and that "the settlement of property rights, being but an incident of the interlocutory decree also abated."

[1-4] It is settled in this state that, when an interlocutory decree deals solely with the marital status of the parties, *and is silent as to their property rights*, the death of one of the spouses before the time for a final decree renders the interlocutory decree functus officio. Abbott v. Superior Court, 69 Cal. App. 660, 666, 232 P. 154, 156; Gloyd v. Superior Court, 44 Cal. App. 39, 185 P. 995, and cases therein cited. The death dissolves the marriage. Estate of Dargie, 162 Cal. 51, 121 P. 320. But, "when the interlocutory decree deals with the status of the parties and also with the property rights of the parties, the case is quite different, and the interlocutory decree, if not vacated in the mode prescribed by law, becomes a conclusive decree as to their property rights." Abbott v. Superior Court, supra, citing Gould v. Superior Court, 47 Cal. App. 197, 191 P. 56, 57. In Huneke v. Huneke, 12 Cal. App. 199, 203, 107 P. 131, 133, it is said: "* * * In the absence of an order continuing the hearing as to the property rights involved, the opportune time for hearing and final determination of the rights of the parties as to the property is at the time and place of the trial of the principal issue involved in the divorce." In Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 492, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107 (which the Huneke Case follows), the purpose and effect of the 1903 amendment of section 132 of the Civil Code is discussed. It will be remembered that before that amendment there was but one judgment, which not only dissolved the marriage but adjudicated the property rights. "By thus making the right to a divorce ineffective for the period of one year," says Judge Shaw in that case, "it became impossible for the parties to contract a valid new marriage anywhere until at least a year after the trial of the action of divorce had taken place. *Except so far as was necessary to accomplish this object*, it was not the intent of the statute to change in any respect the practice and procedure in actions for divorce. We do not doubt that the court has the same power now that it has always had to try and determine the issues between the parties in a divorce action with respect to property and custody of children, *and that this may, and generally should, be done at the same time as the issues with respect to the cause for divorce are tried and determined.*" (Italics ours.) Further it is said that the court may "postpone the trial and decision of the property rights * * * to any reasonable time after the rendition of the judgment of divorce, whether interlocutory or final," and indeed it is suggested that this is a commendable thing to do. Since the Pereira Case the rule of the Gould and Abbott Cases that "the interlocutory decree of divorce becomes a conclusive decree as to the property rights of the parties if not vacated in the mode prescribed by law" has been repeatedly recognized and followed. Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 658, 238 P. 93; Gillespie v. Andrews, 78 Cal. App. 595, 598, 248 P. 715; In re O'Connell, 80 Cal. App. 126, 128, 251 P. 661; Lopes v. Bruns, 92 Cal. App. 691, 693, 268 P. 928; and Greenwood v. Greenwood, 101 Cal. App. 736, 740, 282 P. 433. See also, Claudius v. Melvin, 146 Cal. 257, 79 P. 897; Suttman v. Superior Court, 174 Cal. 243, 162 P. 1032. We have already seen that the only ways to attack the decree are by appeal or under section 473, Code of Civil Procedure, and that

neither method was followed. Therefore, under the authorities, the interlocutory decree, dealing as it did with property rights, became final as to those rights, and the death of Joseph Klebora in no way affected it.

The appellant's five contentions which have been enumerated are really reducible to this, —that the death of one of the spouses before the year has run is productive of the same legal consequences *as to property rights* settled by an interlocutory decree, as those produced with respect to the *marital status*; in other words, that death automatically vacates the adjudication and sets the question of property rights at large. Such contention finds no support in the authorities. The cases, indeed, are all the other way. It may be argued that the Gould Case is distinguishable because there an agreement formed the basis for the decree. The appellant stresses the point that here there was no agreement; but that can make no difference, for "'a judgment is a contract, in the highest sense of the term.'" See Gould v. Superior Court, supra, and cases there cited. Two other cases applying the rule to divorce actions are London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 467, 184 P. 864, and Lopes v. Bruns, supra, where it is said at page 693 of 92 Cal. App., 268 P. 928: "The interlocutory decree became a contract between the parties in the divorce action." Death would not have set at naught an agreement between the spouses. If, then, they could have settled their property rights with finality by contract, it is difficult to perceive, in view of the rule just discussed, how a judgment which does the same thing possesses no such finality and is of lesser dignity.

There are dicta in some of the California cases which seem to lend support to the appellant's claim that "the title would have vested in Joseph Klebora only upon the entry of the final decree." Brown v. Brown, 170 Cal. 1, 147 P. 1168, 1171, is cited, but all it holds is that, in the absence of pleading and proof of community property or an adjudication respecting it in an interlocutory decree, property acquired by a husband (otherwise than by gift, devise or descent) between the interlocutory and final decrees is community property, and that upon the final decree the spouses become tenants in common. When that case was commenced, there was no community property, and the complaint so alleged. The interlocutory decree therefore made no adjudication respecting property rights, for there was no such question before the court. The opinion is careful to say: "The record shows that no adjudication was made in that case barring the rights of the wife in the property here in controversy." Remley v. Remley, 49 Cal. App. 489, 193 P. 604, 605; Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248, and Radich v. Radich, 64 Cal. App. 605, 222 P. 182, are cited by appellant, and are grouped because of their similarity. They simply hold that in the interlocutory decree the court should not dispose of homestead rights, but that such disposition should be left to the final decree. Indeed, it might be said parenthetically, the Pereira Case, supra, itself commends this practice with respect to *all* property rights, but it does not hold, nor do these three cases, that, if an adjudication is made in the interlocutory decree, and no appeal is taken, or proceedings had under section 473, Code of Civil Procedure, such decree does not become final as to the property questions. Indeed, the Remley Case, which the other two follow, expressly recognizes this to be the rule, for it cites the Bancroft Case, supra, as holding that, after the time has expired, "the trial court is without jurisdiction to alter or set aside its interlocutory judgment." All three appeals were from interlocutory decrees, and all three are distinguished in Abbott v. Superior Court, supra, where, among other things, it is said: "But in the instant case there was no appeal from the interlocutory decree, and it has become conclusive on the parties at this time," which may be said with equal force of the case at bar. The Remley Case is cited by this court in People v. Baender, 68 Cal. App. 49, 60, 228 P. 536, 540, as authority for the proposition that "said [interlocutory] decree would have become final if not reversed or modified on appeal." Roberts v. Wehmeyer, 191 Cal. 601, is cited by appellant, where at page 615, 218 P. 22, is found a statement which shows on its face that it is only a dictum. Estate of Boeson, 201 Cal. 36, 255 P. 800, likewise is cited, but it is not in point.

The outstanding finding in the case at bar in favor of the appellant was that, at the time of the divorce trial and decree, the property in question was not community property, which was tantamount to holding that the divorce judgment was erroneous so far as property matters went. But the court also found "that the subject matter involved in this action was fully and finally adjudicated" in the divorce case—an application of the rule illustrated by such cases as Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am. St. Rep. 66, and Akley v. Bassett, 68 Cal. App. 270, 289, 228 P. 1057. In Ernsting v. United Stages, Inc., 206 Cal. 733, 736, 276 P. 103, 105, it is said: "* * * If dissatisfied with the pronouncements of the court in said first action, it was their [appellant's] duty to see that a review of that judgment was had upon appeal. Failing to do this, the judgment, even were it erroneous, is nevertheless final and effective." There can be no question that this case is within that rule and that that determination by the trial court was correct.

[5] We are satisfied that the interlocutory judgment was final and conclusive for another reason. By the decree the husband was

required to pay the appellant $250 for herself and $65 for her counsel. This $315 was paid, and a satisfaction given after the appellant's motion for a new trial had been denied. The rule is well settled that "the judgment, being satisfied, 'has passed beyond review,' for the satisfaction thereof 'is the last act and end of the proceeding.' Morton v. Superior Court, 65 Cal. 496, 4 P. 489." People v. Burns, 78 Cal. 645, 646, 21 P. 540; In re Baby, 87 Cal. 200, 25 P. 405, 22 Am. St. Rep. 239. In Estate of Shaver, 131 Cal. 219, 63 P. 340, it is said: "The right to accept the fruits of a judgment, and the right of appeal therefrom, are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other." The case of Storke v. Storke, 132 Cal. 349, 64 P. 578, 580, is in point. There, as here, the plaintiff lost but the court nevertheless awarded her a small money judgment ($250 for alimony and $200 for attorney's fees and costs), which was paid and accepted. Thereafter the defendant moved for a new trial, but the proceedings therefor were dismissed; the court saying: "Defendant accepted the part of the judgment that was beneficial to her. It was a final judgment, and by its terms gave her $450. This sum was based upon the findings, and was the result of the litigation. Defendant took the $450, and now seeks to attack the judgment through which she received it. This she cannot do. Having taken the benefit, she must bear the burden. The amount of this judgment was not large, but the principle is the same. * * * The principle is well settled that a party accepting and receiving the portion of the judgment beneficial to him cannot appeal from it." See, also, Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 P. 464.

To sum up: Under the authorities first discussed, the interlocutory decree, having spoken with respect to property rights, was unaffected by Joseph Klebora's death, in the absence of appeal or an attack upon it under section 473. Secondly, right or wrong, such decree under the authorities is res judicata. And, thirdly, the acceptance by the appellant of the $315 in any event estops her from attacking the interlocutory judgment.

[6] The appellant, however, makes an altogether separate and independent attack upon the divorce adjudication. Some six months after the respondents had answered, the appellant filed an amendment to her complaint, adding two new counts for fraud and mistake, and praying for the cancellation of the interlocutory judgment. At the outset it should be said that, except for the finding that the property was not of community character, and several minor findings in appellant's favor, the findings on the issues raised by this amendment and the answer thereto were all against the appellant, and she attacks these adverse findings as being unsupported by the evidence.

The court found, in appellant's favor, that Vera and Joseph had been joint tenants of the property; that the first deed to the respondents was made on July 14th and recorded two days later; that the second deed to the respondent Charles J. Klebora was made on December 14th, and recorded on the same day; and that at the time of the divorce trial Vera, Charles and Martha were tenants in common.

The record herein contains the pleadings in the divorce case. The divorce complaint alleged that "there is community property belonging to said plaintiff and said defendant consisting of" the property in question, which the answer did not deny. The cross-complaint therein alleged "that there is certain community property, belonging to said parties hereto, consisting of *an interest*" in the same property. (Italics ours.) In the present case, said amendment alleges that there was, in the divorce case, a mutual misapprehension of the law with respect to community property; that, because of such misapprehension and the belief that the property was community, appellant alleged what has been quoted, and Joseph likewise alleged in his cross-complaint what has been quoted; that, because of this, there was no adversary trial or decision, no real contest, and no fair submission of the question whether the property was the separate property of Vera, the separate property of Joseph, the community property of both, or whether Joseph had any right at all therein. The findings are against the appellant on each of these issues. Indeed, they not only negative these claims, but they go further and find that the interlocutory decree was based solely upon the erroneous pleadings, and that the error was caused by appellant alleging "that which was not true and which she knew or should have known to be untrue," and further that her allegation respecting community property was made "in a fraudulent effort on her part to obtain the whole of said real property."

It must be remembered, in discussing appellant's attack, that the judgment roll in the divorce case was before the court in the instant case, and the findings in the divorce case find as true certain allegations in Joseph Klebora's answer and cross-complaint. Among other allegations so found to be true are those that, while appellant and Joseph were living together, she "designedly sought to obtain the title and control of the property"; that she took community funds from the business and from the bank account; that "she also took from said bank certain papers, deeds, and legal documents." These facts are sufficient to show a familiarity with matters of property and title. There was documentary evidence in the form of a memorandum sufficient in itself to show that she knew, when the divorce complaint was prepared, that her husband had already, on July 14th, conveyed to his children. The appellant admitted taking certain legal papers from a joint tenancy safe deposit box, but she claimed that they were her own. There was impeaching character testimony introduced against her under section 2051, Code of Civil Procedure, by three witnesses. Two of these witnesses, a husband and wife, testified without contradiction that on an occasion when appellant and Joseph had been quarreling, and they were sent for by appellant, the suggestion had been made by them that Joseph and Vera "go 50-50," but that the appellant had said: "No, *the house belongs to me*, and the machine too." (Italics ours.)

The findings herein show that the appellant was at all times, before, during, and since the divorce case, represented by able counsel, and that is not disputed. They show, moreover, that the deed of July 14th was not withheld or concealed, but promptly recorded two days later; that Joseph Klebora did not know his wife's address after July 14th; that the second deed, which by the way was given *after* the interlocutory decree, was recorded on the same day. The record shows that the divorce trial was on October 19, 1927, and the findings were not signed until December 12th following, and in the interim counsel on both sides were trying to settle the property question on the court's suggestion. These findings are sufficient to negative any suggestion that there was hot haste or anything but a cool and deliberate consideration of the matter by counsel. There is an allegation that Joseph Klebora persistently represented to appellant *after July 14th* that the property belonged only to them. This was found to be not true, and it would seem without much difficulty, for they had separated on May 4th. It was found that appellant had appropriated approximately $4,500 from community funds.

The court found that there was no extrinsic fraud; it found also that appellant knew ever since the first quiet title suit in 1926 that the property was held in joint tenancy, and that any statement she made to the contrary was fraudulent. It found that she had been guilty of negligence and carelessness and laches in the conduct of the litigation. The appellant's allegations respecting relations of confidence and trust and her reliance upon her husband are all negatived in the findings, and there is ample support in the evidence for them.

We are satisfied that the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

118 Cal.App. 748

BARKER et al. v. SOUTHERN PACIFIC CO. et al. *

Civ. 4369.

District Court of Appeal, Third District, California.

Dec. 2, 1931.

Rehearing Denied Dec. 31, 1931. Hearing Denied by Supreme Court Jan. 28, 1932.

1. Railroads 🔑282(9).

Contributory negligence of employee of wrecking company hauling bricks on railroad track for weighing *held* question for jury in action for death resulting from impact with backing train.

> The evidence disclosed that decedent was employed by wrecking company to remove junk and materials from premises formerly used for smelting operations, and on the day of the accident was hauling a carload of brick to the scales to be weighed. Deceased brought his engine to a complete stop and sent a man ahead to open the switch before proceeding to the scale track. It further appeared that the train which struck deceased's engine came in an hour or two ahead of its regular time of arrival, and that the only other train over this branch line had arrived in the morning.

2. Railroads 🔑275(2).

Employee of wrecking company, instructed by railroad's station agent to weigh brick collected along spur track, *held* invitee while hauling brick to railroad scales.

3. Railroads 🔑282(5).

Evidence *held* to show authority of station agent to direct wrecking company's employee to use railroad's scales in weighing brick which railroad was to transport, as regards liability for death.

> There was evidence showing that the station agent made out shipping bills for freight originating at the smelter, where the deceased was engaged in removing junk and materials left after cessation of smelting operations, and that two days after the accident the station agent weighed car of brick which was here involved.

4. Appeal and error 🔑173(7).

Claim of want of authority of agent cannot be presented for first time on appeal.

5. Railroads 🔑282(5).

Evidence sustained verdict against railroad for death of invitee struck by backing train while he was hauling carload of bricks to scales.

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*Rehearing denied 6 P.(2d) 982.

The evidence showed that the station agent at point where train originated had told deceased a short time before to use the scale track, and that in doing so he was struck by the backing train, proceeding at considerable speed and running ahead of schedule, which caused a terrific impact, throwing deceased's engine many feet in the air.

6. Trial 🔑194(7).

Where jury can draw but one conclusion from evidence, instruction upon facts thus admitted is proper.

7. Appeal and error 🔑1051(3).

Rulings on admissibility of contracts showing deceased's right to use railroad's tracks *held* harmless to railroad, where railroad admitted deceased was invitee.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Alta Bell Barker and others against the Southern Pacific Company and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

W. D. Tillotson, of Redding, and George R. Freeman, of Willows, for appellants.

L. C. Smith, of Redding, and Cooley & Crowley and Cooley, Crowley & Supple, all of San Francisco, for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought to recover damages arising out of the death of Claude W. Barker, through the negligence of defendants. The jury awarded plaintiffs (who are widow and children, respectively, of deceased) the sum of $30,000, and this appeal is prosecuted from the judgment.

The town of Kennett, Shasta county, is on the main railroad line of defendant Southern Pacific Company. From this town a branch track runs to a smelter which was formerly operated by United States Smelting, Refining & Mining Company. From this branch track a spur track leads to a slag pit. Decedent was employed by a wrecking company, which was engaged in removing the junk and materials left when smelting operations ceased. He was an engineer, and was operating a very small locomotive known as a "Climax," which was used solely to move the cars on the various tracks on the smelter premises. On the day of the accident decedent's engine was hauling a carload of brick to the scales to be weighed. Without dispute, the evidence shows that this was being done under the directions and at the request of the agent of defendant Southern Pacific Company at Kennett. In order to reach the scales it was necessary to switch to the scale track. Decedent stopped his engine near the switch and a fellow employee, Gubetta, jumped off and "threw" the switch, so that the Climax engine could pass to the scale track. Gubetta gave the signal to proceed, and deceased started slowly toward the switch. He went a few feet and was upon the switch when a train operated by defendant Southern Pacific Company, and backing from the direction of Kennett, ran into his engine, and his death resulted.

It is contended that the court erred in denying a motion for a nonsuit, for the reasons, first: That decedent was guilty of contributory negligence; and, second, that he was a trespasser to whom the defendants did not owe the duty of ordinary care.

[1] As to the first ground, we cannot say, as a matter of law, that the jury could not fairly and honestly find for the plaintiff, nor can we say that the evidence is of such a character that it will support no other legitimate inference than that the deceased was guilty of contributory negligence. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. Decedent brought his engine to a complete stop. He sent a man ahead to open the switch. That man opened the switch and gave the signal to proceed. There is evidence that the train of defendant company came in an hour or two ahead of its regular time of arrival, and that the only other train over this branch line arrived in the morning. The accident occurred at 2:30 o'clock p. m. Decedent had no reason to anticipate that a train would back into him at that hour. We are satisfied that the jury might reasonably have found that decedent acted with ordinary care under the conditions which we find in this case.

[2] As to the second ground, the conclusion is inescapable that decedent was an invitee. The agent of defendant instructed decedent to weigh the brick. The scales were situated upon the tracks of defendant Southern Pacific Company. A witness testified that decedent used the only available route, which was over the switch in question. No objection was made at the trial to the testimony of the employer of decedent, when he said that he was directed by the station agent to weigh the brick upon the scales referred to.

"An invitation to go upon the premises of another may be express or implied, and may be manifested by the arrangement of the premises or by the conduct of the owner. The gist of liability consists in the fact that the person injured did not act merely for his own convenience or pleasure, but that an owner or occupant held out an invitation or allurement which led him to believe that the use made by him of the premises was in accordance with intention and design." 19 Cal. Jur. 619, 620.

[3] Defendant company was to haul this brick over its lines, and the weighing was necessary for that purpose. Appellant insists that the agent was without authority to grant the permission to use the scale track, and relies upon Hoffman v. Southern Pac. Co., 168 Cal. 627, 143 P. 1032. There, over the objection of defendant, plaintiff was permitted to testify that an employee of the railroad company told him that he would have time to use a push car upon the main track before the train came. It was held that the objection should have been sustained upon the ground that there was an absence of proof that the employee was authorized to so act. That employee was an ordinary watchman and timekeeper. His duties had nothing to do with the running of trains. Admittedly he was not acting within the scope of his actual or apparent authority. In the instant case, the station agent was attending to the weighing of a commodity which his employer was about to transport. It is a matter of common knowledge that such commodities must be weighed to determine the charges. There is evidence showing that the agent made out the shipping bills for freight originating at the smelter, and two days after the accident he weighed the car of brick which was here involved. We are of the opinion that the agent was authorized to permit decedent to use the scale track.

[4] Furthermore, it does not appear that this question of authority was raised at the trial. The employer of decedent was permitted to testify without objection, and the agent did likewise. The motion for nonsuit did not include this ground. Where points of this character are presented for the first time to a reviewing court, they will not be considered. 2 Cal. Jur., p. 263. If appellant had made a proper objection to this testimony (i. e., want of authority in the agent), opposing counsel would have had an opportunity to produce further evidence to support his position, if he so desired. Where no such objection is made, opposing counsel may rightfully conclude that it has been waived.

It is contended that decedent was a trespasser for the reason that defendant company owned the track upon which the scales were located. Contracts between the wrecking company and the smelter company were introduced by plaintiffs to show that decedent had a lawful right to use the scale track. We deem it unnecessary to discuss these contracts, as we have concluded that decedent was acting under the express directions and permission of defendant company. The motion for a nonsuit was properly denied.

[5] It is next contended that the evidence was insufficient to sustain the verdict. Under this heading in appellants' brief, the following quotation embraces all they have to say in support of this ground for reversal: "The equipment used was modern, the defendants were operating the train in a careful manner and the train was fully equipped and manned by competent employees, each of whom was in his respective place." The transcript in the case consists of some five hundred pages. Upon a presentation of this character, an appellate court is under no obligation or duty to give the point any consideration whatever. We will, however, point out the outstanding facts which might justify the action of the jury. The train of defendant company was approaching around a curve to the scene of the collision. It was seen some two hundred feet away, by Gubetta (after he threw the switch for decedent's engine), and he jumped to safety as it rushed by him and struck the engine. This train was backing up, and there was ample evidence from which the jury could find that due care was not used in the operation. The impact was terrific, throwing the little engine of decedent many feet in the air. It was a question for the jury to decide, as to whether or not the train was proceeding at a rate of speed which was prudent under the circumstances. In addition, there was evidence that the train was over an hour ahead of its regular schedule. The agent at Kennett, where this train originated, had told decedent to use the scale track a short time before. The act of defendant company, under such circumstances, shows almost a reckless disregard for human life, and the facts are ample to support the verdict rendered.

[6] The court instructed the jury that defendants were under the duty to use ordinary care. It is contended that this was error, in that the evidence shows the deceased was a trespasser. As we have pointed out, the uncontradicted evidence shows that deceased was at the point of collision at the express invitation of Southern Pacific Company. Where the jury could draw but one conclusion from the evidence, it is not error to instruct the jury upon the facts thus admitted.

Another instruction bears upon the construction of the contracts mentioned supra. These contracts are immaterial, in that the evidence shows an express invitation. The giving of instructions bearing upon these matters could not harm defendants.

Other instructions given at the request of plaintiffs are attacked, but they involve, directly or indirectly, the considerations disposed of in the two preceding paragraphs.

A number of instructions offered by defendants were refused by a court. These involve the duty of defendant railroad company toward a trespasser. As we have pointed out, the undisputed evidence shows that decedent was not a trespasser. There was no error in rejecting these instructions.

We have examined the instructions as a

whole, and are satisfied that the jury was fully and fairly instructed.

[7] Certain rulings of the court, in respect to the admission of the contracts in evidence, are attacked. These contracts were offered to show that decedent had a right to use the tracks of defendant company, and hence was not a trespasser. Assuming that the court erred, no prejudice could result to defendant company, when the company admitted at the trial that it had expressly invited decedent to use this track.

Most of the arguments in this case are devoted to the determination of the status of decedent. Conceding that appellants are correct, and that he was a trespasser, there is evidence from which the jury could have concluded that the railroad company breached its duty toward him. Even a trespasser has some rights. For instance, if, after he is discovered upon the tracks, the railroad company does not adopt reasonable precautions to avoid injuring him, a recovery can be had. Williams v. Southern Pacific Co., 173 Cal. 525, 160 P. 660.

The case was fairly tried, and the jury was fully instructed. The record is free from prejudicial error. The evidence was ample to support the verdict.

It follows, therefore, that the judgment must be affirmed, and it is so ordered.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 37

PRESIDENT AND PRESIDING ELDER OF SOUTHERN CALIFORNIA CONFERENCE OF SEVENTH DAY ADVENTISTS v. GOODWIN et al.

Civ. 8064.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1931.

1. Quieting title 🔑10(4).

Plaintiff, in action to quiet title, *held* not confined to record title, and could prove title by adverse possession.

2. Quieting title 🔑44(2).

Sustaining objection to plaintiff's offer to prove it had been in possession and paid taxes in action to quiet title *held* error.

> Such ruling was erroneous, since plaintiff could prove title by adverse possession, and since it precluded plaintiff from proving one of its material allegations, that it was in possession; question whether plaintiff was in possession on date of defendants' deed being of special importance in determining the rights of the parties.

3. Vendor and purchaser 🔑242.

Defendants in action to quiet title claiming in answer and cross-complaint to be bona fide purchasers had burden of proving facts pleaded.

4. Vendor and purchaser 🔑244.

Finding in action to quiet title that defendants were bona fide purchasers *held* not sustained by evidence.

5. Contracts 🔑88.

Written instrument is presumably based on consideration.

6. Deeds 🔑195.

Second grant of same real estate to which grantor already executed one valid deed carries with it no presumption of consideration.

7. Deeds 🔑17(1).

Whether executory contract was consideration for second grant to same real estate depends on reasonable value thereof and not worth to owner.

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by the President and Presiding Elder of Southern California Conference of Seventh Day Adventists against Roy I. Goodwin and others. From a judgment in favor of defendants, plaintiff appeals.

Reversed.

J. E. Light, of Los Angeles, for appellant.

Weldon J. Bailey, and Roland W. Schoettler, of Los Angeles, for respondents.

STURTEVANT, J.

[1, 2] The plaintiff has appealed from the judgment in favor of the defendants in an action to quiet title. All parties claimed title under instruments executed by a common grantor, Amelia J. Fliedner. On opening its case, the plaintiff introduced a deed dated July 5, 1923, and recorded April 26, 1928. Out of order, but by consent, at the same time the defendants introduced a deed dated April 5, 1928, and recorded April 6, 1928. They also introduced a quitclaim deed from Goodwin and Foxe to the defendant Bellefontaine. That deed was dated August 23, 1928. The plaintiff then called S. Donaldson, secretary of the plaintiff corporation. By that witness the plaintiff sought to prove title by adverse pos-

session. The defendants claimed that the plaintiff should be confined to a record title, and made their objections accordingly, and the objections were sustained. All of those rulings were erroneous. McCormack v. Silsby, 82 Cal. 72, 22 P. 874; 22 Cal. Jur. 109. The plaintiff then made an offer to prove that it had been in possession and paid the taxes. The objection of the defendants to that offer was sustained. That ruling was erroneous for the reasons just stated, and also because it precluded the plaintiff from proving one of its material allegations, that it was in possession. If it was in possession on April 5, 1928, the date of defendants' deed, that fact was of special importance in determining the rights of the parties under the facts of this case. Bank of Mendocino v. Baker, 82 Cal. 114, 117, 22 P. 1037, 6 L. R. A. 833.

Thereupon the plaintiff rested. The defendant made a motion for a nonsuit. The trial court stated that the deed to the defendants raised a presumption that it was executed for a valuable consideration, and intimated that, in the absence of further proof, it would grant the motion. The plaintiff reopened its case and introduced proof that the defendants' deed was given in consideration of the assignment, by Goodwin and Foxe to their grantor, of a certain executory contract to buy and sell certain lots in the Hemet Riverside Walnut Estates. Mr. Goodwin testified: "The contract had a value of $1,250.00 to me." No other evidence of consideration was given. No other evidence was given by either party.

[3, 4] In their answer and in the cross-complaint of the defendant Bellefontaine, the defendants pleaded the facts, claiming to be bona fide purchasers. The trial court found the facts in their favor. But the burden of proving said facts rested on the defendants. Bell v. Pleasant, 145 Cal. 410, 413, 78 P. 957, 104 Am. St. Rep. 61. They did not introduce that proof nor did it come out in the presentation of the plaintiff's case. The findings mentioned are not sustained by the evidence.

[5-7] As the case must go back for a new trial, it becomes necessary to mention again some of the errors that entered into the first trial. That a written instrument presumes a consideration is ordinarily the rule. But, when the evidence shows that one has executed a valid deed to real estate, it follows that the grantor has exhausted his rights. And, when the same record shows that such grantor attempts to execute another grant to that same real estate, it follows that the grant carries nothing. Such second grant, therefore, carries with it, in the face of such facts, no presumption of a consideration. Bell v. Pleasant, 145 Cal. 410, 415, 416, 78 P. 957, 104 Am. St. Rep. 61. Again, when for such second grant an executory contract is given, the question is not, What was it worth to the owner thereof? but What was the reasonable value thereof?

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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118 Cal.App. 683

PEOPLE v. MARCONI.

Cr. 2113.

District Court of Appeal, Second District, Division 1, California.

Nov. 30, 1931.

1. Automobiles ⚷355(13).

Evidence sustained conviction for manslaughter committed in operation of automobile.

2. Criminal law ⚷1170(4).

No error appears from sustaining objection to question, where witness had answered affirmatively before court's ruling and counsel thereupon withdrew witness.

3. Automobiles ⚷354.

In prosecution of bus company's employee for manslaughter committed in operation of automobile, investigation of defendant's record with employer to show reputation for prudent driving *held* improper.

4. Automobiles ⚷354.

Testimony of witnesses as to passing of unidentified automobile at high speed shortly prior to hearing crash of fatal accident *held* not too remote to be admissible, in prosecution for manslaughter.

> The witnesses in question were some five or six hundred feet from the scene of the accident and did not identify the speeding automobile, except in a general way, that it was a large sedan, headed toward the scene of the accident, which occurred in about a second. No other machine was passing meanwhile.

5. Automobiles ⚷331.

Driving outside residential or business districts at rate less than forty miles per hour may under certain circumstances constitute violation of speed law.

6. Criminal law ⚷763, 764(6).

In prosecution for manslaughter committed in operation of automobile, instruction as to possible reduction of speed before reaching place of accident *held* properly refused as comment on evidence.

7. Automobiles 🔑357.

In manslaughter prosecution based on negligent operation of automobile, instruction to acquit defendant if deceased's negligence was proximate cause of death *held* properly refused as misleading.

8. Automobiles 🔑346.

Contributory negligence of person killed does not constitute defense in prosecution for manslaughter by reason of negligent operation of automobile.

9. Criminal law 🔑822(1).

Statements in court's charge must be read as whole.

10. Homicide 🔑34.

One failing to take ordinary precautions with reference to dangerous instrumentality commits criminal act against person killed as result of his negligence.

11. Criminal law 🔑1172(6).

In prosecution for manslaughter committed in operation of automobile, instruction giving definition of reckless driving under archaic statute *held* harmless (St. 1923, p. 557, §§ 121, 122, as amended by St. 1929, p. 540; Const. art. 6, § 4½).

12. Criminal law 🔑1172(6).

Instruction as to driving on left side of highway, though based on archaic statute, *held* harmless in prosecution for manslaughter committed in operation of automobile (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540).

13. Automobiles 🔑357.

Instruction as to driving on wrong side of highway without "lawful" reason *held* not erroneous in prosecution for manslaughter committed in operation of automobile.

14. Jury 🔑110(5).

Defendant not attempting to ascertain juror's bias before selecting him could not raise point after conviction that juror was prejudiced.

15. Criminal law 🔑1013.

Appeal from judgment should be dismissed, where appeal was also taken from motion denying new trial and court in denying motion suspended proceedings and granted defendant probation.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Ettori Marconi was convicted of manslaughter, and he appeals.

Appeal from judgment dismissed, and order denying motion for new trial affirmed.

Max A. Sturges, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

BISHOP, Justice pro tem.

[1] The evidence, though not without its conflicts, is plainly sufficient to support the jury's conclusion that the appellant was guilty of manslaughter. He was shown to have been driving a fairly heavy car, at night, on a curving road, and to have been to the left of the center line when his car collided head on with one in which a Mr. Newhard was riding. Mr. Newhard died as a result of the injuries received. All the elements of the crime of manslaughter were established. People v. Thomas (1922) 58 Cal. App. 308, 208 P. 343.

[2, 3] Complaint is made of two rulings of the trial court respecting the receipt of evidence. The manager of the bus company, by which appellant was employed, was asked by appellant's counsel if he had charge of its records regarding accidents. An objection was interposed and sustained, but not until after he had answered affirmatively. Appellant's counsel, without asking a further question, withdrew the witness. No error appears here, first, because every question asked remained answered; secondly, because the subject-matter of the inquiry was not the general reputation of the appellant for prudent driving, but his record in a particular service. Without deciding that an investigation into his general reputation would have been proper, we find the limited inquiry would not have been. People v. Gordan (1894) 103 Cal. 568, 574, 37 P. 534; People v. Heape (1925) 72 Cal. App. 226, 238, 237 P. 66.

[4] Two witnesses related that a second or two before they heard the crash of the fatal accident an unidentified automobile sped past them at a rate of speed variously described as being "very fast," "a high speed machine," and stated to be over 40, possibly 70 miles per hour. The witnesses were some five to six hundred feet from the scene of the accident, did not identify the speeding automobile except in the general way that it was a large sedan, headed toward the accident which occurred in "about a second," no other machine passing meanwhile. Appellant's motion to "exclude" the testimony of one only of these witnesses on the ground that it was too remote was properly denied. It was not so remote as to be of no value, as a matter of law, although it was possible that the car seen might have turned off a side road and never reached the place of the accident. The weight to be given it was for the jury to decide.

[5, 6] The theory back of part of appellant's objection is doubtless revealed in the last sentence of this requested instruction: "The maximum speed limit under the law at the time of the accident and at the place where it occurred was 40 miles per hour and you are instructed that before you can find the defendant violated the speed law you must find from the evidence beyond reasonable doubt that he was at the time of the accident driving in excess of 40 miles per hour. You are further instructed that the testimony as to a rate of speed in excess of 40 miles per hour at any given point shall not be controlling if you should find that there was sufficient distance between that point and the place of accident to permit of a change of speed in the ordinary course of driving to that of a lower rate." This instruction was properly refused. The appellant could have been violating the "speed law" although driving outside any residential or business district at a rate less than 40 miles per hour. Ex parte Daniels (1920) 183 Cal. 636, 646, 192 P. 442, 21 A. L. R. 1172; Davis v. Brown (1928) 92 Cal. App. 20, 24, 267 P. 754; Armstrong v. Day (1930) 103 Cal. App. 465, 471, 284 P. 1083. Moreover, the concluding sentence is, in reality, a comment on the inferences to be drawn from the evidence, an improper subject of a court's instruction.

[7, 8] Another instruction, requested but not given, would have advised the jury to acquit the defendant if the negligence of the deceased was the proximate cause of his death. The requested instruction is faulty in that it could be understood as conveying the idea that contributory negligence is a defense, which it is not. People v. McKee (1926) 80 Cal. App. 200, 251 P. 675; People v. Leutholtz (1929) 102 Cal. App. 493, 283 P. 292; note in 67 A. L. R. 922. "The contributory negligence of the person killed, although it may be a defense to an action for a private injury resulting from homicide, does not constitute a defense to a prosecution for homicide. * * *" 29 Cor. Jur. 1155, and authorities there cited. A careful reading of People v. Black (1931, Cal. App.) 295 P. 87, relied upon by appellant, reveals that case as a further authority in point. The court did admonish the jury that the defendant was not responsible unless the death was caused by his own act or omission, thus more correctly covering the point appellant sought to cover. It was not error to refuse to give the requested instruction.

[9, 10] We have examined the several instructions which the court gave, dealing with the question of what constitutes lack of due caution and circumspection, and find no prejudicial error. Some statements, if isolated, would be inaccurate pronouncements of the rule, but, taken as a whole, as they must be read (People v. Kelly [1925] 70 Cal. App. 519, 524, 234 P. 110), we think the jury was fairly advised. Appellant's main ground of complaint with respect to these instructions is that they fail to recognize a difference between civil and criminal negligence. If a distinction is to be made, it will not help the jury to understand it by giving them such an instruction as that requested, that "The charge of manslaughter could be sustained only if the defendant's negligence reached beyond the bounds of lack of skill and foresight, where civil liability begins, to a point where criminal liability is imposed." The instructions given fairly express the rule which now obtains in this state, "that when a person is doing anything dangerous in itself, or has charge of anything dangerous in its use, and acts with reference thereto without taking those proper precautions which a person of ordinary prudence would have used under the circumstances and the death of another results therefrom his act or neglect is a criminal act against the person so killed even though his negligence does not amount to a wanton or reckless disregard of human safety or life." People v. Wilson (1924) 193 Cal. 512, 518, 226 P. 5, 7; People v. Seiler (1922) 57 Cal. App. 195, 207 P. 396, and People v. Crossan (1927) 87 Cal. App. 5, 261 P. 531.

[11] In order to inform the jury as to the unlawful acts, not amounting to felonies, for the commission of which appellant might be found guilty of manslaughter, the court instructed the jury as follows:

"That upon all occasions the driver of a vehicle shall drive the same upon the right half of the public highway, unless it is impracticable to travel on such side of the highway, and except when overtaking and passing other vehicles, in which latter case, the vehicle may be driven on the left side of a highway if such left side is clear and unobstructed for at least one hundred yards ahead;

"That any person who knowingly and wilfully drives any vehicle upon a public highway, either without due caution and circumspection, or in such a manner as to endanger the life, limb or property of any person, shall be guilty of reckless driving.

"It shall be unlawful and constitute a misdemeanor for any person to violate any of the foregoing provisions of the California Vehicle Act just read to you, and any act constituting such a violation would be an unlawful act not amounting to a felony."

This instruction embodies the substance of sections 121 and 122, California Vehicle Act (St. 1923, p. 557) as they stood in 1927. The accident, out of which this prosecution grew, took place in December, 1930. In 1929 (St. 1929, p. 540), amendments to these sections had taken effect which made the law less drastic. Reckless driving, for example, was changed so that it arose only when one drove "any vehicle upon a highway in so negligent a manner as to indicate either a wilful or a wanton disregard of the safety of persons or property." It will be seen appellant might have been guilty of conduct which would constitute reckless driving under the instruction, but which might be lawful, so far as the restrictions of section 121 are concerned. From this conclusion, however, it does not follow that prejudicial error flows from the giving of the instruction. The field of conduct which was described as reckless driving in 1927, but now lies outside of that misdemeanor, plainly falls within the definition of involuntary manslaughter already discussed, the commission of a lawful act "without due caution and circumspection." If the jury convicted appellant because they found that he was guilty of reckless driving, as defined to them, of necessity they found he had so conducted himself that it must be said he had acted without due caution and circumspection. A verdict of guilty would have been obligatory had the correct instruction been given. We must not order a reversal in such a case. Section 4½, art. 6, State Constitution.

[12, 13] In a further particular the instruction last quoted is archaic. In 1927, driving on the left side of a highway was permitted, under conditions not involved, and also "if such left side is clear and unobstructed for at least one hundred yards ahead." In 1929 this restriction was relaxed so that driving on the left side was permitted if the highway ahead was clear a sufficient distance to permit two things: (a) The overtaking and passage of an automobile in safety; and (b) a return to the right side of the road before coming within one hundred feet of an approaching vehicle. Here again under the facts of this case the giving of the erroneous instruction did not prejudice appellant's rights. There was a conflict in the evidence as to whether or not, at the time of the collision, appellant was on the wrong side of the center line. If the jury predicated their verdict on the violation of section 122, it was because they found a violation had occurred which would be such under either wording of the section. The error presented does not go to the merits of the case. The same comment is called for by a further objection to another instruction touching the same subject, wherein the trial court used the expression, "or was driving on the wrong side of the highway without lawful reason." The point appellant makes is that "unlawful" is not synonymous with "criminal." Even so, the distinction is plainly one without a difference, so far as the facts of this case are concerned and could have had no influence on the result. No prejudicial error appears with respect to any instruction.

[14] In support of his motion for a new trial, appellant sought the trial court's order to bring in one of the jurors, that it might be shown that another juror was prejudiced against all bus drivers, and was unable, therefore, to give appellant a fair trial. The trial court declined to take action, a decision of which the appellant is in no position to complain. No attempt was made, so far as is suggested to us, to ascertain the juror's bias before he was selected. An appellant may not neglect the opportunity given him to guard against unsatisfactory jurors, and then make objection for the first time after an adverse verdict is reached. People v. Plum (1929) 97 Cal. App. 253, 275 P. 518.

[15] After the verdict of guilty was received, appellant moved for a new trial and applied for probation. The motion was denied, and thereafter it was ordered "that proceedings herein be suspended and defendant granted probation for a period of six years." No imprisonment was fixed as a condition of probation; financial restitution being the only terms imposed. An appeal was taken from the order denying the motion for a new trial and from the judgment. The respondent takes the position that there was no judgment, and that the attempted appeal should be dismissed. Appellant apparently acquiesces in the position taken by respondent. In this case every point raised by appellant can be as effectively reviewed on his appeal from the order as it could have been on an appeal from a judgment.

We therefore order the appeal from the judgment dismissed. The order denying the motion for a new trial is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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215 Cal. 768

Ex parte MEFFERD et al.

Cr. 3410.

Supreme Court of California.

Dec. 9, 1931.

Courts ⚷212.

Supreme Court *held* without jurisdiction to review order or decision of District Court of Appeal discharging defendant from custody on habeas corpus, where charge was prosecuted by complaint (St. 1927, p. 1845; Pen. Code, § 1506, as added by St. 1927, p. 1061).

In Bank.

Application for writ of habeas corpus by George Mefferd and Joseph Waldman to secure their release after being convicted for violating the Fruit, Nut and Vegetable Standardization Act.

Application dismissed, and petitioners ordered discharged from custody.

Superseding 299 P. 58, which supersedes 292 P. 988.

William P. Redmond, of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., Frank Richards, Alberta Belford, and Clyde P. Harrell, Jr., Deputies Atty. Gen., and Erwin P. Werner, City Atty., George A. Dockweiler, Deputy City Atty., Charles P. Johnson, City Pros., and Joe W. Matherly and John L. Bland, Deputies City Pros., all of Los Angeles, for respondent.

WASTE, C. J.

In a criminal action commenced by the filing of a complaint in the municipal court of the city of Los Angeles, the petitioners, George Mefferd and Joseph Waldman, were convicted of violating certain provisions of the Fruit, Nut and Vegetable Standardization Act (Stats. 1927, p. 1845). Contending that the act is unconstitutional and void, the petitioners appealed to the appellate department of the superior court from the judgment of conviction. The judgment was affirmed and the petitioners applied to the District Court of Appeal (Second Appellate District, Division 2) for a writ of habeas corpus, which was granted. In a written opinion that court declared the act to be unconstitutional and discharged the petitioners from custody. The Attorney General thereupon made application to this court for a hearing, which was allowed. On May 28, 1931, this court filed its opinion declaring the Fruit, Nut and Vegetable Standardization Act to be a proper and valid exercise of the police power, and the petitioners were remanded to the custody of the sheriff of the county of Los Angeles. On a petition for rehearing the petitioners urged, for the first time, that the Supreme Court was without jurisdiction to review an order of the District Court of Appeal discharging a defendant from custody on habeas corpus, when the charge of which the defendant stands convicted originated by way of complaint as distinguished from a charge having its inception in an indictment or an information. In support of this contention the petitioners cited In re Zany, 164 Cal. 724, 130 P. 710, and section 1506 of the Penal Code. In substance, petitioners contended in their application for rehearing that, under the Zany decision, supra, and prior to the passage of section 1506 of the Penal Code, this court was without jurisdiction to review an order of the District Court of Appeal discharging a defendant from custody, and that section 1506, added to our Penal Code in 1927 (Stats. 1927, chap. 628, p. 1061), provides for such a hearing only when the defendant is discharged after conviction prosecuted by indictment or information. The practice of presenting points for the first time on rehearing is not to be encouraged, but, because another cause involving the same legal question was pending in the court, we granted a rehearing, in order that this jurisdictional question might be fully presented and considered. After granting the rehearing we handed down a decision in the Matter of the Application of Milton Page for Writ of Habeas Corpus, 5 P.(2d) 605, in which proceeding the identical point here involved was presented. In that case we held that this court is without jurisdiction to review an order or decision of the District Court of Appeal, discharging a defendant from custody on habeas corpus, when the charge of which he stands convicted was prosecuted by way of complaint. The decision in the Page proceeding decides the point here involved.

The application for a hearing in the Supreme Court is dismissed, and the petitioners are ordered discharged from custody, as directed by the District Court of Appeal.

We concur: SHENK, J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

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214 Cal. 43

KERN SUNSET OIL CO. v. GOOD ROADS OIL CO. et al.

L. A. 11323.

Supreme Court of California.

Dec. 21, 1931.

1. Landlord and tenant ⚷112(2).

Landlord's acceptance of rent with knowledge of breach of condition precludes forfeiture.

2. Mines and minerals 🔑78(5).

Lessee's covenant to drill two oil wells yearly for eight-year period was not continuing covenant, and lessor's waiver of breach, after eight years had expired without drilling 16 wells, prevented subsequent forfeiture.

> Lessor's waiver of breach of covenant after expiration of eight years without 16 wells having been drilled prevented subsequent forfeiture for breach of contract, because the covenant as a whole was breached at the end of the eight-year period, and the mere fact that the lease called for drilling of more than one well would not make the covenant continue beyond that time.

3. Mines and minerals 🔑78(5).

Lessor's acceptance of monthly royalty without complaint, after expiration of eight-year drilling period, constituted waiver of breach of drilling covenant.

4. Mines and minerals 🔑78(5).

Breach of covenant on which lessor based notice of forfeiture *held* waived by lessor's acceptance of royalty payments after service of notice.

5. Mines and minerals 🔑78(5).

Doctrine of lessor's waiver of breach of covenant by acceptance of rent or royalty applies to lease of oil-bearing lands.

In Bank.

Appeal from Superior Court, Kern County; Wm. D. Dehy, Judge.

Action by the Kern Sunset Oil Company against the Good Roads Oil Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Everts, Ewing, Wild & Everts, Dan F. Conway, L. N. Barber, and C. M. Ozias, of Fresno (Morris, Jaffa & Thompson, of San Francisco, of counsel), for appellant.

Borton & Petrini and C. V. Anderson, all of Bakersfield, for respondents.

CURTIS, J.

In this action, the plaintiff sought to declare the forfeiture of a certain lease of oil lands, executed by it in favor of the defendants Barlow and Hill, and by them assigned to the defendant Good Roads Oil Company, upon the ground and for the reason that the lessees and their assign had broken the terms of said lease, in that, while the lease provided for the drilling and placing upon production of two wells each year until sixteen wells had been drilled and brought into production, said lessees and their assign had only completed thirteen wells during a period of over thirteen years from the date of said lease until notice of forfeiture thereof was served upon them by the plaintiff. The lease provided that the lessor, the plaintiff herein, reserved to itself the one-seventh part of all oil or other minerals produced on said premises during the term of said lease. It was further agreed that on or before the 15th day of each and every month the lessees should deliver into tanks and reservoirs to be provided by plaintiff one-seventh part as royalty of any and all minerals and water produced pursuant to this lease during the preceding month. It further appears that by an arrangement made between the parties hereto and the Standard Oil Company, the oil produced under said lease was delivered and sold to the last-named company at a stated price, and that the Standard Oil Company paid in money each month to the parties to said lease the amount to which each was entitled under the terms of said lease; that is, one-seventh thereof to the plaintiff as royalty or rent, and six-sevenths thereof to the lessees.

The lease was dated May 1, 1911, and was to continue to May 1, 1928, a term of seventeen years. The court found that at the date of the lease there were two producing wells upon the property, and three wells were then partially drilled, which were thereafter completed by the lessees. It also found that, in addition to these five wells, the lessees commenced and completed on said property eleven wells after the execution of said lease as follows: Three wells in the year 1914, two wells in each of the years 1916, 1917, and 1918, and one well in each of the years 1920 and 1924. It further found that all of these eleven wells last mentioned were completed, but did not find the date of completion of all of them. This is a matter of no importance, as no claim is made that the wells commenced by the lessees were not completed within a reasonable time after their commencement. The plaintiff bases its right to a forfeiture of said lease upon the failure of the lessees and their assign (whom we will hereafter refer to as the lessees) to drill and place upon production within the time specified in the lease the number of wells required by the terms of said lease, which would be two wells each year until sixteen wells had been completed and placed upon production. The court further found that the plaintiff had received and accepted from the date of said lease up to the date the notice of forfeiture was served by the plaintiff upon the lessees, the one-seventh royalty provided for by said lease, and that after service of said notice of forfeiture, and up to the commencement of this action, and for at least three months thereafter, said royalty was regularly paid to, and received and accepted by, the plaintiff. The findings show that the first notice given by the plaintiff to the lessees in which any claim was made that the lessees had not complied with the terms of the lease was dated and served on or about March 11, 1924. This was followed by a notice, dated May 26, 1924, demanding possession of the leased premises, and by a second notice dated July 11, 1924, making a similar demand. This action was commenced on July 25, 1924. Regarding the payments of royalty after March 11, 1924, the date of the first notice given by the plaintiff, and the amounts of said payments, the court found said payments were made as follows: For the month of March, $656.07 paid April, 1924; for the month of April, $546.63 paid May, 1924; for the month of May, $723.12 paid June, 1924; for the month of June, $548.03 paid July, 1924; for the month of July, $556.64 paid August, 1924; for the month of August, $670.84 paid September, 1924; for the month of September, $799.00 paid October, 1924.

It also appears that after the institution of this action the plaintiff served upon the Standard Oil Company notice of its claim that said lease was canceled, and the Standard Oil Company, after receiving said notice, refused to make any further payments for oil so delivered to it. Whereupon and on January 30, 1925, the parties hereto entered into a stipulation whereby the Standard Oil Company paid to the plaintiff not only the royalty for the previous months, but thereafter on each and every month the regular royalty called for by the terms of this lease; and it also paid to the lessees the sum of $2,000 per month, which amount it seems was the approximate cost per month of producing the oil on said leased premises. It was agreed in said stipulation that the acceptance by said lessor of the royalty subsequent to the date of said stipulation should not be deemed a waiver on the lessor's part of any claim to have said lease canceled. The remainder of the proceeds received for the oil produced on said leased premises was deposited and impounded with a bank of Bakersfield to await the result of this action. As the lease by its terms expired on May 1, 1928, the right to the possession of said real property is no longer involved, and the sole controversy relates to said impounded money, and to the rights of the parties in this action to said money. In addition to the foregoing facts, the court also found that the president of the plaintiff company from 1911 to some time in 1922 lived on lands adjoining the leased premises; that he was on said premises two or three times a month during said period of time; and that from 1911 to 1914 he talked with those in charge of said property, and could readily perceive the activities being carried on under said lease. From these facts, the court made its conclusions of law and found that there had never been a breach of any of the terms of said lease; that if any breach of the terms of said lease had occurred the plaintiff had waived the right to claim or assert the same; that plaintiff was estopped from asserting any breach of the terms of said lease; and that plaintiff's complaint be denied; that the impounded moneys be paid over to the defendants; and that they recover their costs. The judgment decreed that plaintiff take nothing by its said action, and that defendants recover their costs. From this judgment, the plaintiff has appealed upon the judgment roll.

It is strenuously insisted on this appeal by the plaintiff and appellant that the court's conclusion of law that the lessees had never breached said lease is unsupported by the findings. On the other hand, the lessees and respondents contend with equal force that said conclusion finds ample support in the findings. It may be seriously questioned whether the conclusions of the court respecting the breach of the terms of the lease, the waiver thereof by the plaintiff, and the estoppel of plaintiff, are in fact conclusions of law, or whether they are not in their legal aspects findings of fact. But as the trial court found fully the probative facts upon which they are predicated, and, as neither party has raised this point, we will treat them as conclusions of law. In view of the conclusion we have reached regarding the question of waiver, it will not be necessary for us to decide whether or not the lessees were guilty of any breach of the terms of the lease.

By the terms of the lease, the lessees were to drill and complete and put upon production two wells in each year until sixteen wells had been finished and brought into actual production. The lease was executed on May 1, 1911. Therefore, by the first of May, 1919, the full number of wells, sixteen in all, should have been completed and brought into production by the lessees. At that time, according to the contention of the plaintiff, the lessees had commenced only thirteen wells. Yet after this date, and for almost five years thereafter, the plaintiff, with full knowledge of all the facts, accepted the regular monthly payments of royalty from the wells upon the leased premises without making any complaint whatever regarding the lessees' failure to complete the remaining wells. It then served its first notice claiming a breach of the terms of the lease. During this time the lessees had commenced and completed another well. After the service of this notice, the plaintiff continued to receive and accept the monthly payments of royalty called for by the lease, not only up to the time of the commencement of the action, but for a period of at least three months thereafter.

[1] The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach, and precludes the landlord from declaring a forfeiture

of the lease by reason of said breach. This is the general rule, and is supported by ample authority. 15 Cal. Jur., p. 787; Miller v. Reidy, 85 Cal. App. 757, 260 P. 358; Inman v. Schecher, 86 Cal. App. 193, 198, 260 P. 605; Richards v. Silveria, 97 Cal. App. 166, 170, 275 P. 478. The rule is also stated in Ruling Case Law as follows: "The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof." 16 R. C. L., p. 1132.

[2] If we understand the plaintiff's position, it concedes the rule to be as stated above. It contends, however, that the covenant in the lease involved herein, to drill two wells each year for a period of eight years and until sixteen wells were drilled and placed upon production, is a continuing covenant, and that a waiver of a former breach does not preclude the lessor from thereafter claiming a forfeiture of the lease for a subsequent breach of this continuing covenant. In other words, appellant contends that the covenant to drill the sixteen wells is a continuing covenant, and that there was a separate and distinct breach thereof each day during the time the lessees failed to comply with said covenant, and that the acceptance of rent after one of said breaches and the waiver thereby of such breach is not a waiver of any subsequent breach of said covenant.

Whether the covenant to drill a stated number of wells upon the leased premises within a given time is a continuing covenant or a noncontinuing covenant is a question not entirely free from difficulty. The cases of McGlynn v. Moore, 25 Cal. 384, and Inman v. Schecher, 86 Cal. App. 193, 198, 260 P. 605, each involved a lease wherein the lessees agreed to build a warehouse upon the leased property. In each of these cases, the lessee failed to erect the building within the time fixed by the lease. Notwithstanding this breach of the contract, the lessor, or landlord, continued for a time to accept rent for the premises with full knowledge that the tenant had failed to comply with the terms of the lease requiring him to erect a warehouse. Thereafter the landlord claimed a forfeiture of the lease and possession of the premises by reason of the failure of the tenant to erect said warehouse. It was held in each case that by acceptance of the rent the landlord had waived his right to claim a forfeiture by the tenant's failure to erect the warehouse. In the case of McGlynn v. Moore, the court said: "The appellants, to avoid the consequences of the receipt of the rent, and to show that it did not amount to a waiver of the forfeiture, say that the covenant to build is a continuing covenant; that the failure of the lessees after the 14th of July, 1861, to build was a continuing breach of their covenant, and that if the receipt of rent accruing after that time was a waiver of the forfeiture, the neglect of the lessees to build after such receipt of rent was a continuing cause of forfeiture. There can be no doubt that the receipt of rent accruing subsequent to the act which works the forfeiture, waives the forfeiture. [Citing cases.] * * * No case is cited by the appellants that asserts the doctrine, that a covenant to build within a given period, is a continuing covenant, and we have been unable to find such a case." The court then goes on to show the difference between these two classes of covenants, and concludes that a covenant to erect a building, which involves the doing of a single act, is not a continuing contract, and that the failure to perform such a covenant is a "breach once for all," and that when once waived is waived for all time. In Inman v. Schecher, supra, the court simply held that the acceptance of rent from the inception of the lease to September 15, 1925, a period of two years and nine months, was a waiver of a covenant in the lease, "to commence the construction of a class A building within thirty (30) days from the date of the execution of the lease," thereby in legal effect holding that the covenant to build was not a continuing covenant. We are cited to no authorities which conflict with these two cases. We confess our inability to draw any distinction in principle between an agreement to construct a building upon leased premises and an agreement to drill a well thereon. Each is a covenant to perform a single act, which act, when completed, results in the performance of the covenant. On the other hand, the failure to perform said act is a breach of the covenant requiring its performance, and, once this breach is waived, the subsequent failure of the tenant to comply with said covenant affords the landlord no right to a forfeiture of the lease. It would be otherwise with a continuing covenant like that involved in the case of Myers v. Herskowitz, 33 Cal. App. 581, 165 P. 1031, relied upon by the plaintiff. The covenant in the lease considered in the opinion in that case provided that a certain passageway "shall at all times be kept free and clear" for the "common purpose of ingress and egress of any and all persons doing business in said room and their patrons." It will readily be seen that this covenant was not to perform a single act, such as constructing a building or drilling a well, but was to preserve a condition in the leased premises which should continue during the entire life of the lease. On each occasion the tenant failed to maintain said condition, he breached the covenant of the lease. Each breach was separate and distinct from the other, and the waiver of one particular breach would not be a waiver of any breach subsequently occurring.

The fact that the lease executed by the plaintiff in this case contained a covenant to drill more than one well would not make the covenant a continuing covenant. The covenant to drill each well, or to be more exact, the covenant to drill two wells during any one year, might be entirely distinct and separate from the covenant to drill two wells during any of the other years covered by the contract, and the waiver of the breach of any one of said covenants would not be a waiver of the breach of any covenant thereafter occurring, but after the expiration of the time within which all of the wells were to be drilled and the full number had not been drilled, the covenant as a whole was then breached, and a waiver of this breach would foreclose all rights of the plaintiff thereafter to a forfeiture of the lease by reason of said breach.

[3] That plaintiff waived this covenant in the lease we think there can be no question. The time in which the lessees agreed to drill and place upon production sixteen wells upon said leased premises expired on May 1, 1919, at which time, according to the contention of the plaintiff, the lessees had completed only thirteen wells. The lessees therefore at this date may have committed a clear breach of the terms of the lease. Yet after this date, and for almost five years following, the plaintiff accepted and received the regular monthly payments of royalty from the leased premises without making any complaint or objection to the default on the lessees' part. By the receipt of these payments, the plaintiff clearly and definitely recognized the existence of the lease. "A landlord who thus recognizes a lease as a subsisting, operative contract should not be permitted to insist upon a past forfeiture, nor be permitted to assert that the contract is no longer a subsisting lease affording to the tenant all his contractual rights thereunder. [Citing authorities.]" Jones v. Maria, 48 Cal. App. 171, 191 P. 943, 944.

[4] But even if the covenant to drill the sixteen wells is a continuing covenant it cannot avail the plaintiff in this action, as the findings show that even after the service of the notice of forfeiture, and for three months after the commencement of this action, the plaintiff continued to receive and accept the regular monthly payments of royalty under the lease. "Where, however, a landlord, having sued to enforce the forfeiture, thereafter accepts rent subsequently falling due, thus waiving the breach antedating the action, the fact that the covenant broken is a continuing one does not operate to preserve the breach as a foundation for the litigation. His right of action, so far as that particular suit is concerned, is gone. If he would enforce a forfeiture for the breach continuing after the suit, he must serve a new notice to quit and bring a new suit." 15 Cal. Jur., p. 789.

[5] The plaintiff, while admitting that the rules above enunciated might apply to all ordinary leases, contends that they should not govern in the case of a lease like that involved in this action, where the leased premises consist of oil-bearing lands which are let for the purpose of developing the oil and other minerals therein, and in which the lessor reserves a percentage of the oil produced as a royalty. Plaintiff relies in support of the contention upon the case of W. T. Waggoner Estate v. Wichita County (C. C. A.) 3 F.(2d) 962, 963. That case involved the right of the authorities of Wichita county to collect a tax levied "on so-called royalties under oil and gas leases." The leased premises were situated in the county of Wichita. The contention of the owner of said premises was that the property interest which was subject to the tax in question was personal property, and was not taxable in the county other than the owner's residence. The court held that under the statutes of that state (Texas), the property was taxable in the county in which the leased premises were located. In the course of its opinion, the court said: "From the facts that, prior to the making of the leases now in question, the lessor was the owner of the oil in or under the land described, and that nothing contained in those instruments evidences the lessor's consent that the lessee have or retain as owner the part of the oil produced which the lessee was required to deliver to the lessor, it follows that the lessor was the owner of that part of the oil both before and after it was brought to the surface. His property right to mineral oil in or under land owned by him was taxable as real property." From this language the plaintiff argues, "that this one-seventh royalty which the plaintiff herein received at all times subsequent to the date of the lease was something essentially different from the payment by a lessee of money in the way of rent under an ordinary building lease. The one-seventh royalty was property the title to which at all times vested in the plaintiff." We fail to see how this difference in the ownership of the property can make any material difference in the relations of the parties when we are considering the effect of the conduct of the lessor upon the question of waiver. The theory upon which the courts hold that

acceptance of rent, after breach of the covenants of the lease with knowledge of all the facts surrounding said breach, constitutes a waiver of such breach is that by accepting the rent under these circumstances the lessor recognizes the existence of the lease, and that it is inconsistent and not permissible for a party to recognize the existence of a lease and accept benefits under it, and at the same time claim that it is forfeited and seek to recover the fruits of a forfeiture. The plaintiff in accepting the monthly payments of royalty accepted the same under the terms of the lease. Had there been no lease there would have been no royalty. The royalty was a creation of the lease, and, by accepting it, the plaintiff plainly recognized the existence of the lease. We see no valid reason for making any distinction in respect to the question of waiver by acceptance of rent or royalty between a lease of oil lands and a lease of any other kind of property.

Plaintiff in endeavoring to justify the acceptance and receipt of the royalty asks what it could have done under the circumstances, and intimates that its only other course would have been to let its proportion of the oil run to waste down the canyon. But the findings show that no oil was delivered directly to plaintiff. On the other hand, by the agreement of the parties, all of it was sold and delivered to the Standard Oil Company, and this company paid each month one-seventh of the proceeds of all oil delivered during the previous month to the plaintiff. There was nothing to have prevented plaintiff from refusing these monthly payments from the Standard Oil Company. The logical thing for the plaintiff to have done, if it claimed a forfeiture of the lease, would have been to notify the Standard Oil Company that the lease was forfeited, and to have demanded of that company the entire proceeds from the sale of oil from the leased premises. It is true that it gave such a notice to the Standard Oil Company but not until three months after the commencement of this action, up to which time it regularly accepted these monthly payments of royalty. It was then too late, for by its previous conduct it had waived any breach of the lease.

Plaintiff also cites the case of Linnard v. Sonnenschein, 94 Cal. App. 729, 272 P. 315, 318, as supporting some phase of its argument that no waiver on its part was proven or found by the court, and quotes from it as follows: "Waiver cannot be predicated upon the fact of the acceptance of rent alone. The party relying on a waiver must plead and prove facts from which an actual intention to relinquish the right may be derived. This intention may be manifested by express agreement or by conduct. If conduct is relied upon, bona fide reliance upon such conduct must also appear." In that case, however, the evidence was that, on receipt of a check by the landlord in payment of the rent, after breach of the lease, he notified the tenant that, "If you are not contented that I shall accept the sum evidenced by this check without prejudice to the position previously taken by me in respect to your tenancy and the amount of rent due thereunder, kindly advise me." A week passed without the landlord hearing from the tenant, whereupon he cashed the check. The following month the tenant sent a check for the month's rent, with a statement that, "We will continue to remit the rents as we have in the past in accordance with the terms of our lease." This check was promptly returned by the landlord. Under this state of facts, the court held that no waiver was intended by the landlord. It is quite evident that had the landlord accepted the rent unconditionally, as did the plaintiff in this case, the decision of the court would have been entirely different. It is true that acceptance of rent alone will not always result in a waiver, but proof of acceptance of rent after condition broken with full knowledge of all the circumstances of said breach has invariably been held sufficient to constitute a waiver of the breach. As stated in the authorities quoted above, this is "the universal rule." Applying this rule to the facts in the present case, we are compelled to hold that the plaintiff has waived any breach of the lease which the lessees may have committed. Plaintiff, under these facts, is not entitled to recover in this action. This conclusion renders it unnecessary to pass upon the question of estoppel.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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214 Cal. 431

HOLM v. OVERHOLT, County Sheriff.

S. F. 14338.

Supreme Court of California.

Dec. 21, 1931.

1. Mandamus ⚷73(1).

Mandamus was proper remedy to require sheriff to retain property in his possession subject to attachment lien, where temporary restraining order enjoining execution sale had been dissolved.

Mandamus was the appropriate remedy because an appeal from the order dissolving temporary restraining order would not have had effect of staying hand of sheriff pending appeal, and threatened execution sale, if consummated pending the appeal, would have rendered appeal ineffectual, and would have presented a moot question.

2. Attachment ⇨186.

Where attachment is levied on personal property, sheriff must maintain possession for benefit of attaching plaintiff (Code Civ. Proc. §§ 540, 542).

3. Execution ⇨303.

Purchaser at execution sale of personal property is entitled to possession on paying purchase price and to certificate of sale transferring all debtor's interest as of date of levy (Code Civ. Proc. § 698).

4. Execution ⇨219.

Sheriff could not, under execution sale, sell attached personal property subject to attaching plaintiff's lien (Code Civ. Proc. §§ 540, 542).

In Bank.

Application for writ of mandate by A. Holm against George J. Overholt, Sheriff of Fresno County.

Writ granted.

George C. Faulkner, of San Francisco, Everts, Ewing, Wild & Everts, of Fresno, William T. Doyle, of San Francisco, and Goudge, Robinson & Hughes, of Los Angeles, for petitioner.

Irvine P. Aten, of Fresno, for respondent.

SHENK, J.

Application for a writ of mandate to compel the respondent sheriff of Fresno county to retain certain personal property in his possession subject to the petitioner's lien of attachment. As a return to the alternative writ, the respondent demurred generally to the petition.

The petition alleges that on or about the 20th day of March, 1931, the petitioner commenced an action in the Superior Court of Fresno county against the Standard Planing Mill, a corporation, and others, to recover the sum of $24,256 alleged to be due on certain promissory notes, and for attorneys' fees, etc.; that a writ of attachment issued in said action which was levied on certain personal property capable of manual delivery; that in April, 1931, and subsequent to the levying of the petitioner's attachment, one J. W. Ellis also commenced an action against the Standard Planing Mill; that a default judgment was entered in this latter action in favor of Ellis and against Standard Planing Mill for the sum of approximately $9,000; that a writ of execution thereafter issued upon said default judgment; that the respondent sheriff levied the writ of execution on certain personal property belonging to the judgment debtor, and advertised the same for sale to satisfy the judgment; that the property so levied upon included property then in the respondent sheriff's possession under and by virtue of the petitioner's prior levy of attachment; that the threatened sale of said attached property was temporarily enjoined by the Superior Court of Fresno county; and the restraining order was thereafter dissolved.

It also appears that the petitioner had heretofore obtained a temporary restraining order from the federal court in the Southern District of California, Northern Division, in a bankruptcy proceeding, which restraining order was likewise dissolved. However, the point there involved is without the issues of this proceeding.

In substance, the petitioner urges that it is the statutory duty of the respondent sheriff to retain the custody and exclusive possession of the attached personal property during the existence of the petitioner's attachment and to do no act that will directly or indirectly deprive or divest him of such actual and exclusive custody and possession; that a consummation of the threatened sale to satisfy the Ellis judgment would constitute a direct breach of the sheriff's duty in this regard; that mandamus will lie to compel a sheriff to retain possession of attached property "as a duty resulting from an office, trust or station", and that mandamus is the only adequate and speedy remedy available to the petitioner, notwithstanding the appealability of the order discharging the temporary restraining order.

The respondent contends that the relief sought is but another form of the relief sought by the petitioner in both the federal and the lower state court in her application for restraining orders, which applications proved to be futile, that the remedy by appeal from the orders dissolving the temporary restraining orders was adequate, and that there has been no showing that the remedy by way of appeal would not have been complete and adequate. The respondent also contends that under the law he may properly make sale of the personal property under the junior execution as long as such sale is made subject to the prior lien of the petitioner's attachment.

[1] Mandamus appears to be the only adequate remedy of the petitioner under the admitted facts. An appeal from the order dissolving the temporary restraining order of the Superior Court would not have had the effect of staying the hand of the sheriff pending the appeal, and the threatened execution sale, if consummated pending the appeal, would have rendered the appeal ineffectual,

and would have presented a moot question. This will more clearly appear from the following discussion of the effect of the sale.

[2, 3] Where an attachment is levied on personal property capable of manual delivery, it is the duty of the sheriff to attach and safely keep sufficient of such personal property as will satisfy the plaintiff's demand against the defendant, unless a satisfactory redelivery bond or cash be deposited with him (sections 540, 542, Code Civ. Proc.), or the attachment is otherwise released. It is his duty to maintain the possession of the property for the benefit of the attaching plaintiff, and he may not dispose of it except at his peril and only in accordance with law. Callahan v. Danziger, 172 Cal. 738, 158 P. 760; Aigeltinger v. Whelan, 133 Cal. 110, 65 P. 125; Wood v. Lowden, 117 Cal. 232, 49 P. 132; 6 C. J., p. 370, § 819. Upon the execution sale of personal property capable of manual delivery, the purchaser is entitled to possession upon payment of the purchase price and to a certificate of sale transferring to him all of the debtor's interest in the property as of the date of the levy of the execution. Section 698, Code Civ. Proc.; 11 Cal. Jur., pp. 83, 139. The effect of the threatened sale complained of herein would be to transfer the debtor's title and the right of possession in and to said property to the execution purchaser and in effect freed from the claims of the prior attachment creditor.

[4] It appears by the affidavit of the sheriff that he intends to make the execution sale subject to the senior and prior lien of the petitioner under her attachment. He cites no authority to warrant such a proceeding in this state, and none has been discovered. Obviously, when the execution sale is accomplished, the purchaser is entitled to the title of the debtor and to the possession of the property, and no provision is made by law for the retention thereof by the purchaser or for security to satisfy the petitioner's prior claim, and the purchaser would be free to divert the property to the channels of trade and leave the petitioner without remedy. This might and in all probability would take place long prior to the ripening of the right of the attaching creditor into a right of execution. It may be assumed that the rule is different with reference to the execution sale of the debtor's interest in real property subject to a prior attachment lien, but that rule is not applicable to the controversy here presented.

Let the peremptory writ issue as prayed, requiring the respondent to retain the personal property now in his possession which is subject to the attachment lien of the petitioner.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

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214 Cal. 369

PACIFIC GAS & ELECTRIC CO. v. STATE.

Sac. 4412.

Supreme Court of California.

Nov. 30, 1931.

Rehearing Denied Dec. 28, 1931.

1. Statutes 🔑276(1).

Repeal of statute nullifies all remedies and pending actions under it, especially where statute creates cause of action and provides remedy unknown to common law or confers jurisdiction not theretofore existing.

2. States 🔑191(1).

Where statute in respect of action against state on implied contract has been twice changed since institution of action, cause should, in absence of final judgment, be decided according to existing law (St. 1893, p. 57; St. 1929, p. 891, § 3, and p. 895, § 10; Pol. Code, § 688, as added and amended; St. 1931, p. 849, § 15).

> When action was instituted, St. 1893, p. 57, provided for action on implied contracts. Later Pol. Code, § 688, as added by St. 1929, p. 891, § 3, p. 895, § 10, restricted the action to implied contracts. Then St. 1931, p. 849, § 15, enlarged the scope so as to include implied contracts. This was the law when Supreme Court rendered the opinion.

3. Corporations 🔑66.

Graduated charge for filing certificate of increase of capital stock is but a charge imposed on domestic corporation as condition precedent to doing business (Pol. Code, § 409, subd. 7, as amended by St. 1927, p. 1126).

4. Corporations 🔑4.

Subject to constitutional limitations, state may impose any condition it sees fit on domestic corporations desiring to organize or prohibit formation of domestic corporations entirely.

5. Corporations 🔑19, 66.

Graduated charges for filing original articles of incorporation and for filing certificate of increased capital stock are within power of state (Pol. Code, § 409, subd. 7, as amended by St. 1927, p. 1126; Const. art. 4, § 24, and art. 13, §§ 14, 15).

6. Corporations 🔑66.

State, in granting permission to $160,000,000 corporation to function on payment of certain fee, does not thereby consent to subsequent capitalization of $400,000,000 (Pol. Code, § 409, subd. 7, as amended by St. 1927, p. 1126; Const. art. 4, § 24, and art. 13, §§ 14, 15).

7. Corporations 🔑66.

In respect of charges for increased capitalization, state is not restricted to charge provided by law at time of organization of corporation (Pol. Code, § 409, subd. 7, as amended by St. 1927, p. 1126; Const. art. 4, § 24, and art. 13, §§ 14, 15).

8. Corporations 🔑13.

Corporation organizing under laws of California impliedly consents to be bound by all state laws (Const. art. 12, § 1; Civ. Code, § 404).

9. Corporations 🔑66.

Graduated charge for filing certificate of increase of capital stock is only a "fee" as distinguished from an "excise" tax and part of purchase price charged by state for privilege of doing business (Pol. Code, § 409, subd. 7, as amended by St. 1927, p. 1126; Const. art. 4, § 24, and art. 13, §§ 14, 15).

[Ed. Note.—For other definitions of "Excise" and "Fee," see Words and Phrases.]

10. Corporations 🔑66.

Graduated statutory fee collected over protest of corporation on filing certificate of increase of capital stock, *held* validly imposed and collected (Pol. Code, § 667, and § 409, subd. 7, as amended by St. 1927, p. 1126; St. 1893, p. 57; St. 1929, p. 890, p. 895, § 10; Pol. Code, § 688, as added and amended; St. 1931, p. 849, § 15).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Pacific Gas & Electric Company against the State. From judgment for defendant, plaintiff appeals.

Affirmed.

William B. Bosley and Thomas J. Straub, both of San Francisco, and W. H. Hatfield, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession and Albert F. Zangerle, Deputy Attys. Gen., for the State.

WASTE, C. J.

Appeal by the plaintiff corporation, a public utility of the state of California, from a judgment of the Superior Court of Sacramento county upon sustaining of demurrer to plaintiff's amended complaint. The action, based on an implied contract, is one in which plaintiff seeks to recover from the state the sum of $23,995, paid under protest to the secretary of state for the privilege of filing a certificate of increase of plaintiff's capital stock from $160,000,000 to $400,000,000. A tender of $5 as a filing fee was refused, and a total fee of $24,000, or $5 for every $50,000 of such increase, was demanded by the secretary of state, as provided by subdivision 7 of section 409 of the Political Code, as that section read in 1928, when the certificate of increase was offered for filing. The appellant elected to pay under protest, and thereafter presented a claim for the amount to the board of control and department of finance. Pol. Code, § 667. The claim was rejected, and plaintiff brought this suit against the state, the secretary of state, and the state treasurer, pursuant to the enabling statute of 1893 (Stats. 1893, p. 57), to secure repayment of the sum of $23,995 alleged to have been unlawfully exacted and retained. Defendants demurred on the ground (among others) that the amended complaint failed to state a cause of action against the state, and that the court had no jurisdiction of the state nor of the subject of the action, for the reason that the state had not consented to be sued on implied contracts. The decision of this court in Welsbach Co. v. State, 206 Cal. 556, 275 P. 436 (decided February 26, 1929), holding that suits on implied contracts might be brought against the state under the statute of 1893, had not then been handed down.

In the briefs filed by both appellant corporation and on behalf of the state, the question of jurisdiction was argued upon an assumption that the Act of February 28, 1893, which authorized suits for claims "on contract or for negligence" against the state, was still in force. Just prior to the hearing of the appeal by this court, the appellant ascertained that the Legislature at its 1929 session (Stats. 1929. p. 890) had enacted section 688 of the Political Code (page 891, § 3) repealing the act of 1893 (page 895, § 10), and, so far as material here, restricting the bringing of suits against the state to claims founded on express contract only. These matters appearing for the first time on the oral argument, the appellant and respondent were directed to file supplemental briefs upon the question of jurisdiction.

The appellant concedes that the act of 1929, "if valid, repeals the act of 1893 which authorized suits against the State on implied contracts [for the first time so construed in the Welsbach Case], and does not itself authorize such suits," but contends that the jurisdiction of the Superior Court and of this court to adjudicate on its merits the cause of action alleged was not affected by the 1929 statute.

[1, 2] On the other hand, the Attorney General contends that the only right to bring or maintain the action herein was by virtue of the act of 1893, wherein the state permitted suits on implied contract to be maintained against it, which consent was withdrawn after the filing of appellant's amended com-

plaint and prior to the filing and hearing of respondent's demurrer, and invokes the principle that the state may withdraw or modify its voluntary consent to be sued, even though pending suits may be thereby defeated, there being no contract to be impaired. 36 Cyc. 915; Beers v. State of Arkansas, 20 How. 527, 15 L. Ed. 991; State & S. Watson v. Bank of Tennessee, 3 Baxt. (62 Tenn.) 395; State v. State Dispensary Commission, 79 S. C. 316, 60 S. E. 928; Board of Supervisors v. Auditor General, 68 Mich. 659, 36 N. W. 794; O'Neil v. State, 223 N. Y. 40, 119 N. E. 95. While we recognize the rule relied on by the Attorney General that the repeal of a statute takes away all remedies given by such statute, and defeats all actions pending under it at the time of the repeal, especially where the repealed statute creates a cause of action and provides a remedy not known to the common law, or confers jurisdiction where it did not previously exist (Freeman v. Glenn County Tel. Co., 184 Cal. 508, 194 P. 705; People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 867, Ann. Cas. 1912B, 1148; 23 Cal. Jur. 714, § 97), we are here confronted with an anomalous situation in that the Legislature in May, 1931 (St. 1931, p. 849, § 15), amended section 688 of the Political Code by striking out the word "express" before the word "contract" in the first sentence of the section, thereby restoring the law permitting suits against the state upon contract to the condition it was in prior to the repeal of the act in 1893; i. e., to the condition in which it was when this action on implied contract was commenced. Were the suit to be instituted now, a demurrer on the ground of want of jurisdiction for lack of consent on the part of the state to be sued on an implied contract would have to be overruled, and the defendant required to plead to the merits. Therefore, while the law justifies the sustaining of the demurrer upon this ground at the time the trial court ruled thereon, it would seem that, by reason of the 1931 amendment of section 688, supra, having intervened to again change the law in this regard, the cause should be decided according to the existing law which authorizes suits against the state on such an implied contract as appellant has attempted to plead. We find authority for this conclusion in People v. Bank of San Luis Obispo, supra, wherein the following appears: "It is, in general, true that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not; but if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." Such a situation here confronts us. The state having again consented to be sued on implied contract, as it had at the time of the filing of appellant's complaint, and in the absence of a final judgment in the cause, we are of the view that the demurrer on the jurisdictional ground should be overruled.

[3, 4] But there is yet to be considered the remaining ground of demurrer, viz., failure to state a cause of action on implied contract. In this regard, it is appellant's contention that the graduated charge for filing a certificate of increase of capital stock prescribed by section 409 of the Political Code is not embraced in the term "fee" as used in the title of the act prescribing the fees to be collected by the secretary of state for performing official acts. It is therefore urged that subdivision 7 of the section, providing for a graduated charge for filing certificates of increase of capital stock, is unconstitutional and violative of section 24 of article 4 of the state Constitution, the argument being that the statutory charge there prescribed for filing the certificate is neither proportioned to, nor in any manner reasonably related to, the cost or value of the services performed by the secretary of state, and, though denominated a "fee," it constitutes the imposition of an excise tax, from the exaction of which the appellant, as a public utility, is constitutionally exempt by reason of having to pay a gross receipts tax which is in lieu of all other taxes and licenses. Sections 14 and 15, art. 13, Const. In the Political Code, as originally enacted in 1872, there was a section, numbered 416, dealing with the subject of fees to be charged and collected by the secretary of state for services performed in his office. An amendment in 1881 added subdivision 13, prescribing a fee of $5 for filing a certificate of increase of capital stock. Stats. 1881, p. 65. There was no modification of subdivision 13 for a period of twenty years. In 1901 (Stats. 1901, p. 86), a radical change was introduced by an amendment providing that for filing a certificate of increase of capital stock there should be a graduated charge of $5 for every $10,000, or fraction thereof, of increase.

In 1903 (Stats. 1903, p. 27), the fee was fixed at $5 for every $50,000, or fraction thereof, of increase, the same provision being carried into the section as re-enacted in 1927, and in effect when plaintiff made its tender in this case. The title of this last statute (Stats. 1927, p. 1126) is "An act to amend section four hundred nine of the Political Code, relating to fees to be collected by the secretary of state." Appellant contends that, in so far as subdivision 7 of the act purports to prescribe a graduated charge, which, it asserts, is in effect but an excise tax, the subdivision is not germane to the subject of the original section 416, which related solely to fees to be charged by the secretary of state, and that the act is therefore repugnant to section 24 of article 4 of the Constitution, which provides that every act of the Legislature shall embrace but one subject, which subject shall be expressed in its title.

Appellant's principal reliance is upon the case of Fatjo v. Pfister, 117 Cal. 83, 48 P. 1012, wherein an act purporting to establish fees chargeable by county and other officers based upon a graduated charge for filing an inventory and appraisement was declared unconstitutional as an ad valorem tax upon property and not a fee; appellant arguing that the essential point there decided was that the charges, although designated by the Legislature as fees, could not be legitimately regarded other than as taxes. The court held it was perfectly plain that the Legislature had attempted to levy a property tax upon all estates of decedents, infants, and incompetents. That is not the case here. The charge involved herein is but a charge imposed upon domestic corporations as a condition precedent to doing business in this state. It is well settled, of course, that a state, subject only to constitutional limitations, may impose any condition it may see fit upon a domestic corporation desiring to organize under the laws of that state, and may in fact prohibit the formation of domestic corporations entirely. Boca Mill Co. v. Curry, 154 Cal. 326, 97 P. 1117; Bank of California v. San Francisco, 142 Cal. 276, 75 P. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130; City Properties Co. v. Jordan, 163 Cal. 587, 126 P. 351; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 103 P. 341, 347; Ashley v. Ryan, 153 U. S. 436, 14 S. Ct. 865, 38 L. Ed. 773. This state has seen fit to impose upon domestic corporations, as a condition precedent to doing business in the state, a charge depending upon the amount of capitalization, and has likewise seen fit to impose a further condition in the form of an increased charge in the event the capitalization is increased.

[5] The Attorney General argues that the amount of the exaction is not incompatible with the idea of a filing fee, and that to do other than to graduate this fee in proportion to the amount of increase would be inequitable and unjust to similar capitalizations as compared with the capitalization here involved; that the fee for filing of increase of capital stock is on the same graduated plan as for filing original articles of incorporation; that it would be difficult to differentiate the case of the filing fee for filing original articles of incorporation and that of filing a certificate of increase, as far as the filing fees are concerned; and that it would necessarily follow that the exaction for filing original articles of incorporation would be considered in the same light; and, if the state has the right in one case, it also has it in the other; that a possible abuse is suggested, in that a corporation could file original articles of incorporation for a nominal amount and immediately file a certificate of increase of capital stock; and that from the foregoing it may be clearly determined that the Legislature intended to provide the same plan of graduated fees for the filing of certificates of increase of capital stock as for the filing of the original articles of incorporation, the amount of the fee to be dependent upon the amount of capital involved. We are of the view that these contentions rest upon a reasonable construction of the statute involved. Both charges are imposed as a condition precedent to doing business in California, and are therefore within the power of the state under the cases above cited.

[6-10] The state, in granting permission to a $160,000,000 corporation to function on payment of a certain fee, cannot be held to have thereby given its consent to that corporation to capitalize at $400,000,000, without compliance with other reasonable conditions. Nor, in increasing the charge for increased capitalization as part of the original permission granted to such corporation to function in this state, is the state restricted to imposing the charge then provided by the law of the state. A corporation, organizing under the laws of this state, impliedly consents to be bound by all the laws of this state. The Constitution (article 12, § 1) expressly provides that the laws in reference to corporations may be altered or repealed by the state. Section 404 of the Civil Code provides that "the Legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder." The extent of this reserve power to alter, amend, or repeal the laws applicable to corporations was well stated in Kaiser Land & Fruit Co. v. Curry, supra, in dealing with the act providing for a license tax upon corporations, as follows: "It is substantially the purchase price which the state has seen fit to charge for the continuance of the privilege of being and acting as a corporation. Although this privilege had already been granted to plaintiff and all other existing corporations, it had been granted subject to the power reserved by the state, to be exercised by general laws, of revocation, or the imposition of new charges therefor, or new conditions upon which it might be enjoyed." Appellant herein must be deemed to have consented to the power of the state to change the terms and conditions upon which that corporation was permitted to organize in this state. Since this is so, it necessarily follows that the charge to be collected by the state for permission to increase the capital stock of such corporation is but a fee—a part of the "purchase price" which the state charges for the privilege of doing business as a domestic corporation, and must be measured

by the law in force when such application is made.

Having reached this conclusion, and finding no constitutional or other inhibition in aid of appellant's contention that an unconstitutional tax was demanded of it by the secretary of state, we are of the view that the amended complaint does not state a cause of action upon an implied contract or otherwise against the state to recover the amount sued for, and that the demurrer was properly sustained by the trial court.

Judgment affirmed.

We concur: CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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214 Cal. 793

PACIFIC GAS & ELECTRIC COMPANY (a Corporation), Petitioner, v. Frank C. JORDAN, Secretary of State of the State of California, Respondent.

S. F. 14404.

Supreme Court of California.

Nov. 30, 1931.

Rehearing Denied Dec. 28, 1931.

In Bank.

Application for a writ of mandate commanding the respondent Secretary of State to file in his office a certificate of extension of the corporate existence of the petitioner, a public utility corporation of the state of California.

Wm. B. Bosley, Thos. J. Straub, and Robt. H. Gerdes, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for respondent.

WASTE, C. J.

The decision in this case must be the same as that in Pacific Gas & Electric Co. v. State of California (Cal. Sup.) 6 P.(2d) 78, this day decided. The petitioner, having an authorized capital stock of $400,000,000, presented to the respondent secretary of state, and requested him to file in his office, a certificate of the vote of its stockholders extending its term of existence, together with a duly certified copy of the written consent of the Railroad Commission of California, as required by section 401 of the Civil Code as it read at that time. At the same time, petitioner tendered the sum of $5 as the fee for filing the certificate. The secretary of state refused to accept the certificate for filing, unless petitioner should pay as the fee for such service the sum of $40,000, which is the amount of fee or charge prescribed by section 409, subdivision 4, of the Political Code (as amended by St. 1927, p. 1126), for filing articles of incorporation for a corporation having an authorized capital stock of $400,000,000.

The only question to be determined in this case is whether or not the provisions of section 409, supra, purporting to prescribe fees or graduated charges for filing articles of incorporation in the office of the secretary of state, are void under the provisions of the Constitution of this state.

Petitioner contends: (1) That the graduated charges prescribed by the section for filing articles of incorporation are excise taxes and not fees; and (2) that the provision in section 409 purporting to prescribe fees for filing articles of incorporation in the office of the secretary of state was incorporated therein by a statute the subject of which, expressed in its title, did not embrace the imposition of a "tax" of any kind, and that consequently the provision is void under section 24 of article 4 of the Constitution which provides that: "Every act [of the legislature] shall embrace but one subject, which subject shall be expressed in its title."

The exact question was raised and the identical contentions were advanced by the petitioner in Pacific Gas & Electric Co. v. State of California, supra, this day decided. For the reasons given in the opinion in that case, and on the authority of that decision, the alternative writ of mandate heretofore issued is discharged, and the petition for writ of mandate is denied.

We concur: CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

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119 Cal.App. 246

PEOPLE v. PARKER et al.

Cr. 225.

District Court of Appeal, Fourth District, California.

Dec. 16, 1931.

Rehearing Denied Dec. 30, 1931. Hearing Denied by Supreme Court Jan. 14, 1932.

1. Criminal law ⚿1159(2).

Appellate court in determining question of sufficiency of evidence need only determine if there is any evidence supporting verdict.

2. Burglary ⚿41(1).

Evidence *held* to sustain conviction for second degree burglary.

3. Criminal law 🔑406(3).

Fact that admissions respecting commission of offense were made to police officer does not make them incompetent.

4. Criminal law 🔑517(4).

Failure to prove corpus delicti before receiving evidence of confession or admissions against interest was not erroneous, where crime was proven independent of admissions.

5. Criminal law 🔑761(18).

Instruction respecting nature of circumstantial evidence required for conviction *held* properly refused as unwarrantedly assuming state rested case on circumstantial evidence alone.

6. Criminal law 🔑552(3).

All that is necessary in cases depending upon circumstantial evidence is that chain of circumstances convince jurors beyond reasonable doubt of guilt.

7. Criminal law 🔑1166½(12).

Defendants found guilty only of second degree burglary could not complain of statement by court that evidence did not justify verdict of first degree burglary.

> Court in answering a question of one of the jurors who desired a definition of burglary stated that there was no evidence which justified a verdict of first degree burglary in the case, which was a correct statement of the law when applied to the evidence, and could not have been prejudicial to either of defendants, as by it the jurors were told that defendants could not be convicted of burglary in the first degree.

8. Criminal law 🔑863(2).

Court *held* not to have erred in receiving verdict of guilty of second degree burglary after jury had inquired as to whether they could return verdict of theft.

> The court gave the jury the correct definition of theft, and made no other comment or reply to the question.

9. Criminal law 🔑886.

Sentencing defendants to penitentiary for second degree burglary after jury's recommending leniency *held* not error; recommendation being surplusage.

10. Criminal law 🔑1202(6).

Order correcting judgment of conviction for second degree burglary to show defendant's former conviction of petty theft *held* not erroneous.

11. Criminal law 🔑1202(7).

Order amending judgment of conviction to show prior conviction was appealable (Pen. Code, § 1237, subd. 3).

12. Criminal law 🔑1202(6).

Order amending judgment of conviction to show prior conviction, in absence of appeal therefrom, became final (Pen. Code, § 1237, subd. 3).

Appeal from Superior Court, San Diego County; Clarence Hardin, Judge.

Harold Parker and another were convicted of burglary in the second degree, and they appeal.

Affirmed.

M. H. Broyles, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

FREEMAN, Justice pro tem.

Defendants were charged by an amended information with the crime of burglary, and defendant Parker was charged with a prior conviction of petty theft which he admitted upon his arraignment. The case was tried before a jury which found both defendants guilty of burglary in the second degree on August 25, 1931. Sentences were pronounced upon them on August 28, 1931, and they moved for new trials, which motions were denied. They then asked for probation and a hearing was set for September 11, 1931, when it was denied. Defendants have appealed from the judgments and from the orders denying their motions for new trials. On October 2, 1931, the court amended its judgment as to defendant Parker to recite that on his arraignment said defendant had admitted the previous conviction of petty theft.

[1] As one of the grounds for appeal, defendants maintain that the evidence was not sufficient to support the verdicts. In considering this question it is only necessary for us to determine if there is any evidence to support the verdicts.

The amended information charges that on or about the 23d day of June, 1931, defendants did willfully, unlawfully, and feloniously and burglariously enter a certain building, to wit, a warehouse then and there occupied by the Southwestern Grocery Company, with the intent then and there to commit the crime of theft. The place of business of the Southwestern Grocery Company was located on Second street between Market and I streets in the city of San Diego.

[2] The witness Gaines testified for the people that he was standing on the corner of Second and Market streets between 2 and 3

o'clock on the morning of June 23, 1931; that he heard glass breaking, the noise coming from the direction of the Southwestern Grocery Company store south of Market street; that he looked on Second street and saw two men near the Southwestern Grocery Company store backing out of the way; that he saw either two men or two boys running south on Second street three or four minutes after he heard the noise of breaking glass; that he walked to the grocery store and found one window broken; that he walked back and looked east toward Market street and saw two men run onto a vacant lot and drop down; that he went to the Douglas Hotel on Market street and called the police, who arrived in about five minutes; that the police went down and brought back a man whom the witness could not identify because when he was standing on Second and Market streets he could not state who was at the grocery store; that Parker asked the witness to tell the police that he (Parker) "was not one that was down there or something."

The witness E. D. Garnet testified for the people that on June 23, 1931, he was president of the Southwestern Grocery Company a corporation; that their place of business was at 531–535 Second street; that on June 23, 1931, at about 1:30 o'clock in the morning he was called to the store by the police; that he saw a window had been broken out on the outside of what was called the tobacco and cigar room; that the stock of cigarettes and tobacco were packed against the window; that on the next day two cases of Chesterfield cigarettes were returned to the Southwestern Grocery Company by the police; that the two cases contained about one hundred cartons of cigarettes; that the broken window pane was fourteen by twenty inches in size and the cases of cigarettes about ten by sixteen inches in size.

The witness Snyder testified that he worked at the Southwestern Grocery; that both defendants were at the Southwestern Grocery Company store on the afternoon before the burglary; that they asked the witness the price of cigarettes, saying they might put in a stock at the Douglas Café, but placed no order for the goods; that the witness left the place of business at 5 o'clock on June 22, 1931; that he closed and locked the place of business; that the windows were then all right; that when he left no window was broken; that the witness had charge of the stock of tobacco in the store; and that after the burglary he checked the stock and found two cases of Chesterfield cigarettes missing.

The witness Lamadrid testified that he was special investigator for the Auto Club of Southern California at the city of San Diego; that on June 23, 1931, he saw two boys running east on Market street and saw one of them carrying what he thought was a blanket go into the rear end of either a pool hall or restaurant located on Market street between Third and Fourth streets; that, when he saw this man go in at the rear, he ran around to the front; that defendant Walter Good came out of the front door where the witness placed him under arrest; that as they were standing there the witness questioned Good concerning the blanket which the witness thought Good had been carrying; that Good denied having it; that a Jap or Filipino came out and handed the witness a brown overcoat and a hammer, saying, in the hearing and presence of Good, that Good had dropped them inside the building; that the witness took Good to the police station where he tried the overcoat on him and found that it fitted perfectly; that he had a conversation with Walter Good concerning the burglary; that all statements were made by Good freely and voluntarily and without the use of force or threats or without any promise of immunity or reward; that Good denied breaking the window in the Southwestern Grocery Company store; that finally Good admitted ownership of the overcoat and the hammer, explaining carrying the hammer by the fact that he had used it to assist him in repairing a punctured tire on his automobile; that Parker was then brought in, and that, after considerable conversation during which no force or threats were used nor offers of immunity or reward were made, Parker freely and voluntarily told Good to "go ahead and tell them"; that Walter Good told the witness in the presence and hearing of Parker that he broke the window; that the witness then asked what had been done with the stolen cigarettes, to which Good replied that "two packages were along side of the bill board, back of the bill board along side of or over on the vacant lot between Second and Third on Market." The witness then went with one Ward to the location mentioned and they found the two cases of cigarettes. A police officer testified that on the night in question both of the defendants told him that they did not enter the building; that they "just broke the window and pulled the cases of cigarettes out."

The evidence to which we have referred is of itself sufficient to sustain the verdicts and judgments. The fact that the defendants as witnesses for themselves denied the greater part of the conversation related by the police officer and other witnesses merely raised a conflict in the evidence which was submitted to the jury which resolved the conflict against the defendants.

[3] Defendants admitted they broke into the building and took the stolen cigarettes. The fact that these admissions were made to a police officer does not make them incompetent. "It is established law that a confession is not rendered involuntary, or inadmissible in evidence merely because it was made to a police officer while the accused was under

arrest, or because the defendant was not at the time in full possession of his faculties, or was under a state of great excitement or because he made it to free another from suspicion of guilt." 8 Cal. Jur. p. 111.

[4] It is contended by appellants that the corpus delicti should have been proven before a confession or an admission against the interest of the defendants could be received in evidence. "Proof of the corpus delicti should be made before the introduction of evidence of extrajudicial statements or admissions, and confessions. But in the absence of any showing of prejudice, irregularity in the order of proof is of no consequence, if the commission of the crime is ultimately established independently of the alleged admissions of the defendant." 8 Cal. Jur. p. 234. In the instant case the crime was proven independent of the admissions of the defendants.

[5] Defendants contend that the court erred in refusing to give the following instruction proposed by them: "The prosecution having rested its case upon circumstantial evidence, you are instructed that, before you would be justified in returning a verdict of 'guilty' you must first find that each circumstance offered as evidence is consistent with every other circumstance offered as evidence, and that the unbroken, consistent chain of circumstances leads to no other rational conclusion than that of guilt; and, if you have a reasonable doubt as to the consistency of the circumstances offered as evidence, and a resultant reasonable doubt as to whether the chain of circumstances leads to certain guilt, it is your duty to give the defendants the benefit of the doubt, and acquit them."

[6] The instruction assumes that the people rested their case on circumstantial evidence alone, which assumption is not supported by the record. The statement in the instruction that the jury must first find that each circumstance offered as evidence is consistent with every other circumstance offered in evidence in an unbroken chain tending to sustain the guilt of defendants, or the jury must find defendants not guilty, is not a correct statement of the law. All that is necessary in cases depending upon circumstantial evidence is that the chain of circumstances convince the jurors beyond a reasonable doubt of the guilt of the accused. Other instructions given by the court correctly stated the law applicable to both direct and circumstantial evidence and confessions and admissions against interest.

[7, 8] Appellants contend that the trial court committed error in answering a question of one of the jurors who desired a definition of burglary, to which the court replied: "There is no evidence which justifies a verdict of first degree burglary in this case." This was a correct statement of the law when applied to the evidence in this case. Under the evidence it could not have been prejudicial to either of the defendants, as by it the jurors were told that the defendants could not be convicted of burglary in the first degree. The other instructions given fully and correctly defined burglary, and burglary in the first and second degrees. The defendants are not in a position to complain of the statement made by the court in reply to the question by the juror, as they were found guilty of burglary in the second degree. The defendants also contend that the court erred in receiving the verdict of guilty after the jury had inquired of it "as to whether they could return a verdict of theft." The court gave the jury the correct definition of theft and made no other comment or reply to this question. There was no error as to this contention.

[9] The defendants complain because, after the jury returned a verdict in which it recommended leniency for the defendants, the court pronounced judgment sentencing defendants to the penitentiary. The recommendation for leniency was surplusage, and there was no error committed by the court in pronouncing its judgment. People v. Lopez, 210 Cal. 55, 290 P. 582.

[10-12] Defendant Parker contends that the court erred in its order of September 11, 1931, in correcting the judgment to show his former conviction. It was for the court to complete the record upon this question. This omission in the original judgment was an error which the court might correct and make the record speak the truth. Such an omission did not affect the substantial rights of Parker. People v. Kelly, 120 Cal. 271, 52 P. 587. Such an order amending the judgment is an appealable one. Subdivision 3, § 1237, Pen. Code. No appeal having been taken from it, it became final as to the defendant Parker.

The defendants had a fair trial. The evidence was submitted to the jury under proper instructions, and no prejudicial error occurred in the court below of sufficient importance to warrant the granting of a new trial.

It is ordered that the judgments and orders denying defendants' motions for new trials be, and the same are hereby, affirmed.

We concur: BARNARD, P. J.; MARKS, J.

119 Cal.App. 117

PERI v. CULLEY et al.

Civ. 7632.

District Court of Appeal, First District, Division 1, California.

Dec. 10, 1931.

Rehearing Denied Jan. 9, 1932. Hearing Denied by Supreme Court Feb. 8, 1932.

1. New trial 🔑75(4).

If of opinion that personal injury verdict is not legally adequate, trial court may grant new trial upon ground that evidence does not justify verdict and is against law (Code Civ. Proc. § 657, subd. 6).

2. Appeal and error 🔑979(5).

In passing upon order granting new trial for inadequacy of personal injury verdict, reviewing court is governed by same rules as where new trial is granted defendant (Code Civ. Proc. § 657, subd. 6).

3. Appeal and error 🔑977(3).

Granting of new trial must be sustained, absent manifest abuse of legal discretion (Code Civ. Proc. § 657).

4. New trial 🔑159.

Trial court, in passing on motion for new trial, must act upon own judgment as to effect of evidence (Code Civ. Proc. § 657).

Hence, trial court must weigh and consider evidence for both parties and determine for itself just conclusion to be drawn therefrom, and, where verdict is against weight of evidence, it is duty of court to grant new trial.

5. Appeal and error 🔑977(3).

Only in rare instances and upon very strong grounds will reviewing court set aside order granting new trial (Code Civ. Proc. § 657).

6. New trial 🔑75(4).

Granting new trial for inadequacy of $2,500 verdict for severe head and body injuries *held* not abuse of discretion (Code Civ. Proc. § 657, subd. 6).

Evidence disclosed plaintiff, performing duties of motorcycle traffic officer, was 26 years old and receiving $150 monthly at time of accident; that medical and hospital expenses were $1,080; and that he sustained severe skull fracture and nine broken ribs, severe injury to shoulder and loss of three teeth, remaining teeth being chipped. He was in hospital two months, suffering much pain; continued under physician's treatment for four months, and, although thereafter reporting for duty, was unable at time of trial, 18 months after accident, to operate motorcycle, and at that time complained of headaches and pains, nervousness, loss of memory, and defective hearing and vision. Evidence showed plaintiff had scar on forehead and was unable to raise his arm above level of shoulder, and there was possibility of epilepsy developing.

7. New trial 🔑75(1).

It need not appear, before new trial may be granted on ground of inadequacy of damages, that award was influenced by passion or prejudice (Code Civ. Proc. § 657, subds. 5, 6).

While, in view of Code Civ. Proc. § 657, subd. 5, it must appear verdict was influenced by passion or prejudice before new trial may be granted upon ground of excessiveness of verdict, authority of trial court to grant new trial upon ground of inadequate or insufficient damages is not founded on subdivision 5 of such section, but is based upon grounds set forth in subdivision 6 thereof, namely, insufficiency of evidence to justify verdict and that it is against law.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Andrew Peri against Lester D. Culley and others. Verdict for plaintiff, and from an order granting plaintiff's motion for a new trial, on the ground of inadequacy of the verdict, defendants appeal.

Affirmed.

Jordan L. Martinelli, of San Rafael, for appellants.

Edward J. Jose, of San Francisco, for respondent.

KNIGHT, J.

This is an appeal by defendants from an order granting plaintiff's motion for a new trial upon the ground that the amount of damages awarded by the jury was inadequate to compensate plaintiff for the personal injuries sustained by him in a collision which took place on the highway in Marin county between a motorcycle operated by plaintiff and an automobile driven by the defendant Lester D. Culley. The verdict was for $2,500.

[1-3] As to the law it is well settled that in actions such as this, where a plaintiff is seeking damages for personal injuries, if the trial court is of the opinion that under the evidence the amount awarded by the jury is not legally adequate or commensurate with the extent of injury received, it may grant a new trial upon the ground that the evidence does not justify the verdict, and that it is against law; also, that in passing upon the validity of such an order the reviewing court is to be governed by the same rules prevail-

ing in cases where the new trial is granted at the behest of the defendant. Taylor v. Northern Electric Ry. Co., 26 Cal. App. 765, 148 P. 543; Phillips v. Lyon (Cal. App.) 292 P. 711. Therefore, in the present case, unless it appears that there has been a manifest abuse of legal discretion, the action of the trial court in granting the new trial must be sustained. Merralls v. Southern Pacific Co., 182 Cal. 19, 186 P. 778; Morgan v. Los Angeles Pacific Co., 13 Cal. App. 12, 108 P. 735, 737.

[4-6] The evidence shows that plaintiff was chief of police of the Fairfax police district in Marin county, and as such performed the duties of a motorcycle traffic officer; and that he was injured in a head-on collision while in pursuit of such duties. He was 26 years of age, and up to the time of the accident had been in excellent physical condition. The collision happened in mid-afternoon, and as a result of it plaintiff was knocked unconscious and remained so for four or five hours. He was severely cut and bruised about the head and body; and upon arriving at the hospital was pulseless and colorless, the pupils of his eyes were dilated, and he was considerably covered with blood. X-ray pictures were taken, and it was ascertained that his skull was fractured, and nine ribs were broken, two of them showing double fractures. The skull fracture extended from the external portion of the bony prominence of the eye back beyond the ear to a point about an inch and a half from the base of the skull. He also suffered a severe injury to his shoulder, and the loss of three teeth; and the remaining teeth were chipped. He was confined in the hospital for approximately two months, during which time he suffered much pain; and after he was discharged from the hospital he continued under the treatment of his physician for about four months. He reported for duty with the police department about four months subsequent to the date of the accident, but up to the time of trial, which took place some eighteen months after the accident happened, was unable to operate a motorcycle; and at that time he complained of headaches, and pains in the ribs, collarbone, leg, teeth, and spine; also of nervousness, loss of memory, and defective hearing and vision. His physician testified that although there had been a recovery from the traumatic injuries, so that further medical treatment was unnecessary, it was quite probable that he was still suffering from these after-effects about which he complained; also, that there was a possibility of epilepsy developing. Furthermore, the evidence shows that at the time of the trial he was carrying a scar on his forehead, and was unable to raise his arm above the level of the shoulder. At the time of the accident he was receiving $150 a month, and the medical and hospital expenses incurred by him amounted to approximately $1,080.

As pointed out by the decisions in City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496, and Morgan v. Los Angeles Pacific Co., supra, there is a vast difference between the power and duty of a reviewing court on appeal in dealing with the question of the sufficiency of the evidence to sustain a verdict and the power and duty of a trial court in dealing with the same question on motion for a new trial, in that the reviewing court may not disturb the verdict of a jury unless there be a complete absence of substantial evidence to support it; whereas, the trial court in passing on a motion for a new trial must act upon its own judgment as to the effect of the evidence, and, when satisfied that the verdict is wrong, must grant a new trial. In other words, "the parties are entitled to the judgment of the jury in rendering a verdict in the first instance, but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence" (Green v. Soule, 145 Cal. 96, 78 P. 337, 340); and therefore the trial court must weigh and consider the evidence for both parties and determine for itself the just conclusion to be drawn from it, and where the verdict is against the weight of the evidence it is the duty of the court to grant a new trial. City of San Diego v. Cuyamaca Water Co., supra; Morgan v. Los Angeles Pacific Co., supra. Furthermore, "it is only in rare instances and upon very strong grounds" that the reviewing court will set aside an order granting a new trial. Morgan v. Los Angeles Pacific Co., supra, citing Quinn v. Kenyon, 22 Cal. 82.

In view of the broad discretionary power thus vested in trial courts, we are not prepared to hold as a matter of law in the present case that the granting of the new trial constituted an abuse of such power, for in addition to the evidence itself showing the nature and extent of plaintiff's injuries the trial court was afforded full opportunity during the course of the trial to observe plaintiff's condition, and to see whether he was permanently disfigured and to determine whether he was then suffering from the aftereffects about which he complained; and therefore was in a position to arrive at a fair and just conclusion as to whether the amount awarded by the jury was legally insufficient and inadequate to compensate him for the injuries sustained. And since by granting a new trial it has found in the negative on that issue, upon evidence which is legally sufficient to support such conclusion, its finding cannot be disturbed on appeal.

[7] Defendants argue that before a new trial may be granted on the ground of inadequacy of damages it must appear from the evidence, as in cases of excessive damages, that the award was made under the influence of passion or prejudice. While such is the

rule in cases of excessive damages (subdivision 5, § 657, Code Civ. Proc.), it has been definitely held that the authority of the trial court to grant a new trial upon the ground of inadequate or insufficient damages is not founded on the fifth subdivision of said section, but is based upon the grounds set forth in subdivision 6 thereof, namely, insufficiency of the evidence to justify the verdict and that it is against law. Benjamin v. Stewart, 61 Cal. 605. Consequently, we are not here concerned with the question of whether the verdict was or was not influenced by passion or prejudice. Lambert v. Kamp, 101 Cal. App. 388, 281 P. 690; 8 Cal. Jur. 833.

The order is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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119 Cal.App. 106

PERCY et al. v. ALLEN.

Civ. 561.

District Court of Appeal, Fourth District, California.

Dec. 9, 1931.

Appeal and error 🔑782.

Attempted appeal from order sustaining demurrer fails to give any jurisdiction to appellate court to entertain it and must be dismissed (Code Civ. Proc. § 963).

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by Margaret Percy and another, copartners doing business under the firm name and style of the Pratt Realty Company, against Lillian M. Allen, also known as Mrs. S. S. Allen. From the judgment, plaintiffs appeal.

Appeal dismissed.

Harvey D. Taylor, George P. Cook, and Myron W. Tilden, all of Los Angeles, for appellants.

C. L. McFarland, of Riverside, for respondent.

MARKS, J.

Appellants gave the following notice of appeal in the court below: "Notice is hereby given that the plaintiffs do hereby appeal to the Supreme Court of the State of California from the order of the above entitled court made and entered on Monday, the 29th day of December, 1930, sustaining defendant's demurrer to the first amended complaint of the plaintiff above named, and from the whole thereof." As the case is within the appellate jurisdiction of this court, it was transferred here for decision.

Under the provisions of section 963 of the Code of Civil Procedure, an appeal cannot be taken from an order sustaining a demurrer. An attempted appeal from such an order fails to give any jurisdiction to the appellate court to entertain it and must be dismissed. Bryant v. Kelly, 203 Cal. 721, 265 P. 817; Tyler v. City Council of Huntington Park et al., 97 Cal. App. 724, 276 P. 355; O'Neill v. Hicks, 101 Cal. App. 374, 281 P. 531.

Appeal dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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119 Cal.App. 46

WEBSTER et ux. v. HARRIS et al.

Civ. 555.

District Court of Appeal, Fourth District, California.

Dec. 5, 1931.

1. New trial 🔑162(1).

Trial court may limit verdicts deemed excessive.

2. Appeal and error 🔑1004(1).

Power of appellate courts over excessive damages exists only when facts suggest, at first blush, passion, prejudice, or corruption of jury.

3. Appeal and error 🔑932(1).

In considering attack on verdict as excessive, appellate court must resolve conflicting evidence in favor of party obtaining verdict, and must give him benefit of inferences supporting claim.

4. Damages 🔑132(8).

$9,000 damages, including $1,026.50 special damages for injury to left arm, comminuted compound fracture of finger, severed tendon of finger causing permanent impairment of hand, *held* not excessive.

5. Automobiles 🔑249.

Owner whose automobile, while driven with his consent, was involved in accident, *held* liable only for $5,000 damages; there being no evidence of agency (Civ. Code, § 1714¼).

6. Automobiles 🔑158.

That motorist does not know any one is on highway is no excuse for conduct which amounts to recklessness, if motorist has knowledge that another vehicle or person was on highway.

7. Automobiles ⚷246(26).

Instruction regarding rights and duties of overtaking plaintiff motorist in automobile collision *held* proper.

> The court instructed that every person has right to assume that others will obey law, and, in absence of reasonable grounds to think otherwise, it is not negligence to assume that one is not exposed to danger which could be occasioned only through violation of law or duty by another, but one must himself exercise due care, and court further instructed that plaintiff motorist had right to assume that defendant motorist would drive automobile in careful, prudent, and lawful manner, and that, if defendant intended to make left turn on highway, before doing so she would see that turn could be made in safety and would give signal plainly visible of her intention to make turn.

8. Automobiles ⚷244(12).

In action for injuries sustained by overtaking motorist, finding that defendant motorist was negligent in making left-hand turn without giving signal *held* supported.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by A. F. Webster and wife against F. H. Harris and Norma Harris. Judgment for plaintiffs, and defendants appeal.

Modified, and, as so modified, affirmed.

Harry D. Parker, White McGee, Jr., and David W. Richards, all of Los Angeles, for appellants.

Philip T. Lyons, of Los Angeles, and Fred A. Wilson, of San Bernardino, for respondents.

FREEMAN, Justice pro tem.

The plaintiffs brought this action alleging that defendant Norma Harris was negligent in driving defendant F. H. Harris' Dodge automobile on Campus street in Ontario, San Bernardino county, on April 18, 1930, and by reason of such negligence plaintiff Aurilla Webster suffered personal injuries and also special damages. The defendants answered denying negligence, also alleging contributory negligence on the part of plaintiffs. The defendants also filed a cross-complaint against plaintiffs in which they claimed damages by reason of the negligence of plaintiffs which necessitated repairs to defendants' car, loss of the use thereof, and caused personal injuries to defendant Norma Harris' body and head, severe contusions and abrasions of the right leg, and numerous other injuries, and prayed judgment against plaintiffs in the sum of $15,000 general and $125 special damages. The case was tried before a jury which rendered a joint verdict for plaintiffs against defendants for $9,000. On October 8, 1930, judgment for $9,000 was entered. Defendants appeal from this judgment.

Appellants contend that the judgment should be reversed on the following grounds: First, excessive damages; second, prejudicial errors of law occurring at the trial; third, no proof of agency between defendants or permission to drive defendants' car; fourth, insufficiency of the evidence.

The first contention is that the judgment awarded to respondents in the sum of $9,000 is excessive. The special damages consisting of expenditures by respondents were $1,026.50. The largest item was $582 for the doctor's services. This would leave $7,973.50 as general damages for injuries sustained by respondent. Mrs. Webster at the time of the trial was 28 years of age. Prior to the accident her health was "pretty good," "regular health like anybody else," "some days would have a headache." Nervous system "was not like it was after the accident." She was a housewife with three children, the youngest 6 and the oldest 9 years of age. Respondent's left arm and hand were badly injured and mangled, and from the wrist upward for about five inches there was a long laceration two inches wide on the left forearm which left the tendons to the fingers and hand all exposed. There was a comminuted compound fracture of the bone of the ring finger, and the tendon to that finger was severed. The treatment required an anæsthetic and a second breaking of the callous in order to extend the finger. Respondent was in the hospital four weeks. On returning home she was confined to her bed constantly for one month longer. For three months following her return home, respondent was in bed the biggest part of the time. The injuries were received April 18, 1930, and the trial began October 2, 1930, at which time, being approximately five and one-half months after the injuries were received, the respondent was still in bed "quite a lot of the time." The doctor described the course of treatment as a "long siege," and at the time of the trial plaintiff was still under the care of her physician. Respondent suffered pain in the chest of which she complained a great deal. She was bruised all over, including a severe bruise on one hip, and pain in the chest of which she complained for nearly a month. The doctor described the injuries as painful as that of a burn, and particularly were the injuries to the hand and forearm very painful. At the time of the trial it was the opinion of the doctor that it would take six weeks

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

or two months longer before the plaintiff would be entirely free from pain, after which there would only be pain in endeavoring to manipulate the fingers to restore the normal function. Any attempt to grip the hand, as well as massaging it, at the time of the trial, occasioned considerable pain. The shock of the accident has subjected respondent to fainting spells, the last of which occurred a few days before the trial. When respondent was brought to the hospital, she was suffering a great deal from the shock of the injury, and was in a very nervous state and hysterical. At the time of the trial, she was improved somewhat, but still suffered from the nervous condition, and was still taking a nerve sedative medicine. It was the opinion of the doctor that it would take four to six months after the trial before the respondent would completely recover from the nervous condition. Respondent's husband emphasized the nervousness and irritability of the respondent. Respondent up to the time of trial had been unable to do any of her normal housework, with the result that assistance was employed. At the time of trial, her work was confined to what could be done with one hand. Respondent is unable to use three of the fingers of the left hand, and can only pick up things with the thumb and first finger. It is the doctor's opinion that there would be permanent injury in the ring finger with some improvement in the little finger, but there would always be a permanent impairment of the function of the whole hand, leaving her with a grip "very weak." Respondent disclosed the injured hand and arm to the jury, showing scars on the back of the hand and on the forearm. The scars extended "up to the elbow." The scar on the back part of the hand will be permanent. This scar was "red and angry looking" at the time of trial, and, although the redness would fade out in the course of a few months and the raised portion would level down somewhat, there will always be some irregularity of the surface.

[1, 2] Where the question of excessive damage is involved, there are certain rules to follow. First, the trial court has power to control or limit verdicts which are in its judgment deemed excessive. "The question of excessive damages is one that is first addressed to the trial court. Practically, the trial court must bear the whole responsibility in every case. The power of appellate courts over excessive damages exists only when the facts are such as to suggest, at first blush, passion, prejudice, or corruption on the part of the jury." Morris v. Standard Oil Co., 188 Cal. 468, at page 473, 205 P. 1073, 1075. See, also, Bisinger v. Sacramento Lodge No. 6, 187 Cal. 578, at page 585, 203 P. 768; Hale v. San Bernardino, etc., Co., 156 Cal. 713, at page 715, 106 P. 83.

In the case of Hale v. San Bernardino, etc., Co., supra, at page 715, of 156 Cal., 106 P. 83, 84, the court said: "The amount of damages in such cases is committed, first, to the sound discretion of the jury, and next to the discretion of the judge of the trial court, who, in ruling upon the motion for new trial, may consider the evidence anew, determine anew the facts, and set aside the verdict if it is not just. Upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'"

In the case at bar there was no motion for a new trial. Therefore the lower court had no opportunity to pass on this except on his own motion. "The only method of determining whether a verdict is excessive is by comparing the amount of damages awarded thereby with the evidence." Horn v. Yellow Cab Co., 88 Cal. App. 678, at page 681, 263 P. 1025, 1026. Where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, the judge is at liberty to interpose a judgment as against that of the jury. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019.

[3] "In considering an attack upon a verdict as excessive, the appellate court must treat every conflict in the evidence as resolved in favor of the respondent, and must give to him the benefit of every inference that can reasonably be drawn in support of his claim." Wallace v. Pacific Electric Ry., 105 Cal. App. 664, at page 672, 288 P. 834, 838.

[4, 5] This court after considering the evidence cannot say that the judgment of $9,000 was excessive under the foregoing rules. But we are called upon to pass upon the amount of liability of appellant F. H. Harris, as a matter of law, under section 1714¼, Civil Code. This section, in substance, is that every owner of a motor vehicle shall be liable for injury or death to persons, resulting from negligence in the operation thereof, "in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner provided that the liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant shall be limited to the amount of five thousand dollars," etc.

At the trial it was stipulated by the parties "that F. H. Harris was the owner of the automobile that was being driven by Mrs. Norma Harris in the occurrence of the accident here in question and the automobile was being driven by Mrs. Harris with his expressed permission," also "consent." There was no evidence of principal and agent existing between the defendants. F. H. Harris was the father-in-law of Norma Harris. There would be no implied agency, nor could there be negligence imputed to him other than that she drove his automobile with his permission and consent. Therefore his liability falls within the provisions of section 1714¼ of the Civil Code. Neither of the parties herein proposed instructions calling this section 1714¼ to the attention of the jury. The court did not instruct them in relation thereto, nor did appellants object to the form of the verdict. It necessarily follows, therefore, that the judgment herein should be modified by reducing the judgment as to F. H. Harris to $5,000, as a matter of law.

[6] The appellant contends that the following instruction given to the jury was error: "The fact that the driver of an automobile did not know that anyone was on the highway would be no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway."

This instruction correctly states the rule, and has been repeatedly upheld. Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471; Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 99, 239 P. 709, 41 A. L. R. 1027; Rush v. Lagomarsino, 196 Cal. 308, 317, 237 P. 1066.

[7] Appellant also contends that the court erred in giving the following instruction, to wit:

"Every person has a right to assume that every other person will obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could be occasioned only through the violation of law or duty by another. However, such person must himself exercise due care on his part.

"Plaintiff Aurilla Webster, had a right to assume that defendant Norma Harris would drive her automobile in a careful, prudent and lawful manner and that if she intended to make a left turn upon the highway, that before turning, she would see that the turn could be made in safety and would give a signal plainly visible of her intention to make such turn."

It is contended by appellant that this instruction "fails to embody the rule that there must be no circumstances to warn the party to the contrary." The first part of this instruction states "that one has the right to assume that others will obey the law," and "if there is no reasonable grounds to think otherwise it is not negligence to assume that he is not exposed to danger." The jury were told in effect that "plaintiff Aurilla Webster had a right to assume that defendant Norma Harris would drive her automobile in a careful, prudent and lawful manner * * * in the absence of reasonable grounds to think otherwise." In other words, before Mrs. Webster could assume that Mrs. Harris would drive her automobile in a careful, prudent, and lawful manner, the jury were told that they must find there was an absence of reasonable grounds for her to think otherwise. Although this whole instruction could have been more carefully drawn, the jury undoubtedly considered this one instruction as a whole, and were not misled as to the law applicable to the evidence given in the case. It was as much the duty of the jury to consider the first part of the instruction as the latter. We find no error in the giving of this instruction.

[8] Appellant next contends that there was an insufficiency of the evidence to support the judgment. The evidence was that the accident occurred on Campus street, which runs north and south in the city of Ontario, San Bernardino county, between the intersecting streets running east and west, namely, G and H streets; H street being north of G. I street is the next street north of H. The evidence was that defendant Norma Harris, on the 18th day of April, 1930, between 9:30 and 10 o'clock in the morning, started for the grocery store from her home in a Dodge automobile belonging to defendant F. H. Harris, the father-in-law of defendant Norma Harris. Her home was on the west side of Campus street, north of I street. The accident occurred south of H street, a little south of the grocery store which was located on the east side of Campus, and between G and H streets. After leaving her home she drove at the rate of about 25 miles per hour and slowed down to 15 and 20 miles per hour at H street, and from H street she continued at about the same speed. As she approached a point about opposite a driveway near the grocery store, located on the east side of the street, she made a left-hand turn across Campus street. The respondent Aurilla Webster was following the Dodge car south at about the same speed defendant was traveling. From a point 25 feet south of H street the witness Aloha Mabie, who was riding with Mrs. Webster, testified that "Mrs. Harris' car had turned, as I say, west so that the right wheels of her car were about in the center of the five-foot drain or culvert and she proceeded in that position I should say, oh, about 25 or 30 feet further south in that position, and then without any signal or warning of any kind, made a sharp left or east turn upon the pavement on the street and closed off our way of going south on Campus." Respondent Aurilla Webster testified: "She (Mrs. Harris) turned out and drove down in the drain about 10 feet, I judge, and I honked my horn just about a little below the intersection and started to go around her, but I didn't increase my speed any, and she stepped on the accelerator, I guess, and she just shot right out in front of me and didn't give any

signal whatsoever." Witness Aloha Mabie further testified: "Mrs. Webster sounded her horn when Mrs. Harris turned a bit to the right and that slackened her speed to about 15 miles an hour and proceeded a little bit to the east of the street. We were still a foot on the west side of the center line, and when the impact occurred I judge the car in which I was riding, the front wheels were approximately two feet east of the center line and our rear wheels were still to the west of the center line."

The impact took place just about the center of the street. The Harris car was at a slant, but was across the road east and west. The front was east or left of the center line, and the rear was on the other side of this line. Respondents' car turned over on the street, and injuries resulted. In other words, respondent Aurilla Webster and Aloha Mabie were in respondents' automobile, and appellant Mrs. Harris was in her father-in-law's automobile. Both cars were traveling south on Campus street on their right-hand side of the street. Mrs. Webster was following appellant's car from I street. When they came to or near the grocery store, Mrs. Harris turned a little to the right and then to the left to cross the street, and respondent had turned to her left to pass, and, when the Harris automobile was nearly across the center line, the automobiles came together and injuries resulted therefrom. Speaking of appellant's car, respondent stated: "It started to slow down just below the intersection as it turned out into the drain. It was very slow; I imagine about five miles an hour but I don't know—very slow." At the time Mrs. Harris pulled out toward the drain, respondent testified she was traveling approximately "15 and 20." When she first saw the car start to turn to the left, her car was between 10 and 15 feet from appellant's car. Respondent was asked the question: "And up to that time had you looked to see whether or not the driver of the other car gave any signal?" To which she answered: "I watched her all the way down. She gave no signal." The witness Aloha Mabie, who was riding in Mrs. Webster's car, testified practically the same as Mrs. Webster and especially that plaintiff honked her horn and that defendant Norma Harris gave no signal to indicate her intention to turn to the left. Mrs. Harris and one other witness testified that such signal was given by her by extending her left hand out on her left. There being a conflict as to this, the jury evidently took the testimony on behalf of respondents to be correct. The evidence above related was sufficient to support and justify the verdict and judgment.

The judgment is affirmed, except that it is modified by reducing the judgment as to F. H. Harris to $5,000. It is further ordered that each party hereto shall bear his own costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

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118 Cal.App. 697

NORDIN v. FIRST TRUST & SAVINGS BANK OF PASADENA.

Civ. 4300.

District Court of Appeal, Third District, California.

Nov. 30, 1931.

Rehearing Denied Dec. 30, 1931. Hearing Denied by Supreme Court Jan. 28, 1932.

1. Appeal and error ⚷612(2).

Clerk's certified copies of judgment roll and notice of appeal are sufficient to give Court of Appeal jurisdiction of appeal as one based solely on judgment roll.

2. Bills and notes ⚷211.

Indorsements on mortgage notes deposited with bank as collateral *held* indorsements in blank, making notes payable to bearer (Civ. Code, § 3115).

> On borrowing money from the bank, payee of two notes indorsed each of them as follows: "For value received I consent to the terms of this note and guarantee to payment of the same with all costs of collection including attorney's fees in authorized extension of time to maker and same shall not affect my liability. Demand, notice of payment and protest is waived." Two other notes were simply indorsed by the payee.

3. Bills and notes ⚷170, 211.

Payee's indorsement of mortgage notes in blank and deposit of them with bank as collateral made them negotiable and transferable by delivery (Civ. Code, § 3115).

4. Bills and notes ⚷171.

Restrictive indorsement of mortgage notes payable to bearer made necessary concerted action of pledgor and pledgee to further transfer of them.

5. Estoppel ⚷118.

As respects estoppel evidence *held* to show constructive delivery of mortgage notes by bank holding them as collateral to purchaser from pledgor (Civ. Code, § 3266).

> Purchaser carefully looked up records as to title. He inquired of bank amount of its loan. Bank promised delivery to

purchaser on payment of pledgor's loan. Relying on bank's promises, purchaser paid pledgor for the notes.

6. Bills and notes 🔑357.

Bank which in good faith lent money to person in physical possession of mortgage notes indorsed in blank was innocent holder for value (Civ. Code, § 3097).

7. Bills and notes 🔑327.

Purchaser of title from pledgor of mortgage notes held by bank as collateral in good faith *held* innocent holder for value (Civ. Code, § 3097).

8. Trover and conversion 🔑9(1).

Where bank made constructive delivery of mortgage notes to purchaser subject to existing loan, failure to deliver them on tender of amount due was conversion.

9. Estoppel 🔑72.

Bank which delivered to purchaser from pledgor negotiable mortgage notes held as collateral must, as against innocent purchaser, bear loss incident to pledgor's prior misappropriation of notes (Civ. Code, §§ 3097, 3543).

> Officer of bank abstracted mortgage notes indorsed in blank by payee. He then procured loan from another bank, which subsequently made constructive delivery of mortgage notes to purchaser from pledgor. The last named bank learned of pledgor's fraud, and refused to surrender mortgage notes on tender of amount of loan.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by C. O. Nordin against the First Trust & Savings Bank of Pasadena. From judgment for plaintiff, defendant appeals.

Affirmed.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for appellant.

R. L. Horton, of Los Angeles, for respondent.

Mr. Justice pro tem. BURROUGHS delivered the opinion of the court.

[1] This is an appeal from a judgment in favor of the plaintiff in the sum of $3,596.78, together with interest and costs of suit. Respondent has made a motion to affirm the judgment upon the ground of an insufficient record upon which the appeal can be considered by this court. In their closing brief, appellant says: "This case is presented to this court upon the judgment roll." We have before us a copy of the judgment roll and a copy of the notice of appeal, both certified by the clerk of the trial court as being true and correct copies of the originals. This is sufficient to give this court jurisdiction of the appeal as one based upon the judgment roll alone, and will be so considered by this court. Martin v. Pacific Gas & Electric Co., 195 Cal. 544, 234 P. 321. The evidence is not before us, but the material facts as shown by the findings of the court are substantially as follows:

On June 14, 1926, Marie M. Fritz was the owner, holder, and payee of four certain promissory notes; each note being secured by a mortgage. On said date said Marie M. Fritz borrowed a certain sum of money from the Monterey Commercial & Savings Bank, and gave as security two of the notes and mortgages hereinafter referred to as the "Blummer & Conover" notes and mortgages. Each note so delivered was indorsed on the back as follows: "For value received, I consent to the terms of this note and guarantee the payment of the same, with all costs of collection, including attorney's fees, and authorize extension of time to maker, and same shall not affect my liability. Demand, notice of payment and protest is waived. June 14, 1926. Marie M. Fritz."

On or about August 20, 1926, said Marie M Fritz borrowed of Eagle Rock State Bank a certain sum of money, and delivered to it the other two notes hereinafter referred to as the "Wilson & Cammack" notes and mortgages, and she indorsed these notes as follows: "Marie M. Fritz." One I. Klein was president of each of said banks, and owned and controlled them. These banks were to all intents and purposes one-man banks, composed of the said I. Klein. On or about August 20, 1926, said I. Klein abstracted and stole from the banks the four notes and mortgages, and pledged with and delivered to the First Trust & Savings Bank of Pasadena the said four notes and mortgages as collateral security for a personal loan to him of $7,000. Prior to the abstracting by Klein of said instruments from the files of said banks, the Eagle Rock State Bank, through its authorized officer, delivered to Klein the said notes and mortgages held as securities by it, being the Wilson & Cammack notes and mortgages, upon payment by Klein of the amount due said bank, and his representation that he was paying said money for and on account of the Monterey Park Commercial & Savings Bank. The said officer of said Eagle Rock State Bank believed said representations of Klein, and acted in good faith. Each one of these two notes had been indorsed, "Marie M. Fritz." The Blummer & Conover mortgages had been altered, and the words "I. Klein" substituted for the words "Monterey Park Commercial & Savings Bank," the latter having been erased therefrom, but no change was made in the said notes nor in the indorsements thereon. The action of the First Trust & Savings Bank of Pasadena in making the loan to Klein and accepting the collateral security, was in good faith and without notice of any fraud committed by the said I. Klein. Each one of the four said notes was indorsed as follows: "Pasadena, Cal., Aug. 28, 1926. For value received, I, I. Klein, do hereby transfer and assign to First Trust & Savings Bank of Pasadena, the within note, together with all rights accrued or to accrue under the mortgage securing the same so far as the same relate to this note, as collateral. I. Klein." On October 25, 1926, I. Klein and Rebecca Klein, in consideration of $5,400, did, by bill of sale, sell, transfer, and assign to C. O. Nordin the four notes and mortgages, subject to the $7,000 loan and pledge held by the First Trust & Savings Bank of Pasadena. The principal owing aggregated the sum of $10,500. Other properties were included in this bill of sale. Klein, on the same day, notified the Pasadena bank of the transfer, and the said bank confirmed the sale by a writing under the letterhead of the bank dated October 25, 1926, and addressed to I. Klein, in the following words: "Dear Sir: We understand from your verbal instructions today that you have assigned the following notes and mortgages which we hold as collateral security for your $7,000.00 note, to Mr. C. O. Nordin of Los Angeles: [Here follows a description of the notes.] All of which we hold as security for the above mentioned $7000.00 note due 6 months from August 20, 1926. Upon payment of your collateral note, with interest to date of payment, we will turn over the above mentioned notes and mortgages, with assignments, to Mr. C. O. Nordin. Yours truly, First Trust & Savings Bank of Pasadena. G. R. McComb, Secretary." The said Nordin demanded and required the above set out letter prior to payment by him for the said notes and mortgages to said Klein. Prior to the purchase of the notes and mortgages, said Nordin made investigation as to the title of Klein, and found by examination of the county records that I. Klein was the owner thereof. Also, prior to the purchase by Nordin on October 26, 1926, Nordin called up the defendant, First Trust & Savings Bank of Pasadena, by telephone, and was informed that Klein was still the owner. Thereafter, on October 30, said Nordin notified said bank of the sale to him, and inclosed to the bank a document addressed to the bank, and signed by Klein, fully setting out the transfer to Nordin. On November 1, the bank acknowledged receipt of Nordin's letter, saying: "Certain things have just developed that lead us to believe that this is not a loan which we care to carry, and we are calling upon Mr. Klein to immediately take up his loan, which information we are passing along to you, as you appear to have some interest in the security which we hold." On March 8, 1927, Nordin tendered to the said Bank of Pasadena the full amount of Klein's indebtedness, and demanded delivery of the collateral securities. The bank acknowledged the tender to be in all respects good and sufficient, but refused to accept the same, and to deliver the documents, on the ground that there was a question as to the title and ownership of the same. On April 19, 1927, Marie M. Fritz paid her indebtedness, and demanded from the Eagle Rock State Bank and from the Monterey Park Commercial & Savings Bank the return of the notes and mortgages. Thereafter the Pacific National Company, on behalf of these two last named banks, paid to the First Trust & Savings Bank of Pasadena the amount due on the Klein note, and received from said bank the notes and mortgages, which were in turn delivered by the Pacific National Company to Marie M. Fritz. The court further found that plaintiff, Nordin, had, by reason of defendant's refusal to accept plaintiff's tender, suffered damages in the sum of $3,596.78, being the difference between the value of the securities and the amount due the defendant on the Klein note.

[2-5] Appellant claims that the trial court erred in concluding that Klein effected a constructive delivery of the negotiable promissory notes; that Nordin was a bona fide holder for value in due course, of the said notes; that the notes were negotiable to Nordin by reason of Mrs. Fritz' indorsement. We think that the indorsements made by Marie M. Fritz upon each one and all of said promissory notes were indorsements in blank, and, when she delivered them to the banks, they were each one payable to the bearer, and, when they were abstracted from the files of the banks by Klein, they were negotiable instruments, payable to bearer. In 19 California Jurisprudence, § 44, p. 850, it is said: "It is elementary that when a negotiable instrument is endorsed in blank, it becomes payable to bearer, and may be negotiated by delivery alone so long as the endorsement remains in blank. * * * When the payee endorses in blank the instrument may be transferred by delivery alone, notwithstanding subsequent endorsements, so long as the endorsement of the payee remains in blank; and this is true whether the payee is the maker or a third person. * * * An endorsement may be in blank notwithstanding words which limit or enlarge the liability of the endorser, such as 'without recourse' or 'demand, notice and protest waived.'" It is held in Eames v. Crosier et al., 101 Cal. 260, 35 P. 873, that the effect of an indorsement in blank is to make the paper payable to the holder, not as an indorsee, but as the bearer. Section 3115 of the Civil Code provides that: "An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery." It is the holding in Curtis v. Wasem, 96 Cal. App. 604, 274 P. 607, that

an indorsement in blank upon the back of a note is a sufficient indorsement without additional words, and is an assignment in writing. It is therefore clear that, when Mrs. Fritz deposited these notes with the banks, they were, under the above authorities, negotiable, and, Klein having the actual physical possession of them, they were transferred by delivery. When the First Trust & Savings Bank of Pasadena, the defendant and appellant in this action, received said notes and mortgages as pledges for the payment of the note of Klein, the latter, as heretofore stated, indorsed them to said bank as a pledge only, and the bank regarded such restrictive indorsement by Klein in that light, and at no time claimed the title to the property. However, the restrictive indorsement and physical possession made further transfer of said notes and mortgages possible only by concerted action of said bank with Klein. Nordin made careful inquiry as to the title; he examined the official records of the county of Los Angeles, and found that the title stood in the name of Klein; he was told by the defendant-bank that the notes and mortgages were the property of Klein, that the bank would acknowledge the transfer of title to Nordin and deliver the documents upon payment of Klein's note. Under these circumstances, the only logical conclusion to be drawn is that they were holding the notes and mortgages for Nordin, subject to their claim of security for the $7,000 note of Klein. That such conduct on the part of the bank constituted a constructive delivery of the security seems to us to be equally plain. Section 3266, Civil Code, declares "'Delivery' means transfer of possession, actual or constructive, from one person to another." This provision was added to our law in 1917, is a part of the Negotiable Instrument Act.

In 8 C. J. 347, § 525, it is said: "Actual delivery, however, is not necessary, constructive delivery having been held sufficient." In Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319, it is held that an actual manual delivery of an instrument is not indispensable to a transfer, but constructive delivery may be sufficient.

[6-9] In Howe v. Ould, 28 Grat. (69 Va.) 1, it is held: "Whether a purchaser or endorsee of negotiable paper has acquired such possession actual or constructive as is sufficient for all the purposes of the transfer, must always depend upon the particular circumstances of each case." There can be no question but that both Nordin and the bank, as to the dealings with the paper, were innocent holders for value. In 19 California Jurisprudence, 863, § 56, it is said: "The uniform law which is now in force provides that, 'a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.'"

In 8 California Jurisprudence, § 759, referring to the Negotiable Instrument Law, it is declared: "It is held thereunder that non-delivery is no defense as against a bona fide holder, including the defense that the instrument was stolen from the maker before delivery." Section 3097 of the Civil Code, among other things, says: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed."

In the light of these authorities, the facts show that the owner of the notes and mortgages indorsed them in blank and delivered them to Klein as collateral security for a loan; that the latter, being in possession of them, indorsed them to the First Trust & Savings Bank of Pasadena, and delivered them to the last-named bank as security for his personal obligation of $7,000. Before the plaintiff purchased said notes and mortgages from said Klein, he examined the county records, and found that said documents stood of record in the name of Klein. Before purchasing, he required a letter from the defendant-bank as to the status of the title, as above set forth, the bank acknowledged title to be in Klein, and stated that the property would be turned over to plaintiff, Nordin, upon the payment of their promissory note against Klein. On the day of the purchase by plaintiff, he called up the defendant, and was informed that Klein still owned the security. We are of the opinion that under the above facts this was a constructive delivery of the instruments by the defendant bank to Nordin, and they thereafter held the same as security for the note given them by Klein and under no claim of title, and, when the plaintiff tendered to the bank the amount due on the note, their failure to accept the tender and deliver the pledged property was an unlawful conversion of the plaintiff's property. Both the plaintiff and the defendant were innocent of any wrongdoing in the transaction above set forth, but it also appears therefrom that the plaintiff was induced to act to his injury by the representation of the defendant bank. It is one of the maxims of jurisprudence that, "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Section 3543, Civ. Code; Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 73 A. L. R. 1398; Shirey v. All Night & Day Bank, 166 Cal. 50, 134 P. 1001; Schultz v. McLean, 93 Cal. 329, 28 P. 1053; Burgess v. California Mutual B. & L. Ass'n, 210 Cal. 180, 290 P. 1029.

The case last cited appears to be in point. Daniel McKillop and his wife executed a deed of trust in which the California Mutual Building & Loan Association was the beneficiary. It was given to secure the payment of a promissory note for $20,000 and future advances. The security given was two pieces of real property; one called the McKillop Heights property and the other the Wayne Street property. McKillop at that time was engaged in developing the McKillop Heights property as a subdivision. Although there was no provision in the deed for that purpose, from time to time individual lots were released from the effect of the deed. After certain negotiations, the beneficiary under said trust deed wrote a letter to said Daniel McKillop, in which it was agreed that for a consideration of $6,000 it would release certain property which was called the Burgess property from the effect of said trust deed. At the time he obtained the said letter, McKillop, without the knowledge of the California Mutual B. & L. Association, negotiated a loan from Burgess, the plaintiff in said action, in the sum of $12,000, and represented that said property could be released from the first deed of trust on the payment of $6,000. The above letter, when obtained, was deposited with a title insurance company, and, when the deal between McKillop and Burgess was closed, it was delivered to Burgess. Thereafter McKillop's business affairs became bad, and he was finally adjudged a bankrupt. In January, 1927, Burgess called upon the above-mentioned association and tendered the sum of $6,000, and demanded that it reconvey said Burgess property, which demand was refused. In holding that Burgess had a right to rely upon the letter written by the association and obtain a release from their trust deed, the decision of the Supreme Court was based upon the doctrine of estoppel. At page 187 of 210 Cal., 290 P. 1029, 1032, it is said: "But the rights of appellant [Burgess], if any, accrued immediately when, in reliance on the document, it loaned the money to McKillop, and we are unable to reach any other conclusion than that the effect of the transaction was to supply a substitute for a consideration for this promise and to bring into operation the well-known doctrine of estoppel."

In the case at bar, when the appellant, Nordin, acted upon the letter of the defendant bank and its oral information given to him, to the extent of purchasing the property from Klein, the doctrine of estoppel was available to Nordin as against the defendant. It is further said in the Burgess Case: "In short, the application of the doctrine of estoppel has been made to myriads of different sets of facts, and wherever necessary to prevent renunciation from working a fraud upon the party misled, the doctrine is applicable and supplies the absence of a consideration for the promise. * * * We are not attributing fraudulent intent to respondent, but are merely considering the practical effect of its contention if allowed to prevail."

Other objections to the judgment have been made by the appellant, but we are satisfied that what has already been said is controlling, and the judgment must be affirmed. It is so ordered.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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119 Cal.App. 175

KROIJER et al. v. JENKINS et al.

Civ. 7864.

District Court of Appeal, First District, Division 1, California.

Dec. 12, 1931.

1. Negligence ⚷93(1).

Driver's negligence in automobile collision cannot be imputed to passenger having no control over driver or power to direct manner in which automobile should be operated.

2. Automobiles ⚷201(8).

One of two codefendants charged with negligence cannot complain that negligence of other contributed to damage.

3. Automobiles ⚷244(11, 36).

Jury's implied finding that defendant in automobile collision was negligent, and that his negligence proximately contributed to plaintiff's injuries, *held* supported by evidence.

4. Appeal and error ⚷930(1).

Appellate court must accept as true all evidence tending to establish verdict and consider evidence in most favorable aspect toward prevailing party.

5. Appeal and error ⚷1001(1).

Verdict cannot be disturbed on appeal unless evidence was insufficient as matter of law to sustain it.

6. Automobiles ⚷245(80).

Where plaintiff in automobile collision approaching intersection looked in both directions, failure to observe motorist on intersecting street *held* not contributory negligence as matter of law (St. 1923, pp. 557, 560, §§ 122, 131, as amended by St. 1929, pp. 540, 541).

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Marie Kroijer and another against Annie Jenkins and Walter M. Manuel, in which Annie Jenkins filed a cross-complaint against defendant Manuel. From a judgment for plaintiff and cross-complainant, defendant Manuel appeals.

Affirmed.

Myrick & Deering & Scott, of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondents Kroijer.

Edmund Scott, of Redwood City, for respondent Jenkins.

PER CURIAM.

The above action was brought by Marie Kroijer (hereinafter referred to as the plaintiff), with whom was joined her husband, to recover damages for personal injuries.

The action arose out of an accident which occurred on February 2, 1930, at a street intersection in Redwood City.

Whipple avenue runs east and west, and is intersected on the south by King street and on the north by Copley avenue, the latter being a continuation in that direction of King street. Plaintiff was riding in a Nash automobile operated by Annie Jenkins, who was joined as a defendant in the action. This automobile was being driven in an easterly direction on Whipple avenue, while defendant Manuel was driving a Pierce-Arrow in a southerly direction along Copley avenue. A collision occurred between the automobiles at the above intersection, as a result of which both plaintiff and defendant Jenkins were injured and the latter's automobile was damaged.

Defendant Jenkins in addition to her answer filed a cross-complaint for damages against defendant Manuel.

A jury returned a verdict in favor of plaintiff for $6,200 and in favor of defendant Jenkins for $415, both being against defendant Manuel, who, following the denial of his motion for a new trial, appealed from the judgments and contends that the evidence is insufficient to show that he was negligent.

Plaintiff, who had had some previous experience as a driver, testified that as the car in which she was riding approached the intersection she looked to her right along King street, and when the Nash car reached a point about halfway across the intersection she saw the car driven by defendant Manuel enter the intersection from the north, its course being along the east side of Copley avenue; that the Nash car when it entered the intersection was traveling at a speed of from fifteen to twenty miles an hour, while the Pierce-Arrow car was going twice as fast; that when the Nash car had passed the north and south center line and was nearing the southeasterly corner of the intersection, defendant Manuel, continuing his course, attempted to pass in front and to the east of the Nash car, and by so doing caused a collision. The witness further testified that defendant Jenkins immediately before the collision decreased the speed of her car and turned a little to the right in an effort to avoid the accident; also, that her car after the collision remained in the intersection, while the Pierce-Arrow car passed over the curb into a vacant lot for a distance of about thirty feet, turned completely around, and then came to a standstill at a point ten or fifteen feet from the southeast corner of the intersection. The testimony of the plaintiff as to the place where the cars came together was corroborated by defendant Jenkins, who also testified that as she approached the intersection she looked both to the right and left, but did not see the Pierce-Arrow car, and that she entered the intersection at a speed of about fifteen miles an hour. She testified that from the place where she looked she could see from twenty-five to fifty feet in both directions, but admitted on cross-examination that vehicles either on the right or left were visible for at least one hundred feet back from Whipple avenue. Other witnesses testified to the places where the cars stopped after the collision and the physical appearances, all of which tended to support plaintiff's version of the affair. On the other hand, Manuel and his wife, who was riding with him, contradicted plaintiff as to which car was first to enter the intersection, their speed, and other circumstances of the accident; it being testified by defendant Manuel that when he entered the intersection the Nash car was about one hundred feet away. These witnesses were supported by others, none of whom saw the collision, however, as to the speed the Pierce-Arrow car approached the intersection and the physical conditions observed after the accident, including the injuries to the cars, this testimony tending to show that the Pierce-Arrow car was struck on the rear right-hand side.

[1, 2] There was no contention by the pleadings or otherwise that plaintiff was guilty of negligence contributing to her injuries. Furthermore, the evidence shows that she exercised no control over the driver, and had no power to direct the manner in which the Nash automobile should be operated. Under such circumstances the negligence of Mrs. Jenkins, if any, could not be imputed to plaintiff (Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529); nor where two defendants are charged with negligence can one complain that the negligence of his codefendant contributed to the damage. Forsythe v. Los Angeles Railway Co., 149 Cal. 569, 87 P. 24; Blackwell v. American Film Co., 48 Cal. App. 684, 192 P. 189.

[3] As stated, plaintiff testified that defendant Manuel was the last to enter the intersection; that he was traveling at an excessive speed on the wrong side of the street. This

testimony in connection with the physical conditions testified to by others was not inherently improbable. The question of the credibility of the witnesses was for the jury (Code Civ. Proc., § 1847), and we cannot say that their implied findings that Manuel was negligent and that his negligence proximately contributed to plaintiff's injuries were not supported by substantial evidence.

[4, 5] With regard to the verdict in favor of Mrs. Jenkins, it is the rule, as urged by appellant, that there must be substantial evidence to support a verdict. Nevertheless, this court must accept as true all evidence tending to establish it, and consider the evidence in its most favorable aspect toward the prevailing party. Johnston v. DeBock, 198 Cal. 177, 244 P. 330. Nor can a verdict be disturbed unless it can be said as a matter of law that the evidence was insufficient to sustain it. Thom v. Stewart, 162 Cal. 413, 122 P. 1069.

[6] Under the provisions of the California Vehicle Act, it was the duty of both drivers to drive at a careful and prudent speed not greater than was reasonably proper having due regard to the traffic; and in traversing an intersection where the view was obstructed the speed was restricted to fifteen miles an hour. Section 113, as amended by St. 1927, p. 1436. It was also their duty to drive on the right half of the highway, and in approaching an intersection the vehicle which first entered it had the right of way; and if both entered at the same time the driver on the left should have yielded to the driver on the right. Sections 122, 131, as amended by St. 1929, pp. 540, 541. According to the testimony of the plaintiff (and, contrary to appellant's contention, her testimony contains nothing inherently improbable), appellant failed to yield to Mrs. Jenkins the right of way to which the latter was entitled under section 131 by virtue of having first entered the intersection at a lawful date of speed; and he was also traveling on his left side of the highway when he entered the intersection. While Mrs. Jenkins testified that she did not see appellant before she entered the intersection, it was testified that she looked in both directions as she approached; and we cannot say under all the circumstances shown that her failure to observe appellant constituted contributory negligence as a matter of law. In Oberholzer v. Hubbell, 36 Cal. App. 16, 171 P. 436, an automobile approaching an intersection turned obliquely from the right to the left hand side of the highway, and a collision with another vehicle within the intersection followed. It was held that the question whether the driver of the latter vehicle was guilty of contributory negligence in failing to look to see if any vehicle was approaching on that side of the street was one of fact for the jury; and the same rule should apply in the case at bar. See, also, Swartz v. Feddershon, 92 Cal. App. 285, 268 P. 430.

We are satisfied that the verdicts are fairly supported, and the judgments entered thereon are accordingly affirmed.

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119 Cal.App. 316

ARBOGAST et al. v. RICHARDSON.

Civ. 4472.

District Court of Appeal, Third District,
California.
Dec. 19, 1931.

1. Master and servant ⚿416.

In commission's finding that employee was injured while employed by corporation and certain others, words describing named persons as stockholders and directors were merely descriptio personam as respects their personal liability (St. 1917, p. 851, § 21 (a); Const. art. 12, § 3).

> The finding of Industrial Accident Commission involved recited that applicant for compensation was injured while employed as driller by petroleum corporation and named individuals; "the sole directors and sole stockholders of said corporation each owning one-seventh of all the subscribed capital stock." The addition of the quoted words was wholly immaterial, since they were simply descriptio personam so far as persons named were directors and stockholders of the corporation, and finding was not that injured employee was employed by them in their official capacity, but was employed by them individually, and that hence they could be made individually liable for compensation award.

2. Master and servant ⚿417(1).

Superior court has no jurisdiction to review Industrial Accident Commission's awards (St. 1917, p. 851, § 22).

3. Master and servant ⚿416.

Industrial Accident Commission has continuing jurisdiction over its decisions and awards for 245 weeks from injury, irrespective of reservation of jurisdiction in award (St. 1917, p. 850, § 20 (d); Const. art. 20, § 21, as amended in 1918).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by G. E. Arbogast and others against P. R. Richardson. From an adverse judgment, plaintiffs appeal.

Affirmed.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Fred W. Heath, of Los Angeles, for appellants.

Kenneth J. Murphy, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs instituted this action for the purpose of obtaining an order restraining the defendant from proceeding with the levy of execution or such other process for the enforcement of a judgment entered in the office of the clerk of the superior court of Los Angeles county, based upon an award of the Industrial Accident Commission; said judgment being entered in the office of the clerk of said court pursuant to subdivision (a) of section 21, of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 851). The defendant's demurrer to the plaintiff's first amended complaint was sustained without leave to amend, and, from the judgment of dismissal entered thereafter, the plaintiffs appeal.

The complaint sets forth the proceedings had before the Industrial Accident Commission, and also certain court proceedings had in the county of Los Angeles based thereon. It appears from the complaint that the respondent, P. R. Richardson, suffered a severe injury sometime during the year 1923, and thereafter filed a petition with the Industrial Accident Commission for compensation under the Workmen's Insurance and Safety Act. A hearing was had thereon, and an award entered in favor of the respondent against the Kern-Torrance Petroleum Corporation. In this award it is found that the plaintiff had paid to the respondent the sum of $1,044.80. Paragraph VIII of the finding upon which the award was based, after reciting that permanent disability might result from the injury, proceeded to retain jurisdiction of the cause for 245 weeks as provided for by subdivision (d) of section 20 of the act referred to (St. 1917, p. 850).

Nothing having been paid by the Kern-Torrance Petroleum Corporation after filing the award with the clerk of the superior court of Los Angeles county, action was begun against the above-named plaintiffs to enforce their liability as stockholders. It appearing that this action was begun after the running of the statute relating to the liability of stockholders, a judgment of nonsuit was entered in favor of the plaintiffs. Thereafter, and within the period of 245 weeks after the injury, the respondent in this action filed a petition with the Industrial Accident Commission praying that the cause be reopened; a further hearing was had and an award based upon permanent liability as shown by the extent of the injury, continuing as of the date of the filing of the petition. This petition for reopening of the cause, among other things, alleged that the applicant, at the time of his injury, was employed by the plaintiffs in this action in their individual capacity as well as directors, etc., of the corporation herein mentioned; the allegation in the petition being as follows: "That applicant further alleges that he was employed by the individual defendants named herein, with the exception of C. H. Inman, by themselves, for and on their behalf, and also in their capacity as directors, stockholders and managing agents of the defendant corporation herein; that while in their employ he sustained injuries arising out of, and in the course of his employment, as previously found by the commission." Upon the hearing of this application the commission made and entered an award in favor of the respondent in the sum of $1,251.45 against the plaintiffs severally in this action. The finding of fact by the commission in this particular reads: "P. R. Richardson, applicant, while employed as a driller on October 29, 1923, near Muroc, California, by defendants Kern-Torrance Petroleum Corporation, and W. C. Eichner, W. A. Saylor, Fred W. Heath, G. E. Arbogast, E. J. McLaren, E. C. McLaren and Ira D. Vinton, the sole directors and sole stockholders of said corporation, each owning one-seventh of all the subscribed capital stock," etc.

Following the entry of this award, it was filed in the office of the clerk of the superior court of Los Angeles county, by respondent, and execution issued thereon. The purpose of this action was to obtain a judgment annulling this last award and restraining proceedings under the execution issued thereon.

Upon this appeal the appellants base their argument upon the provisions of section 3 of article 12 of the Constitution, which reads in part as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." And also further contend that the proceedings before the Industrial Accident Commission were barred by the judgment of nonsuit in favor of the stockholders. This contention is based upon the doctrine of res adjudicata.

[1] We do not need to follow the argument of appellants based upon the provisions of section 3 of article 12 of the Constitution, for the reason that the findings of the Industrial Accident Commission show clearly that the section is inapplicable. The finding of the commission is, as we have stated, that the respondent, while employed, etc., by the defendants Kern-Torrance Petroleum Corporation and W. C. Eichner, W. A. Saylor, Fred W. Heath, G. E. Arbogast, E. J. McLaren, E. C.

McLaren, and Ira D. Vinton, was injured while in the course of his employment. The addition of the words, "the sole directors and sole stockholders of said corporation, each owning one-seventh of all the subscribed and issued capital stock of said corporation, on said date," is wholly immaterial. These words are simply descriptio personam so far as their being directors and stockholders of the corporation was concerned. The finding is not that the respondent was employed by the plaintiffs in this action in their official capacity, but that the respondent was employed by the individual plaintiffs. Whether they were in fact directors or stockholders of the Kern-Torrance Petroleum Corporation has no bearing whatever upon their liability, when the finding is to the effect that they were the individual employers of the respondent. The appellants have entirely overlooked the fact that, when one is found individually liable as an employer, it does not matter whether he is described as an agent, stockholder, director, or by any other name indicating who he is, or whether he occupies any official capacity.

The record further shows that, after the entry of the last award in which the plaintiffs were found to be individually liable, application was made to the District Court of Appeal of the Second District for a writ of certiorari to review such award, and that the writ was denied.

[2] Section 22 of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 851) reads: "The orders, findings, decisions or awards of the commission made and entered under section six to thirty-one, inclusive, of this act may be reviewed by the courts specified in sections sixty-seven and sixty-eight hereof and within the time and in the manner therein specified and not otherwise." The superior court is not mentioned as one of the courts having jurisdiction to review awards made by the Industrial Accident Commission. The language of section 22 of the act would seem to require no construction or citation of authorities. However, we may properly set forth a short quotation from the case of Thaxter v. Finn, 178 Cal. 270, 173 P. 163, 165, to wit: "It seems to us that there can be no question as to the clear intent of the Legislature to render awards by the commission of compensation to employees on account of injuries alleged to have been received in the course of their employment free from review or attack of any kind except as proscribed by the Workmen's Compensation Insurance and Safety Act. We do not see how this intent could have been made clearer." In the review provided for the court may inquire as to whether the commission exceeded its jurisdiction. Thus, in this case when the question was presented to the District Court of Appeal of the Second District upon the plaintiff's petition for a writ of certiorari, that was one of the questions tendered for the consideration of the court, and, as stated in the plaintiff's petition, the writ of review was denied.

[3] There remains but one other question to consider, and that is the right of the commission to review its findings and award made in the first instance in this case. It will be remembered that the commission expressly purported to continue its jurisdiction in view of the fact that the circumstances indicated further consideration of the case would be required. Irrespective of this language used in the award, subdivision (d) of section 20 of the Workmen's Compensation Insurance and Safety Act confers such power upon the commission. It is therein provided that the commission shall have continuing jurisdiction over its orders, decisions, and awards for the period of 245 weeks from date of the injury. It may rescind any order, decision, or award, or may alter or amend any prior order, decision, or award, and such order, decision, or award shall have the same effect as provided for original orders, decisions, and awards. In this case the plaintiffs were made parties and were given an opportunity to be heard at the time of the hearing upon which the award under consideration in this case was made by the commission. Section 21 of article 20 of the Constitution as amended in 1918 gave the Legislature full authority to empower the commission to act just as it has acted in this case. The law is so well settled that the Industrial Accident Commission possesses this power that we only need to cite the following cases: Bartlett-Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P. 195; Globe Indemnity Co. v. Industrial Accident Commission, 91 Cal. App. 347, 266 P. 992, and C. C. Moore & Co. v. Industrial Accident Commission, 91 Cal. App. 465, 267 P. 122.

From what we have set forth concerning the findings of the Industrial Accident Commission as to the individual liability of the plaintiffs herein, it is likewise unnecessary to review the authorities of the respondent touching the question of stockholder's liability where the stockholders are in fact the corporation.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

119 Cal.App. 188

TITLE INS. & TRUST CO. v. FORD et al.

Civ. 8145.

District Court of Appeal, First District, Division 2, California.

Dec. 12, 1931.

Rehearing Denied Jan. 11, 1932. Hearing Denied by Supreme Court Feb. 8, 1932.

1. Mortgages 🔑335.

Acceptance of property and income therefrom by beneficiary of trust deed *held* not to constitute waiver of debtors' default.

> Acceptance of possession of property and income therefrom by beneficiary of trust deed did not constitute waiver of the debtors' default, since beneficiary's agreement with debtors under which beneficiary entered into possession entitled beneficiary to property and right to furnish and operate it, merely reserving to debtors right during foreclosure period to refinance property, and provided that, if debtors were unable to refinance property, all income derived from property during foreclosure period was to remain property of beneficiary.

2. Mortgages 🔑199(3).

Debtors unable to refinance property *held* not entitled to accounting against trust deed beneficiary taking possession under agreement that income derived from property during foreclosure period was to be beneficiary's property unless debtors refinanced property.

3. Trial 🔑404(1).

Finding should be considered as whole in considering sufficiency thereof.

4. Appeal and error 🔑931(1).

Inferences may be drawn from findings in order to support judgment.

5. Appeal and error 🔑931(1).

If, eliminating defective findings and surplusage, findings are sufficient to support order for sale under trust deed, appellate court will not defeat judgment by placing strained inferences on findings.

Appeal from Superior Court, Los Angeles County; Leonard Wilson, Judge.

Action by the Title Insurance & Trust Company against Billie D. Ford, James A. Ford, and others, in which the named defendants filed cross-complaint against defendant William M. Davey. From an adverse judgment, Billie D. Ford and James A. Ford appeal.

Affirmed.

George Acret, of Los Angeles, for appellants.

Arch H. Vernon and Ralph H. Spotts, both of Los Angeles, for respondent Title Ins. & Trust Co.

Howard B. Henshey, of Los Angeles, for respondent Davey.

WARD, Justice pro tem.

This action was brought by plaintiff, as trustee under a deed of trust, to determine the rights of each defendant in a foreclosure proceeding and, in particular, the effectiveness and validity of a notice of default and notice of sale. Defendants Ford answered and filed a cross-complaint praying that the trustee's sale be enjoined and demanding an accounting from defendant and cross-defendant Davey, who in turn answered the complaint and cross-complaint, denying that the Fords had any right to an accounting.

On October 7, 1927, the Fords, as owners of an apartment house, signed a trust deed note for $55,000 payable in installments monthly with provision for acceleration. Shortly after the making of this note, the defendant Davey by assignment acquired the interest as beneficiary. Upon July 12, 1928, Davey filed a declaration of default, and the next day entered into an agreement with the Fords whereby he was given possession of the property and the right to furnish and operate the apartment. The Fords reserved the right during the foreclosure period to refinance the property, with the further stipulation that, if they were able to refinance, all moneys over and above costs and operating expenses should be applied to the indebtedness; otherwise all the income derived from the apartment house during the foreclosure period was to remain the property of Davey. On the last day of the foreclosure period, the Fords served upon Davey and the plaintiff a notice to desist from the sale and a demand for an accounting of the income, rental, and profits from the property. This was the only written demand ever presented, but the subject of approximate income, etc., had been discussed over the telephone by the Fords and Davey. The trustee continued the sale and thereafter instituted this proceeding. The trial court adjudged and decreed that the proceedings for the sale were regular and valid and ordered the sale to proceed.

[1, 2] There is no doubt that the Fords were in default on the 11th day of July, 1928, the date that the declaration of default was executed and delivered to plaintiff. This is admitted by the terms of the agreement entered into the following day between Davey and the Fords. The acceptance of possession of the property and the income therefrom by the beneficiary, Davey, in view of the terms of the contract, did not waive the existing default. If the default was waived, then

Davey was wrongfully in possession, and this could only be rectified by Davey relinquishing possession to the Fords who had admitted the indebtedness and agreed to Davey's possession and management of the income. The acceptance by Davey of the income from the property did not waive the default. The Fords authorized Davey in the agreement to furnish the building and thereafter to operate it. The only way the Fords could repossess the property was to refinance the property plus furnishings and equipment. The agreement provided, "if we are able to refinance", etc. The record is silent as to any ability to refinance, and hence under the terms of the agreement, the income was the property of Davey. If the income was the property of Davey, then the Fords had no right to an accounting. The "Notice and Demand" served just prior to the date fixed for the sale does not allege, even by inference, a willingness or ability to refinance the property. It was simply a notice to desist from the contemplated sale because Davey, according to the notice, had refused to make an accounting, but an accounting was unnecessary unless the Fords were preparing to refinance. Defendant and cross-complainant James A. Ford testified that he handled the business arrangements concerning the apartments and did not do anything in reference to obtaining a statement from Davey of the expenses and receipts except a discussion by way of the telephone. Appellants seek to excuse this failure to demand a statement preparatory to an effort to refinance upon the theory that Davey had lulled the Fords into inaction, but this contention is declared by appellants in their opening brief to be immaterial.

[3-5] The findings of fact contain many conclusions of law and much surplusage. Sometimes conclusions of law serve the office of findings of fact. Biurrun v. Elizalde, 75 Cal. App. 44, 242 P. 109. Surplusage is often explanatory and enlightening. Findings should be considered as a whole. Inferences from findings may be drawn in order to support a judgment. Hulen v. Stuart, 191 Cal. 562, 217 P. 750. The purpose of a finding is to answer the issues raised by the pleadings. If, eliminating defective findings and surplusage, the findings are sufficient to support the order for sale, this court will not defeat a judgment by placing strained inferences thereon. Anglo-California T. Co. v. Oakland Rys., 193 Cal. 451, 225 P. 452. Stripping the transcript of evidence irrelevant to the material issues and considering the findings as a whole, the evidence in this case warranted the findings and the findings support the judgment. The contentions of appellant as to alleged errors in the court's rulings upon the admissibility of evidence are answered in the position heretofore taken herein upon the real issues of this case.

Judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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119 Cal.App. 203

PATTERSON v. PACIFIC INDEMNITY CO.

Civ. 7057.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1931.

1. Execution 🔑75.

Execution on judgment was enforceable as soon as judgment was entered, unless appeal was immediately taken and stay bond given (Code Civ. Proc. § 681).

2. Appeal and error 🔑351(2).

Appeal is perfected, within statute, whenever stay bond is properly executed and sureties have justified, if required to do so (Code Civ. Proc. § 946).

3. Pleading 🔑350(3).

By moving for judgment upon pleadings, for purposes of motion, plaintiff admitted all affirmative allegations of answer.

4. Pleading 🔑350(1).

Basis for relief and effect of motion for judgment upon pleadings are those only which may arise upon presentation of general demurrer.

5. Pleading 🔑345(1).

Plaintiff is not entitled to judgment on pleadings if answer presents affirmative matter constituting any legal defense.

6. Pleading 🔑345(1).

In suit on undertaking releasing attachment, allegations of answer that immediately after issuance of execution defendant appealed, and filed undertaking within time prescribed by law, staying execution pending appeal, although defective, *held* sufficient to withstand plaintiff's motion for judgment upon pleadings (Code Civ. Proc. §§ 681, 942, 943).

While allegations were not free from ambiguity as to whether the filing of the undertaking took place immediately after issuance of the execution, they were at least susceptible to that interpretation, and therefore were sufficient as against motion for judgment on pleadings.

7. Pleading ⚷237(1).

Utmost liberality is allowed in amending pleadings to conform to truth.

8. Pleading ⚷350(3).

On plaintiff's motion for judgment on pleadings, defendant failing to properly state defense should be allowed to amend answer.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Earl S. Patterson against the Pacific Indemnity Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Halverson & Halverson, of Los Angeles, for appellant.

Charles C. Montgomery, of Los Angeles, for respondent.

CRAIG, J.

An undertaking releasing an attachment levied by the respondent having been furnished by the appellant, the instant suit was based thereon, wherein the surety affirmatively alleged by answer that "immediately after the issuance of the execution in said action, said [defendant] duly filed and served therein its notice of appeal in said action and filed the undertaking therein within the time prescribed by law by good and sufficient surety in double the amount named in said judgment conditioned as prescribed by law, staying execution of said judgment pending and undetermined and said judgment and execution thereof has been duly stayed pending the determination of said appeal." Judgment in favor of the plaintiff in this action was rendered upon the pleadings, and the respondent herein contends in support of such judgment that the matters so alleged were insufficient to preclude recovery of the amount of the first judgment, notwithstanding the pendency of the appeal.

Sections 942 and 946, respectively, of the Code of Civil Procedure, provide, in part:

"If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order."

"Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; provided, however, said property shall not be released from the levy, if the respondent excepts to the sufficiency of the sureties within five days after the giving of the undertaking staying execution until such sureties, or others, justify in the manner prescribed by law."

[1-5] The complaint alleged that execution issued, and that on the following day the same was returned unsatisfied. As alleged by the defendant and appellant, immediately after the issuance of the execution it appealed and filed an undertaking within the time prescribed by law in double the amount of the judgment, and that execution was stayed pending appeal. It is not suggested that an exception to the surety suspended release of the levy of execution. Inapt as the failure of more specific detail may render the defendant's answer, it cannot be said that the allegations do not furnish complete bar to satisfaction of the writ or grounds for its return unsatisfied. An appeal does not stay execution, unless a written undertaking be executed in accordance with the foregoing sections prescribing its form and substance and the time within which it shall be furnished. In order to stay execution, an appellant is required to perfect its appeal as provided by the Code of Civil Procedure. Appellant's answer alleged that its appeal was taken immediately after the issuance of execution, that the undertaking was filed as prescribed by law, and that the judgment and execution were stayed "pending the determination of said appeal." The question here is: "When was execution on the judgment in the attachment suit enforceable? The answer is: As soon as entered (Code Civ. Proc. § 681), unless an appeal was taken at once and stay bond given." Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 P. 416, 418. Whenever a stay bond shall have been properly executed and the sureties shall have justified, if required so to do, the appeal is said to have been "perfected," in the sense in which the term is used in the Code of Civil Procedure. Hill v. Finnigan, 54 Cal. 493. While the allegation is not free from ambiguity as to whether the filing of the undertaking took place immediately after the issuance of the execution, it is at least susceptible to that interpretation, and therefore should be allowed with the issue presented as it is here. Having submitted the case upon the pleadings, the plaintiff admitted, for the purposes of such motion, all affirmative allegations of the answer. Schwab v. Richardson, 188 Cal. 27, 204 P. 396. Uncertainties and ambiguities must be specifically raised by proper procedure. The basis for relief and the effect of a motion for judgment upon the pleadings are those only which may

arise upon the presentation of a general demurrer. People v. Board of Supervisors, 27 Cal. 655; Miller v. Price, 103 Cal. App. 650, 284 P. 1035. A plaintiff is not entitled to judgment on the pleadings if affirmative matter constituting any legal defense is presented by the answer. Brind v. Gregory, 122 Cal. 480, 55 P. 250; Neale v. Morrow, 174 Cal. 49, 161 P. 1165; Cass v. Rochester, 174 Cal. 358, 163 P. 212.

[6-8] Although, as stated, the affirmative allegations of the answer in the instant case did not assert facts and dates constituting a defense upon which the trial court might at a glance conclude that, if true, they entitled the defendant to judgment, yet, if afforded their natural and probable intent, they were sufficient to create a substantial defense upon which the defendant was entitled to be heard. "A litigant should not be compelled to secure the judgment of the court upon a debatable question of pleading at the expense of losing his case if the court differed in its conclusion from the contention of the party. Courts are not instituted or maintained to enable shrewd attorneys to practice legal gymnastics, but to administer justice. The utmost liberality is allowed in amending pleadings to conform to the truth, and to allow a party to escape from the effects of ill-advised allegations of law or fact. Crosby v. Clark, 132 Cal. 1, 63 P. 1022; Jamison v. Hyde, 141 Cal. 109, 113, 74 P. 695. If it appears on plaintiff's motion for a judgment that the defendants have failed to fully or correctly state their defense, they should be allowed to amend their answer. On the other hand, if the plaintiff's motion is not well taken it should be denied, and the case set down for trial on the issues raised." Hale v. Gardiner, 186 Cal. 661, 200 P. 598, 600.

The result follows that the pleadings do not conclusively show that execution was not stayed, and that the respondent was entitled to a judgment in all essentials savoring of a confession or default.

The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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119 Cal.App. 155

SPRENG v. SPRENG et al.

Civ. 4469.

District Court of Appeal, Third District, California.

Dec. 11, 1931.

1. Deeds ⚿8.

Wife acquired no interest by quitclaim deed from her husband executed four years after the husband's conveyance of realty to others (Civ. Code, § 172a).

2. Husband and wife ⚿258.

Wife acquired no interest in property husband obtained in exchange for land held in his name, even if he had improved such land with community earnings, where character of land so improved was not changed by improvements.

3. Husband and wife ⚿258.

As between husband and wife, title to improvements follows land, absent contrary agreement.

4. Husband and wife ⚿267(1).

Grantee of community property acquired in 1912 had absolute right to transfer it without wife's signature (Civ. Code, § 172a).

> Since it clearly appeared that such property was acquired in 1912 and long before the amendment of Civ. Code, § 172, and the enactment of Civ. Code, § 172a in 1917 (St. 1917, p. 829), the wife had but a mere expectancy and not a title or interest in the community property which she would convey by joining in the deed, the husband having the absolute right to convey such property for a valuable consideration, and the wife's signature to the deed of conveyance being wholly unnecessary.

5. Deeds ⚿195.

Where deed made part of complaint showed valuable consideration, burden was on party denying consideration to negative presumption thereof which deed created (Civ. Code, §§ 1614, 1615).

6. Husband and wife ⚿270(3½).

Wife's action to establish community interest in property transferred by husband over four years previously *held* barred by statute of limitations (Civ. Code, § 172a).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Augusta M. Spreng against Charles G. Spreng and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Martindale & Bullington, of Los Angeles, for appellant.

Andreani, Haines, Bisher & Carry and Jacob F. Schwartz, all of Los Angeles, for respondents.

PRESTON, P. J.

Plaintiff and appellant Augusta M. Spreng brought this action against her husband Charles G. Spreng and Henry M. Baker and Laura B. Baker, his wife, to establish her community interest in certain real property in the city of Los Angeles, and for an account-

ing of the proceeds thereof, and for other equitable relief.

Charles G. Spreng was not served with summons, and did not appear in the action. The other defendants answered and denied the allegations of the complaint, and pleaded a number of special defenses, among them being "the claims of plaintiff are barred by the provisions of section 172a of the Civil Code. * * *"

The case came on for trial before the court without a jury, and, after some preliminary discussion, an attempt was made by plaintiff to introduce certain evidence. Defendants Baker and wife objected to the introduction of any evidence upon the ground that the action was barred by the provisions of section 172a of the Civil Code, and also upon the ground that the second amended complaint upon which plaintiff was proceeding to trial failed to state facts sufficient to constitute a cause of action. A motion was also made to dismiss the case "with prejudice." The objections were sustained and the motion granted and the case was finally dismissed and a judgment of dismissal was entered. From this judgment, the plaintiff Augusta M. Spreng prosecutes this appeal.

The facts, which are alleged in her second amended complaint in great detail, are briefly these: Plaintiff and Charles G. Spreng were married in Orange county, Cal., on November 21, 1906, and, so far as the record shows, are still husband and wife. At the time of their marriage, Charles G. Spreng owned three parcels of land situate in Orange county, designated in the second amended complaint as parcels 2, 3, and 4, all of which stood of record in his name. Parcels 2 and 3 were unimproved agricultural lands. Parcel 4 was improved, and was the home of plaintiff and Charles G. Spreng from the time of their marriage until 1912. Plaintiff contributed $1,400 of her separate money in the maintenance and improvement of all of the lands, and thereby enhanced the value thereof. Community earnings also went towards the improvement of all three parcels.

No change whatever was made in the record title to any of said lands until the year 1912, at which time Charles G. Spreng exchanged the three parcels of land in Orange county for property in the city of Los Angeles, which is the property involved in this action. The deed to the Los Angeles property was taken in the name of Charles G. Spreng alone. Thereafter, and on March 25, 1919, Charles G. Spreng entered into an agreement in writing with the defendants and respondents Henry M. Baker and Laura B. Baker, his wife, wherein he agreed to sell and convey to them the Los Angeles property, under certain specified conditions contained in the agreement.

[1] Thereafter Charles G. Spreng brought an action against Henry M. Baker and Laura B. Baker to have the validity of said agreement determined. After trial, judgment was rendered adjudging said agreement to be a valid and subsisting contract, and further adjudging that the respondent Baker and wife had performed each and every term and condition contained in said agreement to be performed by them. This judgment became final. Pursuant to said agreement and judgment and on April 1, 1924, the said Charles G. Spreng conveyed said property to Henry M. Baker and Laura B. Baker by a grant, bargain, and sale deed. Respondents Baker and wife, as part of the purchase price, executed to Charles G. Spreng a promissory note secured by a deed of trust on said property. Thereafter and on March 30, 1928, more than four years after the property was conveyed to Baker and wife by Charles G. Spreng, he, Charles G. Spreng, executed to plaintiff, his wife, a quitclaim deed, describing the property which he had conveyed on April 1, 1924, to said Henry M. Baker and Laura B. Baker.

This quitclaim deed appears to be the basis for appellant's claim to a community interest in the Los Angeles property.

It is clear from this statement of facts alleged that plaintiff and appellant Augusta M. Spreng has no interest in the Los Angeles property, and therefore no cause of action against respondents Henry M. Baker and Laura B. Baker, and that the judgment of dismissal was right and proper.

Appellant acquired no interest in the property in question by virtue of the quitclaim deed from her husband Charles G. Spreng, for the simple reason that he had, more than four years prior to the execution of said quitclaim deed, conveyed all of his title in the property to the respondents Henry M. Baker and Laura B. Baker, his wife.

[2-3] Appellant contends that the deed executed by her husband Charles G. Spreng to Henry M. Baker and Laura B. Baker on April 1, 1924, did not convey her community interest in the property, and therefore she is entitled to assert such interest at this time, by virtue of said quitclaim deed.

As we have already seen, the property exchanged for the property in question was the separate property of Charles G. Spreng, and the deed to the property received in exchange therefor was dated July 13, 1912, and named Charles G. Spreng alone as grantee.

The title remained in Charles G. Spreng until he conveyed it to respondents on April 1, 1924. These facts show that the property received in exchange for the separate property of Charles G. Spreng and conveyed to respondents on April 1, 1924, was also the separate property of Charles G. Spreng, and that appellant's signature to said deed of conveyance was not necessary to pass the entire title to the grantees. If Charles G. Spreng did expend community funds or the separate funds of appellant in making improvements on his separate property, the character of the property so improved was not changed thereby. As between them, in the absence of any specific agreement to the contrary, the title to the improvements follows the land. Carlson v. Carlson, 10 Cal. App. 300, 101 P. 923; Shaw v. Bernal, 163 Cal. 262, 124 P. 1012; Dunn v. Mullan, 211 Cal. 583, 296 P. 604, and cases there cited; Estate of Barreiro, 86 Cal. App. 764, 261 P. 509. No such agreement is here alleged.

If appellant's community or separate funds were so expended by Charles G. Spreng, she would undoubtedly have the right in a proper action for that purpose, if seasonably begun, to recover from Charles G. Spreng alone a sum of money equal to the value added to the separate property by reason of the expenditure of her separate or community funds thereon. Provost v. Provost, 102 Cal. App. 775, 283 P. 842; Estate of Barreiro, supra; Dunn v. Mullan, supra. But such is not the character of the action before us.

[4] However, conceding for the sake of argument that the property involved in this action was community property of appellant and Charles G. Spreng, it clearly appears that it was acquired in 1912 and long before the amendment of section 172 and the enactment of section 172a of the Civil Code in 1917 (St. 1917, p. 829). This being the case, appellant had but a mere expectancy and not a title or interest in the community property which she would convey by joining in the deed. Therefore Charles G. Spreng had the absolute right to convey this property to respondents for a valuable consideration, and appellant's signature to the deed of conveyance was wholly unnecessary. Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22; Stewart v. Stewart, 204 Cal. 546, 269 P. 439; Id., 199 Cal. 318, 249 P. 197; Ososke v. Kalinowsky, 209 Cal. 45–50, 285 P. 318, 321; Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Knaugh v. Baender, 84 Cal. App. 142–150, 257 P. 606; McKay v. Lauriston, 204 Cal. 557–566, 269 P. 519; Perelli-Minetti v. Lawson, 205 Cal. 642, 272 P. 573; Staton v. Buster, 79 Cal. App. 428, 249 P. 878.

In Ososke v. Kalinowsky, supra, the court said: "The real property was acquired prior to the amendment in 1917 (St. 1917, p. 829) of section 172 of the Civil Code, which deals with the management and control of community property. The husband therefore had the absolute management and control thereof, and could sell or incumber the same without his wife's consent."

[5] There is no merit in appellant's contention that there was no consideration for the deed from Charles G. Spreng to Baker and wife. The contract made a part of the complaint shows a valuable consideration. A written instrument is presumptive evidence of a consideration. Section 1614, Civ. Code. There is no allegation in the complaint sufficient to negative this presumption, and the burden of showing want of consideration to support the deed lies with appellant. Section 1615, Civ. Code.

Furthermore, the validity of the contract between Spreng and the Bakers was adjudicated by the judgment set forth in the second amended complaint.

[6] Further conceding that appellant is correct and the property in question is community property, and that Charles G. Spreng had no right to convey it without appellant joining in the deed, nevertheless, her right of action is barred by the provisions of section 172a of the Civil Code, because this action was not commenced until more than one year after the deed in question was made. In fact, it was over four years.

Appellant seems to be of the opinion that this quitclaim deed from Charles G. Spreng gives her the right to maintain this action any time and recover one-half of the property from any one who may now own it, regardless of the fact that the present owners are innocent purchasers for value and without notice of her alleged claim.

This is certainly not the law. The quitclaim deed that she holds from Charles G. Spreng describing the property in question is of no more value to her in obtaining an interest in this property than would be a quitclaim deed signed by "King Tutt" or "Old King Cole," because neither of them, like Charles G. Spreng, had any interest in the property.

Under no conceivable theory that we know of would it ever be possible for appellant to prevail in this action.

This action should never have been commenced in the superior court, much less appealed, after an adverse decision by that court, and thereby add to the already badly congested calendars of the Appellate and Supreme Courts.

The judgment of dismissal is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

PARR v. REYMAN.*

Civ. 560.

District Court of Appeal, Fourth District, California.

Dec. 5, 1931.

Rehearing Denied Jan. 4, 1932. Hearing Granted by Supreme Court Feb. 1, 1932.

1. Appeal and error ⟹907(3).

On appeal on judgment roll alone, court must assume that evidence necessary to support judgment was introduced below.

2. Executors and administrators ⟹315(6).

Probate court's decree of distribution, after becoming final, cannot be collaterally attacked, in absence of extrinsic fraud (Code Civ. Proc. § 1666).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Suit to subject property to a trust brought by Virgil E. Parr against Maysel Reyman, as administratrix with the will annexed of the estate of Willard A. Parr, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Hert, Mussell & Withington, of San Bernardino, for appellant.

O'Connor & Findlay, of Colton, for respondent.

MARKS, J.

By this action appellant sought to subject certain money and real property situated in the city of Colton, county of San Bernardino, to the terms of an alleged trust. The case was tried without a jury, and judgment was entered in favor of respondent. This appeal was prosecuted on the judgment roll.

Elizabeth Parr was the mother of Virgil E. Parr, the appellant, Willard A. Parr, respondent's decedent, Enoch D. Parr, and Emma A. Brady. She was formerly a resident of the state of North Dakota and owned certain real property there, which by the terms of a will executed in North Dakota she bequeathed to her son Willard. After the execution of this will, she sold the North Dakota property and moved to the city of Colton, where she purchased real estate with the money derived from this sale. She died on May 3, 1916, without having changed this will. It was probated in the Superior Court of San Bernardino county with her son Virgil, appellant here, acting as the administrator with the will annexed of her estate. The decree of distribution was rendered on February 2, 1918, and was allowed to become final. By this decree the Colton real estate and cash, involved here, were distributed to Willard A. Parr.

On June 12, 1917, Virgil E. Parr by grant deed conveyed his interest in the Colton real estate to his brother Willard. On the same day Willard conveyed to him six lots in the city of Colton. Thereafter Willard placed valuable improvements on this Colton property described in the decree of distribution and in the deed from Virgil. The complaint alleges that Willard also received from his mother's estate by assignment from his brother Virgil $934.31, which was used to pay part of the cost of these improvements. There is no finding of fact covering this allegation.

Willard A. Parr died testate on the 14th of December, 1928, and Ida M. Mather was appointed executrix of his last will and testament. She caused notice to the creditors of the estate to be published on February 5, 1929, notifying them to present their claims against this estate within four months. She died on June 20, 1929, and Virgil E. Parr was, on August 24, 1929, appointed administrator with the will annexed of this estate. He was discharged as such administrator on December 5, 1929, and respondent was appointed in his place. During the time Virgil was acting as such administrator, he presented a claim against the estate for the sum of $1,118.21, together with interest from July 1, 1916, for the value of the property of the estate of Elizabeth Parr which he had transferred to his brother Willard. This claim was withdrawn on December 23, 1929. Thereafter Virgil demanded of respondent that she convey to him the Colton property and pay him the $934.31 and interest which he maintained belonged to him and was held by the estate of Willard A. Parr in trust for him. This demand was refused.

Thereafter appellant commenced this action to recover the Colton real estate and the $934.31 from respondent. It is alleged in the amended complaint and an amendment thereto that appellant and Willard A. Parr were brothers, and had been associated together in business enterprises which continued up to the death of Willard A. Parr; that during this time the two brothers had jointly owned a number of different parcels of real property; that it was the common practice of the brothers to carry the titles to such parcels of real property in the name of one of them without any written declaration of the interest of the other therein; that each brother had confidence in the honesty and integrity of the other and relied thereon; that the conveyance of the Colton property and the money from the estate of Elizabeth Parr, deceased, was made by appellant to Willard A. Parr solely upon the express promise of the said Willard A. Parr to reconvey such property to appellant upon his

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 12 P.2d 440.

demand; and that there was no other consideration for the transfer of such property. The complaint is based upon the theory of a trust created by this promise at the time of the conveyance of this property on June 12, 1917, terminable upon the demand of appellant.

The trial court found that appellant did not, during the lifetime of his brother Willard, make any demand for the return to him of the property in controversy here, "although the said Willard A. Parr had, during his lifetime and in expectation of death, called his said brother Virgil E. Parr, to his bedside and asked him if there was any unsettled business between them and if there was any obligations owing from him to his said brother."

The court further found: "That there is no charge made in this action on the part of the plaintiff that there was any fraud or bad faith practiced by or on behalf of the said Willard A. Parr during his lifetime and the plaintiff expressly disclaimed that there was any such fraud or bad faith, and the court finds that there is no evidence of any extrinsic fraud entering into or in anywise affecting the alleged transaction above set forth."

The only finding in the record upon the question of the supposed trust in the property is as follows: "That thereafter, and prior to the decree of distribution in said estate, to-wit on the 12th day of June, 1917, the said Virgil E. Parr, then the administrator of the estate of Elizabeth Parr, above mentioned, the plaintiff herein, by a deed transferred all his right, title and interest in and to said estate of his mother, and in and to the real property above described, to defendant's decedent, Willard A. Parr, by a deed absolute in form under a verbal promise (which plaintiff herein alleges was to the effect) that the said Willard A. Parr would take and hold such property and should have the use thereof until such time as the said grantor, Virgil E. Parr, the plaintiff herein, should request the return thereof to himself."

We are unable to determine what the facts are that the trial court intended to find as true by the latter portion of this finding. The words in parentheses render it too uncertain for us to attempt to place a construction upon it. As this was the only finding upon the issue of whether or not there was a promise on the part of Willard A. Parr to reconvey the property to his brother, we must assume that the words "which plaintiff herein alleges was to the effect" were used parenthetically without any intention to have them serve as a limitation on the balance of the finding if the judgment is to be affirmed.

The judgment was based upon the sole conclusion that the decree of distribution in the estate of Elizabeth Parr, deceased, having become final, was an adjudication of the interest of appellant in the property in controversy here, which judgment he cannot collaterally attack in this action.

Appellant strenuously contends that the judgment must be reversed for either one of two reasons: First, if the court found a promise on the part of Willard A. Parr to reconvey the property to his brother, the findings are contrary to and do not support the judgment, or, second, if the court failed to find on this issue, it failed to find on a material issue raised by the pleadings and evidence, and therefore the case will have to be sent back for further findings. In support of his argument he relies upon the doctrine announced in the following cases: Chever v. Ching Hong Poy, 82 Cal. 68, 22 P. 1081; More v. More, 133 Cal. 489, 65 P. 1044; 66 P. 76; Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459; Smith v. Lombard, 201 Cal. 518, 258 P. 55; Archer v. Harvey, 164 Cal. 274, 128 P. 410; Brazil v. Silva, 181 Cal. 490, 185 P. 174; Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 368; Cole v. Manning, 79 Cal. App. 55, 248 P. 1065; Anderson v. Nelson, 83 Cal. App. 1, 256 P. 294.

Speaking very generally, the foregoing cases resolve themselves into three classes: First, where a grantor in a grant deed to property belonging to a decedent is claiming title under a decree of distribution adversely to the terms of his prior grant; second, also speaking very generally, where the claimant to the property was not an heir, legatee, or devisee of the deceased, and had obtained his title during the pendency of the probate proceedings through a deed or other legal conveyance from an heir, devisee, or legatee; third, where such extrinsic fraud existed in the probate proceedings leading up to and connected with the decree of distribution that the plaintiff could attack the decree collaterally as any other judgment might be attacked when obtained by extrinsic fraud.

The cases cited under the first classification can be easily distinguished from the instant case, because here the appellant is not claiming under the decree of distribution, but adversely to it. The foregoing cases falling under this classification might easily have rested upon the broad and well-established principle of law that a grant deed passes subsequently acquired title by operation of law. Section 1106, Civ. Code; 9 Cal. Jur. 275 to 277, and cases cited.

The second class of cases cannot be authority here, for in those the claimant to the property was not an heir, legatee, or devisee of the deceased, while here both parties were at least heirs of the deceased and properly before the probate court at the time of the distribution of the estate of Elizabeth Parr.

The third class of cases, where extrinsic fraud existed, are not authority here, because the trial court expressly found that no fraud of any kind existed.

Section 1666 of the Code of Civil Procedure as it existed at all times material to this case provided as follows: "In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal."

In the case of Miller v. Pitman, 180 Cal. 540, 182 P. 50, 51, the question of an erroneous decree of distribution rendered by the probate court was under consideration. It seems that Elias W. Pitman died in February, 1888, the owner of real property. By his will he bequeathed a life estate in certain land to his wife, with remainders in fee to his children and to the heirs of the children's bodies. Under the terms of the will, the plaintiff in that case was entitled to receive an undivided one-sixth interest in the total remainder. The estate was probated, and by the decree of final distribution all of the property of the deceased was distributed to the widow to the exclusion of the plaintiff. After the death of the widow, the plaintiff brought suit to quiet his title to his interest in the real property. The trial court rendered judgment in his favor which was reversed upon appeal. In reaching its conclusion, the Supreme Court said:

"It thus appears that the paramount point presented upon the appeal involves the scope, effect, and finality of the decree of distribution which was made and entered in November, 1891, and never appealed from. The fundamental finding of the trial court to the effect that Charlotte Pitman took no more than a life estate by the decree of distribution is not supported by the evidence. The only evidence responding to this phase of the case consists of the will of Elias W. Pitman, the petition for its probate, the petition for the decree of distribution, and the decree itself. Neither extrinsic fraud nor mistake in the procurement of the decree was alleged, shown, or found. The decree is valid on its face. Clearly the probate court had jurisdiction of the subject-matter of the decree of distribution, and the fact that the decree erroneously construed the terms of the will did not operate to render the decree void. The time for appeal from the decree has long since expired. It is well settled that a decree of distribution is not subject to collateral attack, no matter how erroneously it may appear to depart from the terms of the will devising and bequeathing the estate distributed, if all of the interested parties have had due notice of the petition. The law does not require personal notice to be given of the presentation and pendency of a petition for final distribution, and, the complaint in the present case failing to allege that the notice required by law was not given, it will be presumed that such notice was given. [Citing cases.]

"This brings us to a consideration of the legal effect of the language of the decree. In our judgment, it is susceptible of no construction save that it purports to, and does in fact, distribute all of the estate of Elias W. Pitman to Charlotte Pitman, without limitation. In this behalf, it will be noted that the decree in terms declares that it is disposing of the 'residue of the estate' thereinafter 'particularly described' as follows: 'All of said property to Charlotte Pitman, the widow of said Elias W. Pitman, deceased.' Section 1666 of the Code of Civil Procedure, which provides the requirements of a decree of distribution, declares that it 'must name the persons and the proportions or parts to which each shall be entitled. * * *' Viewed in the light of this Code section, there is no escape from the conclusion that the decree in controversy, in express terms distributed all of the property of the estate to Charlotte Pitman without limitation and thereby confirmed in her an estate in fee simple absolute. This decree, in the absence of a showing or claim of extrinsic fraud or mistake, was irrevocable save upon appeal within the time provided by law, even though it was in contravention of the terms of the will. McKenzie v. Budd [125 Cal. 600, 58 P. 199], supra; Mulcahey v. Dow [131 Cal. 73, 63 P. 158], supra. So long as this decree stands unimpeached by such fraud or mistake, and it has not been so impeached herein by any fact alleged in the pleadings, developed in the proof or found by the court, there is no theory upon which any right or title of the plaintiffs to the land in question can be predicated and sustained. It follows that neither the pleadings nor proof of the plaintiffs suffice to support an action to quiet title, and, consequently, the question of the statute of limitations, which was put in issue by the pleadings, need not now be considered." The following cases support the doctrine announced in the Miller Case: Estate of Finch, 202 Cal. 612, 262 P. 34; Shipley v. Jordan, 206 Cal. 439, 274 P. 745; Newport v. Hatton, 195 Cal. 132, 231 P. 987; Silva v. Santos, 138 Cal. 536, 71 P. 703.

[1, 2] This case is before us on the judgment roll alone. It is therefore our duty to assume that any and all evidence necessary to support the judgment was introduced in the court below. There is nothing in the record that would tend to indicate that the distribution to Willard A. Parr in the decree in the estate of Elizabeth Parr, deceased, was made to him as a purchaser of the interest of his

brother, Virgil, the appellant here. We may assume that the evidence disclosed that the petition for distribution alleged that Willard A. Parr was an heir at law of Elizabeth Parr and a distributee under her will, and entitled to receive the Colton property and the money in question here; that appellant, who was the administrator of the estate, testified to such facts, and led the probate court into the mistaken belief that they were true; that the probate judge, acting on such mistaken belief, distributed this property to Willard A. Parr as the legatee of his deceased mother, and so found in the decree of distribution. Both Virgil E. Parr, the appellant here, and Willard A. Parr were heirs at law of their deceased mother, and were brought before a probate court by the notice of the time and place of the hearing of the petition for distribution. The probate court was authorized by law to determine heirship, construe the will of deceased, and to order distribution to the heirs, devisees, or legatees entitled to participate therein. This the probate court did, and, as the decree of distribution became final, it has all the dignity and effect of a judgment of court that cannot be collaterally attacked in the absence of extrinsic fraud. Miller v. Pitman, supra; Clavey v. Loney, 80 Cal. App. 20, 251 P. 232; Smith v. Vandepeer, 3 Cal. App. 300, 85 P. 136; Cunha v. Hughes, 122 Cal. 111, 54 P. 535, 68 Am. St. Rep. 27; Mulcahey v. Dow, supra.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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119 Cal.App. 207

CASE v. KIRKWOOD et al.

Civ. 549.

District Court of Appeal, Fourth District, California.

Dec. 14, 1931.

Rehearing Denied Jan. 11, 1932. Hearing Denied by Supreme Court Feb. 11, 1932.

Venue ⚿5(2).

Action to establish and foreclose mechanic's liens against interest of defendants, residents of another county, in particular realty *held* triable in county where realty was situated, where personal judgment sought against defendants was merely incidental to lien foreclosure (Code Civ. Proc. §§ 392, 395; Const. art. 6, § 5).

> Such action to establish and foreclose mechanic's lien was triable in county where realty was situated, under Code Civ. Proc. § 392; Const. art. 6, § 5, precluding defendants from having venue changed to county of their residence under Code Civ. Proc. § 395, where complaint seeking to establish and foreclose the lien not only sought a personal judgment against defendants but, alleged also that they claimed an interest in a particular parcel of real property, and sought to have such interest subjected to a lien in favor of claimants, and to have any such interest foreclosed.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by George S. Case against M. M. Kirkwood, Jack F. White, and another. From an order denying motion for change of venue, named defendants appeal.

Affirmed.

Leonard J. Meyberg, of Los Angeles, for appellants.

Walter C. Davison, of Riverside, for respondent.

BARNARD, P. J.

This is an appeal from an order denying a motion for a change of venue. The action is one to foreclose a mechanic's lien on certain real property in the county of Riverside. The complaint also asked for a personal judgment against the appellants for the amount of the debt which was claimed to be secured by the lien. The only question presented is as to whether these appellants have a right to have the action as against them tried in the county of their residence, it being conceded that they are and were residents of the county of Los Angeles.

It is contended that the cause of action against the appellants is a personal one, and that it is separate and distinct from another cause of action to foreclose a mechanic's lien, as set up against the other defendants. In the complaint, it is alleged that the appellants ordered the work performed and agreed to pay for the same. Because it is also alleged in the complaint, on information and belief, that another one of the defendants is the owner and reputed owner of the real property described, it is argued that, in fact, a cause of action for the foreclosure of a mechanic's lien, as against the owner of the property, is joined with another cause of action for the recovery of the contract price of the work from the appellants. Appellants contend that this latter cause of action is entirely separate and distinct from the former; that it is a personal action, so far as they are concerned; and that they are entitled to have it removed to the county of their residence, under section 395 of the Code of Civil Procedure. They rely on such cases as Sheeley v. Jones, 192 Cal. 256, 219 P. 744, and Brown v. Happy Valley Fruit Growers, Inc., 206 Cal. 515, 274 P. 977.

The cases cited do not apply here, since a different situation is presented by the record before us, and the supposed two causes of action are neither separate and distinct as between themselves, nor as between the appellants and the other defendants. While the complaint alleges that another defendant is the owner and reputed owner of the land on which it is sought to establish a lien, it also alleges that these appellants employed the respondent to do the work in question, agreeing to pay him a specific sum therefor upon the completion of the work; that the work was done in accordance with the agreement; that a notice of claim of lien was duly recorded; and that all of the defendants, including the appellants, have or claim to have some right, title, or interest in and to the premises in question, which rights, titles, or interests are subsequent to, and subject to, respondent's lien. The prayer not only seeks a personal judgment against the appellants for the amount claimed, but asks that it be declared that the respondent has a lien on the land for that amount; that the interest in the land claimed by each of the defendants, including the appellants, be declared to be subordinate to respondent's lien; that the land be sold; and that the interests of the appellants in the land be foreclosed.

It thus fully appears that the complaint not only seeks a personal judgment against these appellants, but also alleges that they claim an interest in a particular parcel of real property, and seeks to have such interest subjected to a lien in favor of the respondent, and to have any such interest foreclosed. Section 5, article 6 of the Constitution of this state, reads in part as follows: "Provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated."

Section 392 of the Code of Civil Procedure provides in part as follows: "Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this code: * * * 3. For the foreclosures of all liens and mortgages on real property."

In McFarland v. Martin, 144 Cal. 771, 78 P. 239, 240, the court says: "The right of a defendant to have an action against him tried in the county of his residence is, by the terms of section 395, Code Civ. Proc., limited to 'all other cases' than those enumerated in the previous sections, and is subordinate to the direction in section 392 that a local action like the present must be tried in the county where the property is situated. The authority given the court by section 397 to change the place of trial, when the county designated in the complaint is not the proper county, is a limitation upon its power, and necessarily implies that if the county designated in the complaint is the proper county, the place of trial cannot be changed, except for some reason authorized by the Code."

These authorities dispose of the question before us. The cause of action set up as against these appellants is not separate and distinct from the foreclosure of the lien asked for as against the other defendants, but a lien is sought to be established against the interest of these appellants in particular real property, and a foreclosure of this lien is sought. The personal judgment asked for against these appellants is merely incidental to the foreclosure of the lien. Coley v. Hecker, 206 Cal. 22, 272 P. 1045.

In Giant Powder Co. v. Flume Co., 78 Cal. 193, 20 P. 419, 421, the court said: "It has been the constant and uniform practice ever since we had a lien law in this state for the benefit of material-men and others, in actions for the foreclosure of such liens, to make the owner and contractor parties defendant, and to unite a personal action against the contractor for the money, with the action to establish the lien, and for its foreclosure against the owner. The practice is much to be commended, in that it prevents a multiplicity of suits, and thus saves labor and expense. If each material-man or person performing labor on a building had to bring separate actions against the contractor for the recovery of his money, it is manifest the expense of the litigation would be greatly increased. This constant and uniform procedure, continued for so long a time, is strongly persuasive that the practice is correct."

When it is alleged that the party against whom a personal judgment is sought is also interested in the real property, and a foreclosure of this interest is sought, the action as to such a party is one to foreclose a lien, and, under the authorities cited, must be tried in the county in which the land is situated.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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119 Cal.App. 755

Robert V. MEYER, Plaintiff and Respondent, v. M. M. KIRKWOOD and John F. White, Defendants and Appellants; Cora Bloom et al., Defendants.

Civ. 550.

District Court of Appeal, Fourth District, California.

Dec. 14, 1931.

Rehearing Denied Jan. 11, 1932.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Leonard J. Meyberg, of Los Angeles, for appellants.

Walter C. Davison, of Riverside, for respondent.

BARNARD, P. J.

All of the material facts and propositions of law herein involved are identical with those in the case of Case v. Kirkwood, 6 P.(2d) 110, this day decided, with the exception that this action is brought by a different plaintiff, relates to a different improvement upon the same property, and the amount claimed is not the same. Upon the authority of that case, and for the reason therein given, the order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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119 Cal.App. 322

REIDY v. YOUNG et al.

MERCHANTS' NAT. TRUST & SAVINGS BANK OF LOS ANGELES v. TIMOURIAN et al.

Civ. 8053.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1931.

1. Mortgages 🔑439.

Foreclosure action *held* not defeated because plaintiff had assigned mortgage as collateral security, where trial was actually held on pleading filed by assignee.

> The original complaint was amended by joining the assignee as party defendant, and then assignee filed cross-complaint upon which trial was held. The accepted view is that the assignor may sue with the consent of the assignee or may make the latter a party, and here trial was held on assignee's pleading filed with consent of assignor.

2. Mortgages 🔑550.

Continuance of receiver in foreclosure action after sale *held* improper (Code Civ. Proc. § 707).

3. Mortgages 🔑474.

Order refusing to discharge receiver in foreclosure action, made before determination whether deficiency judgment should be entered, was not improper.

4. Mortgages 🔑473.

In foreclosure action, order directing receiver to reimburse plaintiff for taxes advanced during receiver's possession was not erroneous.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Suit by P. M. Reidy against J. R. Young and others, in which the Merchants' National Trust & Savings Bank of Los Angeles filed a cross-complaint against Onnik Timourian and others. From the judgment and from orders refusing to discharge receiver and directing receiver to reimburse plaintiff for moneys advanced for payment of taxes, defendants Onnik Timourian and others appeal. Orders affirmed. Judgment affirmed as modified.

Y. B. Arsen, of Los Angeles, for appellants.

F. E. Davis, of Hollywood, for respondent P. M. Reidy.

Rohe & Freston and Ralph E. Lewis, all of Los Angeles, for respondent Merchants' Nat. Trust & Savings Bank.

NOURSE, P. J.

Plaintiff sued to foreclose a mortgage on real property. By an amended complaint, Merchants' National Trust & Savings Bank of Los Angeles was joined as a party defendant. This party filed a cross-complaint joining plaintiff and the original defendants as cross-defendants. The trial was had on the cross-complaint. The trust company had judgment for foreclosure of the mortgage which it held as collateral security for a loan to plaintiff Reidy. The latter had judgment for the amount due him after the trust company's claim had been satisfied which was made payable out of the proceeds of the sale on foreclosure. The case was dismissed as to the defendant Young, the maker of the note which the mortgage secured. There was no deficiency judgment. The defendants Onnik Timourian and wife purchased the property subject to the mortgage prior to the institution of these proceedings. Against them the judgment awarded costs accruing subsequent to the filing of their answer to the cross-complaint. Upon the filing of the original complaint, and based upon its allegations, a receiver was appointed who took possession of the property and collected all rents and profits. Prior to the entry of judgment, the defendants moved for the discharge of the receiver on the grounds that, the issues having been tried on the cross-complaint, the receiver's appointment upon the original complaint which was held not to state a cause of action, was no longer justified; and, the action having been dismissed as to the maker of the note, and hence no deficiency judgment being possible, the jurisdiction of the court to continue the receiver was exhausted. This motion was denied, and judgment was entered upon the cross-complaint as indicated. In this judgment and decree the receiver was continued in possession of the property "until the judgment has been paid in full and until the further order of this Court. * * * That if the rents, profits and returns of said receivership exceed the costs of operation and administration that such sums as are now or may hereafter come into the possession of said receiver shall be first applied to the claim of the Merchants National Trust and Savings Bank of Los Angeles; secondly * * *" During the course of the proceedings the trial court, upon motion of plaintiff Reidy, ordered the receiver to reimburse him for moneys advanced by him to the receiver for payment of taxes assessed to the property in suit. The defendants Timourian appealed from the latter order, from the order refusing to discharge the receiver, and from the judgment and decree. These appeals were all made in one notice, and are presented on the same typewritten transcripts.

[1] The first point raised by appellants is that plaintiff Reidy could not sue to foreclose the note and mortgage because he had assigned them to the trust company as collateral security for another loan. It was on this ground that the trial court sustained appellants' demurrer to the Reidy complaint. Following that order, the complaint was amended by joining the trust company as a party defendant, and then the trust company filed its cross-complaint upon which the trial was held. The accepted view is that the assignor may sue with the consent of the assignee or may make the latter a party. 3 Cal. Jur. p. 291. Here the trial was actually held upon a pleading filed by the assignee, but with the consent of the assignor, and, if they chose to proceed in this manner, it was no ground for complaint on the part of these appellants.

Secondly, it is argued that, when the action has been dismissed as to the maker of the note and the complaint contains no allegation of personal liability as to any other party, the action is one in rem only, and no deficiency judgment can be entered. This is conceded and because of it the decree is free from any deficiency award within the ordinary contemplation of that term.

[2] In view of this situation, it is then argued that the continuance of the receiver after the sale was beyond the jurisdiction of the court. The respondents make no answer to the point except that the appointment of a receiver in foreclosure proceedings is within the discretion of the court. But judicial discretion must be within the limits of the court's jurisdiction. Here the decree continued the receiver in possession after the sale and "until the further order of the court," with directions to pay the rents and profits to the trust company and other claimants and to deposit the remainder in court. Under the provisions of section 707, Code of Civil Procedure, the purchaser is entitled to the rents and profits during the period of redemption. But this right "affords no sufficient reason for the appointment of a receiver merely to secure to the purchaser the rent," etc. Boyd v. Benneyan et al., 204 Cal. 23, 26, 266 P. 278, 280. In that case, as here, the mortgage covered the rents, issues, and profits of the property and the Supreme Court held that, if the receiver were appointed for the purpose of paying these rents in satisfaction of a deficiency judgment, the appointment would have been within the jurisdiction of the court, but otherwise the court was without power to remove the mortgagor from his right of possession during the period of redemption. The effect of the decree as entered was to limit the mortgagee's recovery to the proceeds of the sale on foreclosure, and hence the order continuing the receiver in possession added materially to the costs to be assessed against these appellants. For this reason the judgment should be modified by striking therefrom that portion continuing the receiver in possession after the sale.

[3] On the second appeal, that from the order refusing to discharge the receiver, it is sufficient to say that this order was made prior to the entry of judgment and prior to the determination whether a deficiency judgment should be entered. From what we have said, if such a judgment had been entered, then the continuance of the receiver would have been proper. From the record before us we cannot say that there was any error in the order appealed from.

[4] As to the third appeal, that from the order directing the receiver to reimburse the plaintiff for taxes advanced during the receiver's possession, it is sufficient to say that this was an indebtedness which was admittedly due, and that appellants have advanced no reason why the order was not properly made.

The orders appealed from are affirmed. The judgment is modified by striking therefrom the provisions thereof continuing the receiver in possession after the sale, and, as so modified, the judgment is affirmed; appellants to have their costs.

We concur: STURTEVANT, J.; SPENCE, J.

119 Cal.App. 82

PEOPLE v. BEESLY.*

Cr. 2143.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1931.

Rehearing Denied Dec. 21, 1931. Hearing Denied by Supreme Court Jan. 7, 1932.

1. Forgery ⇨26.

Information charging crime of violating State Narcotic Act by forging prescription for narcotics *held* not demurrable (Deering's Gen. Laws Supp. 1925–1927, Act 5994, §§ 7, 8; Pen. Code, §§ 870, 925, 950–952, and § 959 as amended by St. 1927, p. 1041).

> Information charged defendant with the crime of violating the State Narcotic Act, and alleged that defendant, with intent then and there to obtain narcotic drugs, did willfully, unlawfully, fraudulently, and feloniously make, forge, and counterfeit a certain prescription and order in writing for delivery of narcotics, and did then and there utter, publish, and pass the same, knowing said prescription to be false, forged, and counterfeited, with intent to obtain narcotic drugs as aforesaid, and then set out in haec verba a physician's prescription for "H M C No. 1 Tablets No. XX."

2. Indictment and Information ⇨1.

Purpose of indictment or information is to inform accused of charge which he must meet at trial.

3. Indictment and Information ⇨119.

That information charges more than law requires will not render it defective, where surplusage does not tend to establish defense or destroy effect of essential averment (Pen. Code, § 959, as amended by St. 1927, p. 1041).

4. Forgery ⇨27.

Indictment charging violation of State Narcotic Act by forging prescription for narcotics was not defective because of failing to charge intent to defraud (Deering's Gen. Laws Supp. 1925–1927, Act 5994, §§ 7, 8).

5. Criminal law ⇨1167(1).

Error in overruling demurrer to indictment or information is not prejudicial where, upon trial, crime sought to be charged is fully proved (Const. art. 6, § 4½; Pen. Code, § 960).

6. Criminal law ⇨273.

Plea of guilty amounted to waiver of former objection by demurrer to information.

7. Statutes ⇨38.

Law relating to sale of narcotics *held* not in violation of constitutional provision requiring laws to be published in English language (Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8; Const. art. 4, § 24).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer and William C. Doran, Judges.

Jacques Beesly was convicted of violating the State Poison Act by forging a prescription for narcotics, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

Appellant was charged with violating the State Poison Act by forging a prescription for narcotics and appeals from the judgment of imprisonment in the state prison on the grounds that the court erred in overruling his demurrer to the information and that the sections of the State Poison Act (sections 7 and 8, Act 5994, General Laws, as amended) upon which the prosecution is based are unconstitutional.

[1] The information charges the defendant with the "crime of violation of the State Narcotic Act," and alleges that defendant, "with intent then and there to obtain narcotic drugs, did wilfully, unlawfully, fraudulently and feloniously make, forge and counterfeit a certain prescription and order in writing for the delivery of narcotics, and did then and there utter, publish and pass the same, knowing said prescription to be false, forged and counterfeited, as aforesaid, with intent then and there to obtain narcotic drugs as aforesaid," and then sets out in hæc verba a physician's prescription for "H M C No. 1 Tablets No. XX." Appellant relies basically upon the failure of the pleading to set forth that the drug called for by the forged prescription was one of those enumerated in section 8 of the Poison Act. The information quite evidently was intended to charge a violation, not of the general forgery law, section 470 of the Penal Code, but of section 7 of the Poison Act, which makes it a felony to forge a prescription "for any narcotic drugs specified in section 8 of this act or who obtains any such drugs by any forged or altered prescription. * * *"

[2] The sufficiency of an indictment or information is not to be tested by the rule of the common law nor by the rules which existed prior to the amendments of 1927 and 1929 of our statutes relating to pleading in criminal cases. The true rule can be deter-

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*Rehearing denied, 6 P.(2d) 970.

mined only by a consideration of all of the statutes affecting the subject as they exist since those amendments. The purpose of an indictment or information is to inform the accused of the charge which he must meet at the trial. At common law, where this information came solely from the indictment, much particularity was required. Thus, in charging murder, it was necessary to charge the manner in which the murder was committed and the means used, but, long before the present form of pleading, our Supreme Court, in People v. King, 27 Cal. 510, 87 Am. Dec. 95, said: "If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense." As a part of the accusatory procedure, the law now provides that in every case the accused is entitled to a copy of the testimony given before the grand jury or the committing magistrate, as the case may be (sections 870, 925, Pen. Code), and he is today better informed as to the case he must meet than was an accused under the detailed form of pleading required at common law. By section 959 of the Penal Code as amended in 1927 (St. 1927, p. 1041), we have the statutory provision that an information is sufficient if it can be understood therefrom that it is entitled in a court having authority to receive it, that the defendant is named, or, if his name is not known and that fact is pleaded, he may be charged by a fictitious name, that the offense is one of which the court has jurisdiction, and that the offense was committed prior to the filing of the information. The former requirements of subdivisions 6 and 7 of section 959, that the act or omission charged must be clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended and to enable the court to pronounce judgment upon conviction, were repealed by the 1927 amendment and are no longer a part of that section. In so far as section 950 of the Penal Code seems to conflict with the rule laid down by section 959 as amended, the latter section must control in view of the evident intent of the Legislature to remove the former requirements of subdivisions 6 and 7 by their repeal. Section 952, which formerly required the pleading to set forth the particular circumstances of the offense charged, as amended, declares that it shall be sufficient if it be "in any words sufficient to give the accused notice of the offense of which he is accused." There, in a nutshell, is stated the principle of our present simplified form of pleading a criminal offense—the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, such details being furnished him by the transcript of the testimony upon which the indictment or information is founded.

[3] Illustrating the foregoing principle, we find that an allegation that the defendant "did wilfully and unlawfully take, steal and carry away the property of J. B. Dalby consisting of five head of cattle, of the value of two hundred twenty dollars" is sufficient to charge that form of the crime of theft which is the obtaining of property by false pretenses, an offense which before the 1927 amendments could not be properly charged in less than several hundred words. People v. Plum, 88 Cal. App. 575, 263 P. 862, 265 P. 322; People v. Maddux, 102 Cal. App. 169, 282 P. 996; see, also, People v. Manchell, 91 Cal. App. 788, 267 P. 718; People v. Wickersham, 98 Cal. App. 502, 277 P. 121. Section 952 must also be read in connection with section 951 of the Penal Code, providing for the form of an indictment, wherein is given, as an example of the statement of the act or omission charged, the form "murdered C. D." The authorities support an indictment or information charging murder in this simplified form (People v. Magsaysay, 210 Cal. 301, 291 P. 582), and also sustain a charge of robbery in the words "robbed B" of certain described property. People v. Fallai, 99 Cal. App. 297, 278 P. 449; People v. Sampsell, 104 Cal. App. 431, 286 P. 434; People v. Summers, 107 Cal. App. 250, 290 P. 464. As stated in People v. Plum, 88 Cal. App. 575, 587, 263 P. 862, 265 P. 322, 323, when a defendant has been furnished with a transcript of the testimony upon which the pleading is based, a rule requiring the indictment to state more than is required by sections 951 and 952 would leave "nothing but the most flimsy pretext to support it." By clear analogy an information charging that on a certain date and within the county a defendant violated the State Narcotic Act, to wit, that the defendant "forged" a prescription for narcotics, would be good. The fact that the information here charges more than the law requires will not render the information defective where, as here, the surplusage does not tend to establish a defense or to destroy the effect of an essential averment.

[4] The point that the information fails to charge an intent to defraud is without merit, as the crime defined in section 7 of the Poison Act does not include an intent to defraud as one of the elements of the corpus delicti. The cases cited, involving the charge of forgery under section 470 of the Penal Code, are, therefore, not in point since in forgery the intent to defraud is an element of the crime. Furthermore, these cases were decided prior to the amendments of 1927. While the information before us would have been freed from the attack here made by a specific allegation that the drug covered by the prescription was

a specific drug enumerated in section 8 of the Poison Act, it was sufficient even in the face of the demurrer.

[5, 6] Even where an indictment or information is so defective that a demurrer thereto should have been sustained, still, if upon the trial the crime sought to be charged is fully proved, the case falls within the saving grace of section 4½ of article 6 of the California Constitution, and of section 960 of the Penal Code, relating to errors in matters of pleading, and the error is not prejudicial. People v. Kuder, 93 Cal. App. 42, 55, 269 P. 198, 630; see, also, People v. Bonfanti, 40 Cal. App. 614, 181 P. 80. The plea of guilty of the defendant in the case at bar, admitting that he had violated the Poison Act by forging a prescription for narcotics, of itself removed any claim that defendant was prejudiced and furthermore amounted to a waiver of his former objection by demurrer to the information. See In re Cook, 13 Cal. App. 399, 110 P. 352. Conceding for the purpose of argument only, appellant's contention that an objection to the sufficiency of an information is not waived by a plea of guilty, where a demurrer has been interposed, we call attention to the record which shows that the information as filed charged the defendant with "Forgery" and that the demurrer was filed to this information; that the demurrer was overruled and that then the information was amended by inserting the words "Violation of State Narcotic Act" instead of the word "Forgery" and that the defendant pleaded guilty to the information as thus amended. There was, therefore, no demurrer to the amended information to which defendant pleaded guilty, nor did the defendant make any motion in arrest of judgment, and the case is therefore one in which the defendant pleaded guilty to a charge in an information to the sufficiency of which he had made no objection.

[7] Appellant's final point is that section 8 of the Poison Act is unconstitutional as violative of section 24 of article 4 of the State Constitution, requiring that laws shall be published in no other than the English language, and contends that, while the words "cocaine," "opium," morphine," and "heroin" are commonly recognized, the words describing other drugs in the same paragraph of the statute, viz., "codeine, alpha eucaine, beta eucaine, flowering tops and leaves, extracts, tinctures and other preparations of hemp or loco weed (cannabis sativa) or peyote (anhalonium)," quoted from the statute in the brief, are not in the English language, and the statute is therefore void for uncertainty. Appellant's counsel, with a confidence deserving of a more substantial foundation, asserts that, "Several of the above terms having a Latin derivation cannot be found in the English Dictionary." However, on examination of our nearest available dictionary, Funk & Wagnalls New Standard Dictionary of the English Language (copyright in 1919), we find that it defines "codeine," "eucaine," "alpha" and "beta," "hemp," "cannabis," "loco weed," "peyote," and "anhalonium." The only word included in the quoted list which is not defined is lonely little "sativa." But, as the terms "cannabis sativa" and "anhalonium" are inclosed in brackets in the statute to indicate that they are the synonymous botanical names for the English words immediately preceding them, they are not necessary to the interpretation of the statute, may be treated as surplusage, and cannot affect its validity. We might add that even a 1909 copyright edition of Webster's International Dictionary of the English Language defines all of the quoted words except "sativa," "peyote," and "anhalonium," and here in the Southwest "mescal" or "peyote" is certainly well enough known to be a part of our language even if it be but a mere spineless cactus. While the presence in the dictionary of the words in question disposes of counsel's argument by eliminating his major premise, we do not wish to be understood as holding that only those words which are found in an English dictionary are a part of the English language. When a word, whether coming from a foreign language or coined to meet a particular need of expression, has been used as an English word in speech or writing to such an extent that its meaning has become commonly understood by people dealing with the subject to which it relates, it becomes a part of the English language with the meaning attached to it by such use. Thus, even if the word "codeine" were not in the English dictionary, its use as an English word for more than a quarter of a century by people buying, selling, and using that drug, would make it such. The contention that section 8 of the Poison Act is not certain and definite and is unconstitutional is untenable.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

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119 Cal.App. 107

HIGHLAND SECURITIES CO. et al. v. SUPERIOR COURT IN AND FOR ORANGE COUNTY et al.

Civ. 607.

District Court of Appeal, Fourth District, California.

Dec. 9, 1931.

Rehearing Denied Jan. 6, 1932. Hearing Denied by Supreme Court Feb. 4, 1932.

1. Appeal and error ⚿484.

On appeal from order appointing receiver, supersedeas bond filed by one company would not stay order and suspend receiver's powers as to property of another company.

2. Receivers ⚷81.

Receiver is officer of court and subject to its directions.

3. Receivers ⚷112.

Receiver, served with demand to surrender property in his possession, had right to petition court for direction and advice.

There was no order of court fixing the amount of the stay bond to be given on appeal from order appointing the receiver, and this defect in proceeding of itself was sufficient to justify receiver in seeking advice of court before surrendering assets in his possession to one who had furnished supersedeas bond on such appeal.

4. Receivers ⚷112.

Court which appointed receiver acted within jurisdiction in ordering receiver to deliver to proper owner assets within his possession, after receiver's powers were suspended by stay bond on appeal.

5. Certiorari ⚷34.

Persons demanding return of property from receiver cannot complain because court ordered property delivered to attorney designated by themselves as one to whom delivery might be made.

6. Certiorari ⚷34.

Petitioners for certiorari cannot attack judgment to which they consented and which they procured, even conceding it was erroneous in part.

7. Certiorari ⚷4.

Writ of review will not be granted where there is plain, speedy, adequate remedy at law, such as writ of supersedeas (Code Civ. Proc. §§ 1068, 1103).

Application for certiorari by the Highland Securities Company and another against the Superior Court of California in and for the County of Orange, James L. Allen, Judge, and others, to review and annul an order of the court settling the account of a receiver.

Writ discharged.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Culbert L. Olson and Welburn Mayock, both of Los Angeles, for petitioners.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents Curry, Reinhaus, H. J. Forgy, and Fred Forgy.

MARKS, J.

This is an original proceeding instituted in this court seeking to review and annul an order of the respondent court settling an account made by respondent Curry as receiver, ordering the delivery of assets in his hands to Leonard Evans, fixing the compensation of the receiver and his attorneys, and directing the deduction of the amount of these fees from the assets in the hands of the receiver. The respondent court has not appeared herein by counsel, but, as its return, has presented certified copies of the records and files in the action in which receivership proceedings were had.

In July, 1931, R. R. Carew, one of the respondents here, filed his action in the respondent court against petitioners and a number of others seeking, among other things, judgment against certain of the defendants in the sum of $5,075.83 on a promissory note, the cancellation of a certain contract between himself and certain defendants, an accounting of the affairs of several defendant corporations, and the appointment of a receiver for the petitioners here and the Southern California Company, Limited, a corporation, to preserve their assets during the pendency of the action. On July 21, 1931, the respondent judge made his ex parte order appointing respondent Curry as such receiver. Curry qualified by taking the necessary oath of office and giving a bond in the sum of $25,000 for the faithful performance of his duties, as required by the order appointing him. He entered upon a discharge of his duties and took control of the assets of the three corporations. Subsequently the Southern California Company, Limited, was adjudged a bankrupt by the United States District Court in and for the Southern District of California, and upon the order of the court the receiver delivered such assets of this corporation as he had in his possession to an officer of that court.

The complaint of Carew, and the petition here, alleged that the assets of the two petitioner corporations were intermingled and that the receiver had assets of both corporations under his control. There is nothing in the record to indicate which of the properties belonged to the Highland Securities Company and which to the People's Finance & Thrift Company. The receiver denied that the Highland Securities Company owned any of the assets in his possession.

On September 18, 1931, each of the petitioners here filed separate notices of appeal from the order appointing the receiver. On September 21, 1931, the People's Finance & Thrift Company of Northern Orange County filed its stay bond on appeal with the approval of one of the judges of the respondent court. No order appears in the record before us fixing the amount of this bond. No bond was filed by the Highland Securities Company.

In the proceeding in the court below Culbert L. Olson appeared as attorney for the Highland Securities Company and Leonard Evans as attorney for the People's Finance & Thrift Company, except that in the demand next mentioned Welburn Mayock joined with Mr. Evans as attorney for the latter company. On September 21, 1931, the People's Finance & Thrift Company, by its attorneys, and Highland Securities Company, Limited, by Culbert L. Olson, its attorney, served the following demand upon the receiver, and Forgy, Reinhaus & Forgy, his attorneys:

"Whereas, the court did on the 21st day of July, 1931, make its order in the above entitled action wherein you were appointed Receiver for the defendant People's Finance & Thrift Company of Northern Orange County, and under said appointment took into your possession and are now holding all assets and property of the said People's Finance & Thrift Company of Northern Orange County; and, certain assets of Highland Securities Corp., Ltd., and,

"Whereas, an appeal has been taken from said order appointing you as such receiver, and defendant People's Finance & Thrift Company of Northern Orange County has filed the necessary bond as provided in section 943 of the Code of Civil Procedure staying the excution of your order of appointment in a sum fixed by the Court, and the execution of the order of appointment being, therefore, stayed by operation of law; and,

"Whereas, the filing of said undertaking, which has been approved by the Court, operates as a supersedeas and suspends all authority given to you under said order appointing you as Receiver, and withdraws from you the right to the control and possession of the property and assets now in your possession and under your control as property and assets of said People's Finance & Thrift Company of Northern Orange County, and restores the same to the party or parties from whom the same was taken.

"Demand is hereby made upon you by said People's Finance & Thrift Company of Northern Orange County and by Highland Securities Corporation, Ltd., that you immediately deliver over to Leonard Evans or Welburn Mayock, attorneys for said People's Finance & Thrift Company of Northern Orange County, all property and assets of whatsoever nature taken over by you as such receiver and now in your possession, or under your control."

On September 23, 1931, the receiver filed in the respondent court his petition for advice and permission to deliver the assets in his possession to petitioners, his accounts as such receiver, and a request that the court fix his compensation and that of his attorneys. By stipulation of counsel this report, petition, and account were heard the following day and resulted in the trial court making an order in which the following parts are material: "Now, therefore said Byron V. Curry, the said receiver, is hereby ordered and directed to release and restore and deliver possession of all property and assets taken into his possession or under his control as such receiver unto Leonard Evans, attorney for said The People's Finance & Thrift Company of Northern Orange County, defendant herein, and having accounted to this court regarding all property received into his possession and under his control, and his account having been this day approved by the Court, and the Court having fixed as a charge against the said property and assets, compensation of said receiver at $1250.00, and for his attorneys, Forgy, Reinhaus & Forgy, $350.00; Now, therefore, said receiver is ordered and directed to release and restore and deliver possession of all property and assets taken into his possession or under his control as such receiver and as shown by his said account filed herein after deducting from the cash so held by him as such receiver the sum of $1250.00 as receiver's compensation, and after paying the additional sum of $350.00 to Forgy, Reinhaus & Forgy, as attorney's fees of said receiver allowed herein. And it is further ordered that the receipt of the said Leonard Evans as such attorney for the said People's Finance & Thrift Company of Northern Orange County shall be sufficient acquittance and discharge of said receiver."

On the same day the receiver delivered the property to Leonard Evans as attorney for the People's Finance & Thrift Company, who gave him the following receipt: "Received of Byron V. Curry as receiver appointed by the Court in the above entitled matter, the sum of $10,977.95 evidenced by checks on the receiver's accounts, and in addition thereto physical assets which are mentioned and referred to in the receiver's report and account filed herein, which are listed in books of account and other lists delivered to the undersigned by said receiver."

A number of interesting questions are presented in this proceeding, some of which do not seem to have been definitely decided by the courts of California.

It is the contention of petitioners that the filing of the supersedeas bond effectually stayed the proceedings in the court below and that it had no jurisdiction to enter the order made by it on September 24, 1931.

[1] The first question presenting itself is whether or not the supersedeas bond of the People's Finance & Thrift Company stayed the order appointing the receiver and suspended his powers in so far as the property of the Highland Securities Company was concerned. This company having failed to file any bond on appeal, the following authorities require us to answer this question in the negative: Zane v. De Onativia, 135 Cal. 440, 67 P. 685; Halsted v. First Savings Bank, 173 Cal. 605, 160 P. 1075; Bolles v. Hilton & Paley, 101 Cal. App. 92, 281 P. 73. As we have remarked before, we cannot determine what

portion, if any, of the assets in the hands of the receiver belonged to the Highland Securities Company and what portion belonged to the People's Finance & Thrift Company. Even though we should agree with the contention of the People's Finance & Thrift Company that their stay bond on appeal suspended the jurisdiction of the court over the receivership proceedings against this corporation, we would be unable to determine what portion of the assets formerly held by the receiver belonged to this corporation to be returned, and what portion, if any, belonged to the Highland Securities Company to be retained by the receiver.

[2] It has been repeatedly held that a receiver is an officer of the court and subject to its direction. In the case of Meili v. Crane, 102 Cal. App. 144, 282 P. 960, 961, the court, quoting from the case of Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 S. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155, clearly defined the relation of a receiver to the court and the parties litigant as follows: " 'Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. In Booth v. Clark, 17 How. (U. S.) 322, 331, 15 L. Ed. 164, 167; see, also, Rose's U. S. Notes, it was said: "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. Wyatt, Practical Reg. 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan (Ir.) 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 452." In Porter v. Sabin, 149 U. S. 473, 479, 37 L. Ed. 815, 818, 13 S. Ct. 1008, 1010; see, also, Rose's U. S. Notes, the court said: "When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it." ' "

In the case of Baughman v. Superior Court, 72 Cal. 572, 14 P. 207, 208, the Supreme Court had under consideration the duties of the court and the receiver where the receivership had been terminated by final judgment, and said: "Where a bill upon which the appointment of a receiver is made is afterwards dismissed on demurrer, the duties of the receiver cease, as between the parties to the action. And so, where the defendant finally obtains judgment, the entry of judgment would seem to have the effect of terminating the receiver's functions, although plaintiff perfects his appeal to the appellate court. But the abatement of the action, or entry of final judgment, does not discharge the receiver ipso facto. Although, as between the parties, his functions terminate with the determination of the suit, he is still amenable to the court as its officer until he has complied with its direction as to the disposition of the funds he has received as receiver. And when the bill is dismissed on demurrer it is the plain duty of the court to direct the receiver to restore the fund or property to the person from whom it was taken. High, Rec. 833; Field v. Jones, 11 Ga. 413; Beverley v. Brooke, 4 Grat. [45 Va.] 220; Ireland v. Nichols [40 How. Prac. 85, 9 Abb. Prac. (N. S.) 71] supra. It would seem that where the decree, in terms, provided that one of the parties should take certain property from the receiver, the late receiver did not hold the property after decree as receiver, but as trustee of the party, although there had been no formal order of discharge. Very v. Watkins, 23 How. 475 [16 L. Ed. 522]. It has been said a receiver will be 'discharged' by a decree in the cause in which he is appointed, unless he is expressly continued. Daniell, Ch. Pr. 1601. But the discharge spoken of evidently refers to the surcease of his functions as receiver proper, leaving on him the duty of properly accounting under the order of the court. But whether, when his office is not expressly continued by decree, he should afterwards be called receiver or not, he is subject to the orders of the court with respect to the winding up of his affairs as receiver,—as to accounting and application of funds. In these respects he continues liable until he is discharged of his responsibilities as trustee, and we see no impropriety in his being designated 'receiver' up to the date of such discharge." The cases of Pacific Bank v. Madera Fruit & Land Co., 124 Cal. 525, 57 P. 462; Ephraim v. Pacific Bank, 136 Cal. 646, 69 P. 436, and Havemeyer v. Superior Court, 84 Cal. 327, at page 382, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, further illustrate the rule laid down in the last quotation.

[3, 4] Certainly the receiver upon being served with the demand to surrender the property in his possession to petitioners had a right to petition the respondent court for direction and advice. There was no order of

court fixing the amount of the stay bond to be given by the petitioners or either of them on appeal. This defect in the proceeding of itself was sufficient to justify the receiver in seeking the advice of the court before surrendering the assets in his possession. The court was acting within its jurisdiction in ordering the receiver to deliver to the proper owner assets within his possession belonging to it after his powers had been suspended by the giving of a good and sufficient stay bond on appeal. Jacobs v. Superior Court, 133 Cal. 364, 65 P. 826, 85 Am. St. Rep. 204.

[5] Petitioners cannot complain because the court ordered the property delivered to Leonard Evans, the attorney for the People's Finance & Thrift Company. In their demand for the return of this property which we have quoted, Mr. Evans was designated as one of the parties to whom delivery might be made. A corporation can only act by its officers or agents. We see no reason why the corporations could not designate one of the attorneys as the agent to receive this property and receipt for it. In any event the petitioners, having specifically requested that this procedure be followed, cannot complain because the respondent court granted their request.

[6] We may concede that the contention of petitioners that the balance of the order of the trial court, and particularly that portion fixing the compensation of the receiver and his attorneys and directing that the amounts be paid out of the properties of the petitioners, was erroneous. Ephraim v. Pacific Bank, supra; West Riverside, etc., Co. v. Rogers, 16 Cal. App. 262, 116 P. 683; Grant v. Los Angeles & Pacific Ry. Co., 116 Cal. 71, 47 P. 872; Lewis v. Hall, 38 Cal. App. 329, 176 P. 171. However, such a concession on our part does not result in our being required to issue the writ sought by the petitioners.

The record before us discloses that as soon as the receiver was served with the demand to deliver the property in his possession to the petitioners (September 21, 1931), he immediately communicated with his attorneys and proceeded to prepare the report and account which was filed two days later. The account is voluminous and covers his actions as receiver for a period of two months. The receipts and expenditures alone contain more than five hundred separate items. Attorneys for petitioners stipulated that the petition and account might be heard on the following day after its filing. They were present in court, and the record fails to disclose the slightest objection from them to the court's proceeding with the hearing. The record further discloses that after the hearing, Culbert L. Olson and Stanley Reinhaus collaborated in preparing the order of which petitioners now complain. After its preparation Mr. Olson and Leonard Evans took the order to the respondent judge and secured his signature thereto. Mr. Olson is now one of the attorneys for the petitioners who are seeking to have this court annul the very order which he assisted in preparing and to which he with Mr. Evans secured the signature of the respondent judge. These facts indicate that the order complained of was rendered by the trial court not only with the consent of the attorneys for petitioners, but was secured by their active co-operation and upon their request. Under these circumstances the petitioners cannot attack a judgment to which they consented and which they procured. 14 Cal. Jur. 878, and cases cited. Mr. Evans is not before this court as one of the attorneys seeking to have this order annulled.

[7] In the case of McAneny v. Superior Court, 150 Cal. 6, 87 P. 1020, 1021, the Supreme Court had under consideration the granting of a writ of prohibition to prevent further proceedings in the respondent court, after an appeal had been taken and a stay bond given in an action in which a receiver had been appointed. The court said: "A writ of prohibition will not be issued where there is a plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1103. We have already seen that the proceeding to appoint a receiver was a step toward the enforcement of the alimony order appealed from, and that the effect of the stay bond on the appeal was to stay all proceedings on the order, or in the enforcement thereof. The petitioner has, therefore, a speedy and adequate remedy by means of a motion in this court in the matter of the appeal for a writ of supersedeas to stay the hand of the court below in any proceeding to enforce the order, whether judicial or ministerial. * * * In the case of State I. & I. Co. v. Superior Court, 101 Cal. 150, 35 P. 549, and in other cases where prohibition has been entertained at the instance of a party to the appeal, the existence of the remedy by writ of supersedeas does not appear to have been called to the attention of the court, and the effect of such remedy has not been discussed in the opinion. * * * Another objection to the sufficiency of the case made by the petitioner is that it does not appear that the objection to the jurisdiction of the court was ever brought to the attention of the superior court and an opportunity given to that court to recede from its position, a step which is usually a condition precedent to the right to a writ of prohibition in this court."

The cases of Rogers v. Superior Court, 158 Cal. 467, 111 P. 357; Daly v. Ruddell, 129 Cal. 300, 61 P. 1080; Welch v. Reese, 82 Cal. App. 27, 255 P. 250, and Bolles v. Hilton & Paley, supra, support the rule announced in the McAneny Case. We can see no difference in the principles governing the issuance of a writ of prohibition and a writ of review in cases of this kind. It is very generally held that under the provisions of sections 1068 and

1103 of the Code of Civil Procedure neither writs will be granted where there is a plain, speedy, and adequate remedy at law. The right to apply for a writ of supersedeas furnishes such a remedy here.

The writ of review is discharged.

We concur: BARNARD, P. J.; JENNINGS, J.

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115 Cal.App.(Supp.) 782

ALVARADO v. DAVIS et al.

Civ. A. 558.

Appellate Department, Superior Court, Los Angeles County, California.

May 22, 1931.

1. Mechanics' liens 🔑8.

Failure to comply with act relating to registration and licensing of contractors barred original contractor's recovery upon mechanic's lien (St. 1929, p. 1591).

2. Licenses 🔑11(5).

Statute relating to registration and licensing of contractors, although not requiring examination, has object of protecting public against fraudulent and illegal practices (St. 1929, p. 1591).

Appeal from Municipal Court of Los Angeles; Georgia P. Bullock, Judge.

Action for foreclosure of a mechanic's lien by J. P. Alvarado against Marie L. Davis and others. From the judgment of the municipal court of Los Angeles, named defendant appeals.

Reversed.

Plaintiff had judgment in the court below for the sum of $150, principal sum, $9.22 as interest, and the sum of $1.50 for recording a mechanic's lien, and for the foreclosure of the mechanic's lien claimed by him upon property of the defendant Marie L. Davis situated in the city of Los Angeles. The record shows that on October 29, 1929, plaintiff and defendant entered into a written contract whereby the plaintiff, as a contractor, agreed to construct for the defendant a three-room stucco house and to remodel a garage on the real property mentioned. The work was completed by the plaintiff, and he received from the defendant, on account, the sum of $643. There were also extras amounting to $30. No notice of completion was filed. On May 16, 1930, plaintiff duly filed his claim of lien. The court below gave judgment in the amount first stated, and ordered the lien foreclosed. It is the contention of the defendant that the lien was not filed in time.

Henry E. Holbrook, Jr., of Los Angeles, for appellant.

Harry A. Goldman, of Los Angeles, for respondent.

YANKWICK, Judge pro tem.

The lien is claimed here by one who is an original contractor. The premises were occupied on December 14, 1929. The lien was filed May 16, 1930. The only work performed after occupancy was the painting of two air vents under the house, "which was part of the contract."

[1, 2] We need not decide whether the lien was timely, because the failure to comply with the act relating to the registration and licensing of contractors (Statutes of 1929, chapter 791, p. 1591) bars recovery. The act is intended for the protection of the public. Control over the contractor is given to the director of professional and vocational standards through the power to revoke licenses for fraudulent and illegal practices. And, while an examination is not made a condition precedent to the granting of a license, the entire object of the statute is that protection of the public against fraudulent and illegal practices which has always been recognized as a distinctive characteristic of statutes which are not mere revenue measures. Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825, 12 L. R. A., N. S., 575, 11 Ann. Cas. 661; Payne v. De Vaughn, 77 Cal. App. 399, 403, 246 P. 1069; Van Wyke v. Burrows, 98 Cal. App. 419, 277 P. 190. A similar local statute has been so interpreted in Draper v. Miller, 92 Kan. 275, 140 P. 890 (cited with approval in Payne v. De Vaughn, supra).

The judgment is reversed, with costs of appeal to the appellant.

I concur: SHAW, J.

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120 Cal.App.(Supp.) 775

BLAKE, MOFFITT & TOWNE v. LUCKENBACH S. S. CO., Inc.

No. 102.

Appellate Department, Superior Court, City and County of San Francisco, California.

Nov. 12, 1931.

1. Shipping 🔑136.

Action for damage to goods shipped on intercoastal steamship is governed by maritime law as relaxed by Harter Act (46 USCA §§ 190–195).

2. Shipping 🔑121(1).

Prior to Harter Act, subject to limitations by contract, there was a warranty by shipowner that ship was seaworthy at beginning of voyage.

3. Shipping 🔑136.

Purpose of Harter Act was to relieve stringency of maritime law, and distinguish between risks to be guarded against by insurance and those for which vessel or owner is liable (46 USCA §§ 190–195).

4. Shipping 🔑132(3).

Proof of receipt by intercoastal steamship of goods in good, and delivery in damaged, condition, raises presumption of unseaworthiness at beginning of voyage (46 USCA §§ 190–195).

5. Shipping 🔑132(3).

Where presumption of unseaworthiness at beginning of voyage exists, burden shifts to owner to show that damage to goods resulted from peril exempted by contract or statute (Harter Act [46 USCA §§ 190–195]).

6. Shipping 🔑132(3).

To get benefit of Harter Act, owner must prove due inspection and that ship was in all respects seaworthy at beginning of voyage or that due diligence to that end had been used (46 USCA §§ 190–195).

7. Shipping 🔑137.

Diligence required of owner is diligence in making vessel in fact seaworthy and not merely in procuring a certificate of seaworthiness (Harter Act [46 USCA §§ 190–195]).

8. Shipping 🔑137.

That sounding pipe was inclosed did not lessen obligation to remove sufficient portion of casing for thorough test and inspection to assure beginning voyage with thoroughly seaworthy ship (Harter Act [46 USCA §§ 190–195]).

9. Shipping 🔑137.

Ineffectual practice furnishes no excuse for omission to use all reasonable precautions to assure beginning voyage with thoroughly seaworthy ship (Harter Act [46 USCA §§ 190–195]).

10. Shipping 🔑137.

Undertaking as to seaworthiness is not discharged when want of fitness results from laches or latent defect discoverable by due diligence (Harter Act [46 USCA §§ 190–195]).

11. Shipping 🔑132(3).

Under Harter Act, if failure to use reasonable tests is left in doubt, it must be resolved against shipowner (46 USCA §§ 190–195).

12. Shipping 🔑132(3).

Shipowner's obligation as carrier approaches responsibility of insurer, and, damage occurring, burden is on owner to exculpate himself.

13. Shipping 🔑121(1).

In making inspection, owner is not justified in relying on external appearances in place of known tests.

14. Shipping 🔑121(1).

In making inspection of ship, requirement of due diligence by owner is not satisfied by mere selection of competent inspectors.

15. Shipping 🔑121(1).

If, instead of making careful examinations and tests, owner relies on external appearances of ship or superficial survey, he assumes responsibility for what diligent inspection would reveal.

16. Shipping 🔑137.

Purpose of Harter Act is to relieve shipowner of liability for only latent defects not discoverable by utmost care and diligence (46 USCA §§ 190–195).

17. Shipping 🔑141(3).

To constitute a "peril of the sea," the weather, wind, or seas must be catastrophic or of such irresistible force as to be beyond ordinary exertions of human care and skill to guard against.

[Ed. Note.—For other definitions of "Perils of the Sea," see Words and Phrases.]

18. Shipping 🔑137.

Shipowner is liable for damages occurring in violent storm, if due diligence was not used to make ship seaworthy at beginning of voyage (Harter Act [46 USCA §§ 190–195]).

19. Shipping 🔑132(3).

Shipowner *held* to have failed to sustain burden to prove due diligence in inspection of sounding pipe to make ship seaworthy at beginning of voyage, and hence liable to owner for damage to goods (Harter Act [46 USCA §§ 190–195]).

> Damage to goods was caused by break in sounding pipe which connected with fuel oil tank. No part of casing around pipe was removed, neither was there any test of the soundness before beginning of voyage. The cause of the break was a matter of conjecture.

Appeal from Municipal Court of City and County of San Francisco; Thomas F. Prendergast, Judge.

Action by Blake, Moffitt, and Towne against the Luckenbach Steamship Company, Inc. From a judgment for defendant, plaintiffs appeal.

Reversed and remanded, with directions.

Derby, Sharp, Quinby & Tweedt, of San Francisco, for appellant.

Andros, Hengstler & Dorr, of San Francisco, for respondent.

JOHNSON, P. J.

This is an appeal by plaintiff from a judgment rendered against it in the municipal court.

The action is one growing out of damage to a quantity of pulp-board dishes belonging to plaintiff, which were shipped in June, 1929, from New York to Los Angeles on board the steamship K. I. Luckenbach, owned and operated by the defendant. The damage was caused by leakage of fuel oil taken aboard after the vessel reached San Pedro. The leakage was due to a break in a galvanized iron sounding pipe which connected with a fuel tank located in the stern of the ship and called the afterpeak tank. This sounding pipe served as an aid in determining the level to which the oil fell as used. The pipe ran vertically from the upper deck to the bottom of the tank, passing through the hold where the dishes were stored, and was screwed into a flat flange bolted to the deck. Above the deck the sounding pipe, together with another pipe and a valve rod, was inclosed in a wooden casing except for an open space of about an inch close to the deck.

The steamship was engaged in intercoastal trade between the Pacific Coast and North Atlantic ports via the Panama Canal. She started her westward voyage in June, 1929, from Boston, stopping on the way at New York to take cargo, including the goods of plaintiff. On her arrival at San Pedro on July 14, the afterpeak tank was there filled with a new supply of oil; and about two hours later leakage through the break in the sounding pipe was discovered, as a result of which plaintiff's goods were damaged in part.

[1-3] The case is governed by the maritime law as relaxed by the so-called Harter Act adopted February 13, 1893 (27 Stat. 445, 46 USCA §§ 190–195). Prior to the Harter Act, except for limitations in some particulars by special contract, there was a warranty on the part of the shipowner that his ship was seaworthy at the beginning of the voyage. The purpose of the Harter Act was to relieve the stringency of this rule. The law is framed so as to distinguish between the risks to be guarded against by insurance and those for which redress may be had from the vessel or its owners. While the statute lays upon the shipowner the absolute obligation to use due diligence to make his vessel seaworthy and capable of performing her intended voyage, it provides that, if due diligence is used to make the vessel in all respects seaworthy at the beginning of the voyage, then neither the vessel nor the owner shall be liable for losses arising from faults in navigation or management of the vessel or from perils of the sea and certain other causes.

[4, 5] The fundamental question in this case is, then, whether due diligence was used to make the vessel in all respects seaworthy before she left Boston on her voyage to the Pacific Coast. A prima facie case was made out by plaintiff by showing receipt of the merchandise by defendant in good order and condition at New York, and delivery at destination in damaged condition. The Folmina, 212 U. S. 354, 361, 29 S. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; The Rosalia (C. C. A.) 264 F. 285, 288.

Such damage raised a presumption of unseaworthiness at the beginning of the voyage, and the burden was then cast upon the defendant to show affirmatively that due diligence was used to make the vessel in all respects seaworthy, and that the damage was proximately caused by a peril from the consequences of which defendant was exonerated by the provisions of the bill of lading and the federal statute. The Medea (C. C. A.) 179 F. 781, 784–786.

In other words, the shipowner's defense is brought under the evidentiary rule applied when the principle of res ipsa loquitur is invoked. The Josephine (D. C.) 37 F.(2d) 928, 930.

[6] There is no presumption in behalf of the shipowner that he fulfilled the condition precedent on which exemption in his favor depends. In order to have the benefit of the immunity afforded by the Harter Act, he is bound to make proof that due inspection was had, and that the ship was in all respects seaworthy at the beginning of the voyage or at least that due diligence to that end had been used. The Wildcroft, 201 U. S. 378, 386–387, 26 S. Ct. 467, 50 L. Ed. 794; The Southwark, 191 U. S. 1, 13–14, 24 S. Ct. 1, 48 L. Ed. 65; International Nav. Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218, 225, 21 S. Ct. 591, 45 L. Ed. 830; Compagnie Maritime Francaise v. Meyer (C. C. A.) 248 F. 881, 884; Pac. Coast S. S. Co. v. Bancroft (C. C. A.) 94 F. 180, 196.

In an effort to sustain the burden of proof imposed upon it, the defendant undertook to show that due diligence was used to make the vessel entirely seaworthy before it left Boston, and ascribed the break in the sounding pipe either to a peril of the sea or to a latent defect not discoverable by the exercise of due diligence.

The primary question thus presented on this appeal is whether the burden of proof was met by defendant by showing that the steps followed to assure complete seaworthiness were such as to constitute due diligence.

The evidence shows that the pipe, being inclosed in a wooden casing, was invisible from the deck, except at an open space of about an inch where the pipe passed through the deck into the hold. The only inspection of the pipe at Boston was a scant visual inspection, made by use of a flashlight directed through that small opening in the casing close to the flange into which the pipe was screwed. Such inspection was made together by the chief officer and the chief engineer.

[7] Later the chief officer accompanied United States local inspectors on their annual inspection of the ship; but it does not appear that anything more than a casual inspection of the sounding pipe was made then. At that time there was no leakage into the hold; and, while it is said that the tank was under pressure, the evidence is silent as to whether the pressure was equivalent to that created when the tank was filled at San Pedro. The diligence required is diligence in making the vessel in fact seaworthy and not merely in procuring a certificate of seaworthiness. The Abbazia (D. C.) 127 F. 495, 496; Compagnie Maritime Francaise v. Meyer (C. C. A.) 248 F. 881, 885.

[8] At no time was any attempt made to remove any part of the casing at Boston or to subject the pipe to any real test of soundness. The examination made of the sounding pipe appears to have been of a casual or perfunctory character; and the fact that the pipe was inclosed did not lessen the obligation to remove at least a sufficient portion of the casing for a thorough test and inspection, and facilities for that purpose should have been provided. The Elkton (D. C.) 35 F.(2d) 49, 52; W. R. Grace & Co. v. Panama R. Co. (C. C. A.) 285 F. 718, 722; The Rappahannock (C. C. A.) 184 F. 291, 293; The Alvena (C. C. A.) 79 F. 973, 975.

[9] The officers may have pursued their habitual mode of inspection; but an ineffectual practice furnishes no excuse for omission to use all reasonable precautions to assure beginning the voyage with a thoroughly seaworthy ship. The Edwin I. Morrison, 153 U. S. 199, 215, 14 S. Ct. 823, 38 L. Ed. 688; The Tenedos (D. C.) 137 F. 443, 447, affirmed (C. C. A.) 151 F. 1022.

If facilities for a true test had been provided, an inspection meeting the requirements of the Harter Act could then have been had. The Alvena (C. C. A.) 79 F. 973, 975.

[10] The undertaking as to seaworthiness is not discharged when want of fitness is the result either of laches or of a latent defect discoverable by use of due diligence. The Irrawaddy, 171 U. S. 187, 190, 18 S. Ct. 831, 43 L. Ed. 130.

[11] The Harter Act contemplates more than casual inspection. The Agwimoon (D. C.) 24 F.(2d) 864, 866, affirmed (C. C. A.) 31 F. (2d) 1006. And, if failure to use reasonable tests is left in doubt, the doubt must be resolved against the shipowner. The Folmina, 212 U. S. 354, 363, 29 S. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; The Southwark, 191 U. S. 1, 16, 24 S. Ct. 1, 48 L. Ed. 65; The Medea (C. C. A.) 179 F. 781, 791; The Rosalia (C. C. A.) 264 F. 285, 288; The Lassell (D. C.) 53 F. (2d) 687, 1925 A. M. C. 1066, 1069.

[12] A shipowner's obligation as a carrier approaches the responsibility of an insurer; and, damage occurring, it follows that an inference of unseaworthiness is justified, until and unless the carrier shows that the damage complained of was due to a peril of the sea or some cause other than unseaworthiness of his vessel. The Josephine (D. C.) 37 F.(2d) 928, 930–931.

[13, 14] In making inspection, the owner is not justified in relying on mere external appearances in place of known tests, nor is the requirement of due diligence satisfied by mere selection of competent inspectors. Nord-Deutscher Lloyd v. President, etc., of Ins. Co. (C. C. A.) 110 F. 420, 425; The Leerdam (C. C. A.) 17 F.(2d) 586, 587; Navigazione Libera Triestina v. Garcia & Maggini Co. (C. C. A.) 30 F.(2d) 62, 64.

[15] If, instead of making careful examinations and tests, the owner is satisfied to rely on external appearances or on a superficial survey, he assumes the responsibility for such defects as may exist and which a diligent inspection would reveal. Warner Sugar Ref. Co. v. Munson S. S. Line (D. C.) 23 F.(2d) 194, 197; The Southwark, 191 U. S. 1, 16, 24 S. Ct. 1, 48 L. Ed. 65.

As regards the sounding pipe in this case, due diligence would seem, under the general current of authority, to have made a hammer test, or something equivalent to it, imperative. The Edwin I. Morrison, 153 U. S. 199, 213, 14 S. Ct. 823, 38 L. Ed. 688; The H. A. Rock (D. C.) 23 F.(2d) 198, 200; The Charlton Hall (D. C.) 285 F. 640, 641; The Rappahannock (C. C. A.) 184 F. 291, 293–294; Compagnie Maritime Francaise v. Meyer (C. C. A.) 248 F. 881, 885.

The cause of the break is really left to conjecture. It occurred close to the top of the flange fastened to the deck, and was a clean new break. It does not appear from the evidence what the serviceable age of the pipe was, how long it had been in use, or to what extent, if at all, it had previously been tested. As is said in The Rappahannock (C. C. A.) 184 F. 291, 294, "nothing in use will wear forever, and as time goes on every appliance of this sort draws near the end of its life."

[16] Even if the defect was latent, it was nevertheless the duty of the shipowner to use

due diligence to discover it. For, even when such defects exist in an appliance, it is the purpose of the Harter Act (46 USCA §§ 190–195) to relieve the shipowner of liability for only those latent defects which are not discoverable by the utmost care and diligence. The Irrawaddy, 171 U. S. 187, 192, 18 S. Ct. 831, 43 L. Ed. 130.

And conjecture as to the existence of a latent defect will not be permitted to take the place of proof. The Folmina, 212 U. S. 354, 363, 29 S. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748; The Edwin I. Morrison, 153 U. S. 199, 212, 14 S. Ct. 823, 38 L. Ed. 688; Navigazione Libera Triestina v. Garcia & Maggini (C. C. A.) 30 F.(2d) 62, 64.

[17] There is testimony that in the Caribbean Sea the vessel encountered heavy weather for a couple of days, and that the ship rolled and twisted about. The chief officer expressed the opinion that damage was done to the pipe in such twisting. But the weather described was not such as to create a peril of the sea as understood in admiralty law, nor was any damage done to the casing or to the other appliances inclosed therein. To constitute a peril of the sea, the weather, wind, or seas must be catastrophic or of such irresistible force or overwhelming power as to be beyond the ordinary exertions of human care and skill to guard against. The Giulia (C. C. A.) 218 F. 744, 746; The Arakan (D. C.) 11 F.(2d) 791–792.

Mere twisting of the ship in heavy weather, whereby an incipient crack is caused to open, is not classed as a peril of the sea. The Rappahannock (C. C. A.) 184 F. 291, 294–295. And, as was said by Judge Hough in The Rosalia (C. C. A.) 264 F. 285, 288, the peril must be "something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety."

[18] Moreover, even if damage occurs in a storm of violent intensity, the shipowner is not exempt from liability, if due diligence is not shown to have been used to make the vessel thoroughly seaworthy at the beginning of the voyage. Atlantic Transport Co. v. Rosenberg Bros. & Co. (C. C. A.) 34 F.(2d) 843, 845.

In reference to the adequacy of the inspection made at Boston, the defendant relies particularly on the case of E. I. Dupont de Nemours & Co. v. American Hawaiian S. S. Co. (D. C.) 41 F.(2d) 226. There, on arrival of the defendant's ship, at San Pedro, after a voyage from Boston, a certain oil tank was refilled, with the result that oil leaking through a large rivet hole caused damage to cargo belonging to the plaintiff.

The court held that a visual examination of the tank at Boston, in connection with other facts, constituted due diligence on the part of the shipowner. But in that case there was a sump at each end of the tank into which any leakage would drain; and planks over the tank top and at the sumps were taken up, and examination was made for signs of leakage. No traces of leakage were found, however, though the tank was full of oil at the time. Moreover, on the eastward trip through the Panama Canal, the oil taken into the tank at San Pedro before sailing had been subjected to sufficient expansion by heat to search out an opening of the size of a large rivet hole; yet no leakage had occurred on that voyage. There was also evidence that "a rivet may pop out at any time." It was only because of these accompanying facts that the court concluded that due diligence was used to secure seaworthiness of the vessel when she left Boston.

There is not a comparable situation in the case before us; and, in relying on a casual examination without making any adequate tests of the sounding pipe, the defendant took the risk of being unable to prove satisfactorily its soundness. As was said in The Edwin I. Morrison, 153 U. S. 199, 215, 14 S. Ct. 823, 38 L. Ed. 688, mere conjecture as to the cause of the break cannot relax the important and salutary rule in respect of seaworthiness.

[19] From the record, we think that it must be said as a matter of law that the diligence required to secure the benefits contemplated by the Harter Act was not exercised, and that accordingly defendant is not exempt from liability in this action.

The damage sustained by plaintiff is shown by the evidence to have amounted to $201.56.

The judgment is reversed and the cause remanded to the municipal court, with directions to vacate the judgment entered, and in lieu thereof to enter judgment in favor of plaintiff against defendant for $201.56, together with the taxable costs paid or incurred by plaintiff in the trial court and the costs of plaintiff on this appeal.

We concur: GOODELL and CONLAN, JJ.

214 Cal. 468

UNITED STATES FIDELITY & GUARANTY CO. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 14346.

Supreme Court of California.
Dec. 23, 1931.

Rehearing Denied Jan. 21, 1932.

1. Judgment 🔑641.

Issue respecting existence, at time of employee's injury, of insurance policy affording employer compensation coverage, *held* concluded by Industrial Commission's unappealed decision.

2. Judgment 🔑641.

Issues relating to enforcement against insurer of liability for compensation *held* concluded by final determination of Industrial Commission (St. 1917, p. 868, § 55).

3. Courts 🔑472(1).

Action by employer against insurer for breach of contract to keep compensation insurance in force *held* within jurisdiction of Superior Court, notwithstanding Industrial Commission's decision respecting nonexistence of policy was conclusive.

In such case, the mere circumstance that the damage claimed by employer was the exact amount of the compensation awarded to the injured employee did not change the essential nature of the action, which was purely on a claim for damages based on breach of a contract to insure in a controversy affecting only the employer and the insurance carrier, no rights of the employee being involved.

4. Master and servant 🔑397.

Industrial Commission is tribunal of limited jurisdiction, with no powers beyond those conferred by Constitution (Const. art. 20, § 21).

In Bank.

Petition by the United States Fidelity & Guaranty Company for a writ of prohibition prayed to be directed to the Superior Court of the City and County of San Francisco, James G. Conlan, Judge.

Alternative writ discharged, and petition denied.

See, also, 298 P. 63.

George A. Work and Horace W. B. Smith, both of San Francisco, for petitioner.

Edward J. Lynch, of San Francisco, for respondent.

PRESTON, J.

Petition for writ of prohibition to forever restrain respondent court from proceeding with the hereinafter described action.

On April 17, 1929, an employee of Dutton Dredge Company sustained an industrial injury, and in a proceeding before the Industrial Accident Commission, in which both petitioner and said employer were defendants, procured a compensation award against the employer. In said proceeding the defendants filed separate answers presenting the issue of whether petitioner was at the time of said injury the compensation insurance carrier for the employer, and upon this issue the commission found that petitioner was not then the insurance carrier for the employer, and ordered petitioner to be released and discharged from liability. No review of the award was sought, and it became final.

In December, 1929, the employer filed in respondent court against petitioner the action here sought to be arrested. The complaint is in two counts. The first count alleges that in 1921 plaintiff entered into a compensation insurance contract with defendant, to be terminated only by notice in writing, pursuant to which defendant kept plaintiff continuously insured up to December 27, 1928, upon which date, disregarding said agreement and without notice to or knowledge of plaintiff, it permitted said insurance to lapse; that plaintiff relied upon said agreement, and was unaware of its violation until three days after the injury to its said employee, terminating in the imposition upon it by the commission of a total liability of $2,990.05, no part of which the defendant assumed or paid. The second count incorporates all of the allegations of the first count, and further alleges that during all the years subsequent to 1921, defendant sent representatives to plaintiff's office at short intervals to examine its books and figure the premiums due for said insurance, one such visit being made in January, 1929, and another between April 1 and 10, 1929; that during March, 1929, defendant even presented a bill showing a premium of $368.72 then due, which plaintiff paid on April 11, 1929, still having no knowledge that defendant had permitted the insurance to lapse. The pleading then alleges that for these reasons plaintiff is entitled to a policy dated as of December 27, 1928, and to reimbursement for past payments made to and protection from future payments due said employee under his said award. The prayer of the complaint is, first, for said sum of $2,990.05 as damages for breach of contract; second, for the relief just above mentioned; and, third, for such other relief as may seem just and proper. A demurrer to the complaint on the ground of want of jurisdiction of the subject-matter was overruled, and defendant later instituted this proceeding for prohibition to restrain the court below from proceeding with trial of the action.

[1, 2] It is petitioner's contention that the matter has already been concluded by the exercise by the Industrial Accident Commission of jurisdiction over it. This is undoubtedly true of the issue respecting the existence, at the time of said injury, of an insurance policy affording plaintiff compensation coverage. Furthermore, section 55 of the Workmen's Compensation Act (Stats. 1917, c. 586, p. 868) provides: "All proceedings for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto, or for the enforcement against the employer or an insurance carrier of any liability for compensation * * * jurisdiction over which is vested by this act in the commission, shall be instituted before the commission, and not elsewhere. * * *" It is therefore likewise true that any issues relating to enforcement against petitioner of any liability for compensation or for the payment of said award have also reached a final determination in said proceeding before the commission.

[3] Treating the action in question, however, as one for the recovery of damages for breach of a contract to issue and keep in effect said insurance, we are satisfied that the complaint states a cause of action within the jurisdiction of the court. It does not seek to review the issues passed upon by the commission, but is predicated upon the express finding of the commission that petitioner at said time was not the insurance carrier for the employer; upon this very ground is based the claim for damages on account of petitioner's negligence in permitting said insurance to lapse.

[4] It is well settled that the Industrial Accident Commission is a tribunal of limited jurisdiction, with no powers beyond those conferred upon it by section 21 of article 20 of the Constitution, to "create, and enforce a complete system of workmen's compensation. * * *" If plaintiff had learned in some other manner than through injury to one of its employees of the lapse of said insurance and resulting damage, could it not have instituted an action in the Superior Court for damages? What difference does it make, then, that the damage here alleged is the amount of the liability imposed upon the employer by reason of the injury to its said em-

ployee? Does this fact abrogate plaintiff's right to seek relief? The cause of action for damages does not involve the construction of an insurance policy with respect to coverage thereunder, the recovery of compensation or incidental liability or the enforcement against an insurance carrier of compensation liability; it attempts to set forth purely a claim for damages based upon the breach of a contract to insure in a controversy affecting only the employer and the insurance carrier, no rights of the employee being involved. The mere circumstance that the damage claimed is the exact amount of the compensation award to the employee does not change the essential nature of the action, and the court should not be prevented from proceeding with it.

The alternative writ is therefore discharged, and the petition is denied.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

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214 Cal. 427

EDLER v. HOLLOPETER, Municipal Judge.

S. F. 14409.

Supreme Court of California.

Dec. 18, 1931.

Rehearing Denied Jan. 14, 1932.

1. Courts 🔑70.

Judicial council amendment to Constitution permits assignment of any judge to courts of like or higher jurisdiction as public welfare requires (Const. art. 6, § 1a).

2. Courts 🔑70.

Inferior magistrates, as police judges or justices of peace, are "judges" within judicial council amendment to Constitution (Const. art. 6, § 1a).

[Ed. Note.—For other definitions of "Judge (In Law)," see Words and Phrases.]

3. Courts 🔑70.

By assigning judge for service in higher court, Legislature is not deprived of power to legislate respecting powers, duties, and qualifications of his particular office (Const. art. 6, § 1a).

4. Courts 🔑70.

Constitutional provision requiring stated period after admission to practice to qualify inferior judge for assignment to higher court precludes assignment without meeting that qualification (Const. art. 6, § 1a, and § 23, as amended in 1924).

5. Courts 🔑62.

Code provision forbidding inferior judge, otherwise qualified, to receive assignment to higher court contravenes judicial council amendment to Constitution (Code Civ. Proc. § 170b, as added by St. 1931, p. 2234; Const. art. 6, § 1a).

In Bank.

Application for writ of prohibition by Vernon Edler directed to C. E. Hollopeter, Judge of the Municipal Court of the City of Los Angeles, to prevent imposition of sentence by respondent as judge of said court.

Writ denied.

A. B. Edler and Hal Hughes, both of Los Angeles, and Clifford D. Good, of San Francisco, for petitioner.

Leslie K. Floyd, of Los Angeles, for respondent.

Kimball Fletcher, of Los Angeles, and William A. Beasley, of San Francisco, amicus curiæ.

Clyde C. Shoemaker, George W. Rochester, Lawrence Cobb, George W. Prince, Jr., and Charles L. Nichols, all of Los Angeles, amici curiæ, Special Committee Los Angeles Bar Association.

PRESTON, J.

Petition for writ of prohibition.

The object of this proceeding is to establish the validity of section 170b of the Code of Civil Procedure, which went into effect August 14, 1931 (St. 1931, p. 2234), as against the claim that it is in conflict with section 1a of article 6 of the Constitution. This Code section reads as follows: "No justice of the peace, police court judge, or judge of any other inferior court now existing or which may hereafter be provided by law shall sit or act as a judge in any municipal or superior court or court of higher jurisdiction on the trial or hearing of any cause or question."

The issue before us arises out of the fact that petitioner has violated a traffic ordinance of the city of Los Angeles; has been arrested therefor; and has been brought to trial in the municipal court of that city, and respondent, as acting judge thereof, is about to impose judgment upon him. Petitioner objects to this proceeding because respondent is not a regular incumbent of the municipal bench in said city, but holds the office only of police judge of the city of Monterey Park in the county of Los Angeles. Respondent judge, however, has been regularly commissioned by an existing order of William H. Waste, chairman of the judicial council, to sit as a judge of said municipal court, and by the presiding judge of said court, has been assigned to determine the cause against the petitioner herein. The sole objection to respondent sitting as such judge in said cause is that he is not permitted to do so in view of the above-quoted section of the Code of Civil Procedure.

Petitioner seeks to sustain the validity of said section, asserting that it comes well within the power conferred upon the Legislature by sections 11, 11a, and 13 of said article 6 of the Constitution, which purport to invest the Legislature with authority to fix by law the "powers, duties, qualifications and responsibilities" of all judges of so-called inferior courts, such as justices of the peace and police judges. Respondent, however, bases his claim that said section is invalid upon the provisions of section 1a of said article 6 of the Constitution, which, so far as here material, reads as follows: "The chairman [of the judicial council] shall seek to expedite judicial business and to equalize the work of the judges, and shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred."

[1, 2] It must be evident that said section 1a is designed to unify our judicial system, and to that end to allow supervision over the action of the judges thereof by the chairman of the judicial council to the extent that any judge of a given jurisdiction may be assigned to another court of like or higher jurisdiction where the public welfare may be deemed to require it. It is clear also that inferior magistrates, such as police judges and justices of the peace, are judges within the meaning of said judicial council amendment, as well as within the meaning of other provisions of said article 6. That this amendment was designed to affect the entire judicial body of the state has already been declared in the case of Fay v. District Court of Appeal, 200 Cal. 522, 528, 254 P. 896.

[3] To so assign a judge for service in a higher court is not to take away the power of the Legislature to enact laws respecting the powers, duties, qualifications, and responsibilities of the particular office of which he then is an incumbent; the assignment of such a judge is simply calling upon him for additional service in some other court without in any manner changing his powers, duties, qualifications, and responsibilities in the office he may then be holding. In other words, for the general good, he is simply taken from the duty he is then performing to perform an emergency service elsewhere. So read and understood, all these sections of the Constitution relied upon harmonize and have full sway, and it is elementary that we should, if possible, so interpret the various provisions of an article of the Constitution as to harmonize them. Fay v. District Court of Appeal, supra.

[4] There is, however, section 23 of this same article of the Constitution, which provides as follows: "No person shall be eligible to the office of a justice of the supreme court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the supreme court of the state for a period of at least five years immediately preceding his election or appointment to such office."

This section must be construed along with the other sections above referred to and given due effect, and to this end it must be held that no judge of inferior jurisdiction may be assigned for duty to a higher jurisdiction unless he meets the test above prescribed for persons who may occupy the higher judicial positions. In other words, if a judge of an inferior court is assigned to a higher court, he may not serve in that capacity unless he shall have been admitted to practice before the Supreme Court of this state for a period of at least five years immediately preceding his election or appointment to the office then held by him.

[5] In the case before us, petitioner fails to show that the respondent is not so qualified. It must therefore be assumed for the purposes of this cause that he has been duly admitted to practice before the Supreme Court of the state, and was so admitted at least five years immediately preceding his election or appointment to office. This being true, his right to sit in the cause of petitioner is plain. Said section of the Code of Civil Procedure in so far as it forbids a judge of an inferior court to receive a regular assignment from the chairman of the judicial council to sit in a higher court, where he is otherwise qualified so to do, is invalid and in plain violation of the evident meaning and purpose of said section 1a of article 6 of the Constitution.

It follows that the alternative writ must be discharged and the petition denied, and it is so ordered.

We concur: CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.

WASTE, C. J., and SHENK, J., being members of the judicial council, do not participate.

214 Cal. 447

DIVANI v. DONOVAN et al.

L. A. 11083.

Supreme Court of California.

Dec. 22, 1931.

Rehearing Denied Jan. 21, 1932.

1. Fraud 🔑58(2).

Evidence *held* to support findings that defendants made representations knowingly false in sale of property.

2. Fraud 🔑64(1).

In action tried by court, court has exclusive function to determine whether evidence of fraud outweighs defendants' evidence allegedly bearing inferences of fair dealing.

3. Fraud 🔑58(4).

Purchaser's testimony of not making more thorough inspection because of defendants' representations *held* sufficient evidence of reliance on defendants' representations, notwithstanding contention that purchaser bought property because of its artistic effect.

4. Fraud 🔑31.

Plaintiff may allege entire transaction and all false representations in one cause of action, notwithstanding different remedies pursuable are indicated thereby.

5. Fraud 🔑39.

Complaint joining seller and person making representations *held* not defective, since charging making and known falsity of representations against defendants jointly.

6. Fraud 🔑59(1).

Absent other evidence of property's value had representations been true, purchase price was sufficient for court to find for buyer respecting damages.

> Although measure of damages is difference between actual value of property whose purchase was induced by fraudulent representations and value it would have had if it had been as represented, the contract price or price paid for the property is some evidence of the value it would have had if it had been as represented.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Mae Murray Divani against Jack Donovan and others. From the judgment, defendants Jack Donovan and Jeanette G. Donovan appeal.

Affirmed.

Superseding 298 P. 863.

Patrick F. Kirby, W. Joseph Ford, A. P. M. Narlian, and Joseph N. Beardslee, all of Los Angeles, for appellants.

David H. Cannon, Howell Purdue, W. I. Gilbert, and Root, Bettin & Painter, all of Los Angeles, for respondent.

O'Melveny, Millikin & Tuller and J. R. Girling, all of Los Angeles, for defendant First Nat. Bank of Hollywood.

SHENK, J.

This is an appeal from a judgment for the plaintiff in an action for damages resulting from the fraudulent representations of the defendants Donovan in the sale of real and personal property to the plaintiff.

The defendant Jeanette G. Donovan, the mother of the defendant Jack Donovan, was the record owner of a lot improved by a residence and garage known as 13047 San Vicente boulevard, Los Angeles. On April 30, 1926, the plaintiff entered into a written contract with the defendant Jack Donovan to purchase this piece of property, including all furniture and furnishings, pipe organ, etc., for the sum of $50,000. On May 3, 1926, the defendant Jeanette G. Donovan executed and delivered a deed to the premises. On May 11, 1926, the plaintiff and the defendant Jack Donovan entered into a written contract for the construction of an addition consisting of two bedrooms, dressing room, and bath for the sum of $6,000, which the plaintiff paid. The plaintiff assumed a mortgage, gave her note and trust deed for a portion of the purchase price, and made the installment payments under the contract, the details of which it is not necessary to recite. This appeal does not present for review the issues raised by the plaintiff respecting the note and mortgage involving the defendants other than the defendants Jack Donovan and Jeanette G. Donovan, since the plaintiff has not taken an appeal from the judgment against her on those issues. Therefore reference herein to the defendants will include only the defendants Donovan, mother and son.

The first question for consideration is whether the findings favorable to the plaintiff on the issues of fraud are supported by the evidence. The undisputed events leading up to the purchase of the property by the plaintiff are briefly the following:

On the evening of April 28, 1926, at the instance of the Donovans, the plaintiff called at their home at 13047 San Vicente boulevard, making a visit of about one hour in duration. During this visit the defendants entertained the plaintiff with music and refreshments. The plaintiff expressed herself as charmed with the defendants' home and its furnishings and decorations, and at the invitation of the mother was shown through the house and gardens. The defendants pointed out pieces which they stated were authentic antiques, some of them heirlooms, and very valuable, especially referring, among other articles, to an Empire bed, desk, and chairs, also to a shrine in the patio which the plaintiff particularly admired and which was stated by the defendants to be an ancient shrine recovered from a church which had been torn down. During this visit it was suggested by Mrs. Donovan that she would like to see the plaintiff possess such a restful place as her home, to which the plaintiff demurred that the Donovans would not wish to sell their own home and furnishings, and to which Mrs. Donovan replied that in the plaintiff's case it would be different. The next morning the defendant Jack Donovan telephoned to the plaintiff and stated to her that they had a bona fide offer from a major to purchase the home, but that they wanted the plaintiff to consider it, and that if she wanted it she would have to make a quick decision. The plaintiff called again at the Donovan home that morning and stayed for about an hour. The defendants do not dispute, in fact they concede, that representations were made as hereinbefore stated respecting the furniture and furnishings, and also respecting the great skill and fame of the defendant Jack Donovan as an architect and builder, and that nothing but the very best of everything, materials and workmanship, had been put into the construction of the home, which had been built by Jack Donovan as a home for himself and his mother and not as a place to sell. The plaintiff testified: "I asked what price he held it at. He said $75,000, and I said I could not give that price, what other price did he have. And he said, well, seeing it's you, $50,000, and then we discussed how it would be paid, and I left the house that morning saying that I would take the house."

The contract signed on April 30th provided that certain changes in landscaping would be effected and that the defendant Jack Donovan would supervise the construction of the addition of two bedrooms, dressing room, and bathroom fitted with a Marathon shower, and the enlargement of the kitchen and laundry and servants' quarters over the garage. In this respect it is in evidence that the defendant Jack Donovan represented that such additions would be made at cost and that he himself would provide without charge his services in planning and supervising the construction of the wing and enlargements, which would be of the very best materials and workmanship to conform with the superior construction of the main building, and that the cost thereof would not exceed $3,000. The defendant Jack Donovan also represented that he would plant new shrubbery where it was wanted by the plaintiff, of the value of $1,000 to $1,500, and install electrically controlled locks on two driveway gates. On May 11, 1926, Jack Donovan presented to the plaintiff for signature a contract providing $6,000 as the price of the new wing and enlargements. The construction was completed, and the plaintiff took possession about July, 1926.

It would extend this discussion beyond reasonable limits to detail all of the evidence bearing upon the issue of the falsity of these representations and others which were found by the trial court to have been made. Suffice it to say that the evidence fully supports the finding of the trial court that the construction of the house was of poor and inferior quality and workmanship; that the hardwood floors were of such inferior grade and construction that they cupped and buckled; that the plaster fell off; that the exterior stucco fell off and the waters penetrated the cracked stucco to the sheathing which became rotten and warped; that the foundation became out of line; that the plumbing and wiring were defective; also that the cost of the additions and changes were not of the value of $6,000; that the new bath was not fitted with a Marathon shower nor with tiling as agreed; that the materials used in the construction of the additions were crude and of inferior quality and workmanship; that a porch in the servants' quarters over the garage was constructed in a flimsy manner, was unsafe and dangerous to use; that the premises were subject to overflow of storm waters which the defendants well knew; and that no adequate drainage was provided. It is undisputed, and the court found, that certain articles in the house, including the Empire bed, chairs, and other pieces, and the shrine in the patio, had been removed, and that cheap and inferior substitutions had been made and put in their places, and that a desk, a harp, and certain pictures had also been removed. It was also found and not disputed that the shrubbery promised had not been planted and that electrically controlled locks had not been installed on the driveway gates. Many details of inferior quality of materials and construction found by the trial court are not mentioned herein. The court found generally that all of the representations made were false and known by the defendants so to be, and made with the intent to wrong and defraud the plaintiff, and were relied upon by her. It was also in evidence that the market value of the lot at the time of the transaction was not more than $10,000 and that $10,000 was the market value of the improvements after the changes and additions had been made. A detailed appraisal of all of the furnishings and furniture, including the pipe organ, received by the plaintiff, showed an aggregate value of $3,705. The court found damages in the sum of $32,295, which it is noted is the difference between the actual value as so proved and $56,000, the price paid by the plaintiff.

[1, 2] No contention is or can be made that the representations, if willfully false and relied upon by the plaintiff to her damage, may not ground a recovery. French v. Freeman, 191 Cal. 579, 585, 586, 217 P. 515; Herdan v. Hanson, 182 Cal. 538, 546, 189 P. 440; Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 573, 126 P. 351, 42 L. R. A. (N. S.) 125; Crandall v. Parks, 152 Cal. 772, 776, 93 P. 1018; 12 Cal. Jur. 725 et seq.

[3] No merit can be found in the contention that the evidence does not support the findings that the defendants made the representations and that they were knowingly false. The greater portion of the appellants' argument on this phase of the appeal is devoted to a discussion of the inferences that could be drawn from the evidence favorable to fair dealing on the part of the defendants; but such inferences depend for their existence upon the conflicting evidence or explanation introduced by the defendants and which the trial court had the right to reject and to make its findings accordingly. It is exclusively the function of the trial court to determine whether the evidence tending to prove fraud outweighs or preponderates the evidence of the defendants. Noll v. Baida, 202 Cal. 98, 101, 259 P. 433. The defendants' contention that the evidence supports only the conclusion that the plaintiff bought the house for its restful atmosphere and artistic effect and without any reliance on the representations made as to the construction, etc., is equally without merit. The plaintiff testified that she did not make a more thorough inspection because she believed both Jack Donovan and his mother, and, had she not believed and relied upon their statements and representations, she would not have entered into the transaction. This was sufficient evidence of reliance. French v. Freeman, supra, page 586 of 191 Cal., 217 P. 515; Desmond v. Standard Bond & Mtg. Co., 91 Cal. App. 201, 205, 266 P. 1005.

The defendants offered no proof as to the actual market value of the property. They offered figures showing the original cost of the building and of the additions and the furniture, including organ and piano. They accept the plaintiff's evidence as to the value of the lot, and, adding their own figures as to the original cost, they themselves show a value greatly below the price paid. The trial court, in measuring the damages, could have received proof based on the actual market value; and, in the absence of proof other than that offered by the plaintiff, we cannot say that there is any merit in the defendants' contention that the court underestimated the actual value of the property purchased.

[4] Two questions of law are raised by the defendants: First, that the trial court erred in overruling the demurrer to the complaint made on the grounds that several causes of action were improperly joined and not separately stated, and that there was a defect of parties defendant; and, secondly, that the court applied an erroneous measure of damages.

[5] The defendants first contend that the plaintiff has joined without separately stating a cause of action to rescind, a cause of action for damages for fraudulent representations in the sale of real and personal property, an action for damages for breach of warranty of the quality of personal property, an action for damages for failure to perform a contract to build, and an action for the unlawful conversion of personal property. The answer to this contention appears to be that the defendants have indicated the remedies which the plaintiff may have elected to pursue, but the fact that the plaintiff could have pursued different or other remedies does not preclude her from setting up the entire transaction and all of the representations claimed to be false and upon which she relies, in one cause of action to recover the damages suffered by her for the fraud of the defendants. This is the one and entire cause of action stated by the plaintiff and the only theory upon which she sought a recovery. Neither is there any defect on the face of the complaint in joining the defendants Jack and Jeanette G. Donovan, since the complaint charged the making of the representations and the known falsity thereof against both defendants jointly, and, if the agreements signed only by Jack Donovan and the deed signed by Jeanette G. Donovan might be said to indicate any such defect, no prejudice was suffered by the defendants in view of the proof and the finding of the court that the false representations were made "by the defendant, Jack Donovan, acting in his own behalf and for and on behalf of the defendant, Jeanette G. Donovan, by her authority, and the defendant, Jeanette G. Donovan, acting in her own behalf and for and on behalf of the defendant, Jack Donovan, by his authority," and the correctness of this finding is not disputed.

[6] The other point to be considered is whether the court applied the correct measure of damages. In support of their contention that the court erred in this respect, the defendants cite authorities which establish without question that the proper measure of damages to be applied is the difference between the actual value of the property purchased and the value it would have had had the property been as represented. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Hines v. Brode, 168 Cal. 507, 143 P. 729; Perry v. Ayers, 159 Cal. 414, 114 P. 46; Hunter v. McKenzie, 197 Cal. 176, 186, 239 P. 1090; George Cople Co. v. Hindes, 34 Cal. App. 576, 580, 170 P. 155. The defendants point out

that there is no direct proof of what the value would have been had the property been as represented, and that the court, in awarding as damages the difference between the actual value as proved and the price paid for the property, applied a measure which is not adopted as the correct measure under our law. The contention of the defendants apparently is that, in the absence of any proof other than proof of the price paid, or the contract price, the plaintiff cannot recover. But the lack of merit in this contention is made apparent by a number of decisions in which it has been held that the contract price or the price paid is some evidence of value. Hines v. Brode, 168 Cal. 507, 510, 143 P. 729. In other words, it is some evidence of what the value would have been had the defendants' representations been true. The defendants have not called our attention to any objection on their part to the consideration by the trial court of the purchase price as evidence of what the premises would be worth as represented. It may be said therefore that the evidence of the purchase price in this case in the absence of any other evidence of what the value would have been had the representations been true, was sufficient upon which to base findings and judgment for the plaintiff. Burgess v. Felix, 42 Okl. 193, 140 P. 1180; Reeser v. Hammond, 122 Kan. 695, 253 P. 233; Cramer v. Overfield, 115 Kan. 580, 223 P. 1100; Houghton v. Carpenter, 40 Vt. 588, 595; Long v. Davis, 136 Iowa, 734, 114 N. W. 197.

No sufficient ground for reversal is presented.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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214 Cal. 423

PEOPLE v. FEWKES.

Cr. 3502.

Supreme Court of California.

Dec. 18, 1931.

1. Criminal law 🔑1083.

Trial court was without jurisdiction to modify judgment of conviction by showing prior conviction pending appeal from original judgment (Pen. Code, § 1168, and § 969a, as added by St. 1927, p. 1064).

2. Criminal law 🔑1202(6).

Modification of judgment pending appeal to show prior conviction without resentencing defendant as required by statute *held* erroneous (Pen. Code, § 969a, as added by St. 1927, p. 1064).

> Judgment of conviction was modified pending appeal, and after filing of supplemental information charging defendant with prior conviction of felony by adding thereto the following paragraph: "The court finds defendant suffered a prior conviction of a felony and that he served a term of imprisonment in a penal institution therefor."

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

John B. Fewkes was convicted of grand theft, and, from the judgment as modified by finding defendant had suffered a prior conviction of felony and served a term of imprisonment in a penal institution therefor, defendant appeals.

Reversed.

Superseding opinion in 3 P.(2d) 590.

William J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

SHENK, J.

The defendant was convicted on October 10, 1930, of the crime of grand theft. Application for probation was made and denied. Judgment was pronounced on December 8, 1930. An appeal from the judgment and from an order denying a motion for a new trial was taken on that day. The judgment and order were affirmed on October 24, 1931. People v. Fewkes (Cal. Sup.) 4 P.(2d) 538. Pending the appeal and on December 11, 1930, the district attorney, acting pursuant to the provisions of section 969a of the Penal Code as enacted in 1927 (St. 1927, p. 1064), filed a supplemental information charging the defendant with a prior conviction of a felony in New Mexico. On arraignment, the defendant denied the prior conviction. Trial by jury was waived on this issue and the trial thereon was by agreement set for February 27, 1931. When the matter came on for hearing, the defendant admitted the prior conviction. The court found the allegations of the supplemental information to be true, and forthwith ordered that the judgment be modified by adding thereto the following paragraph: "The court finds defendant suffered a prior conviction of a felony and that he served a term of imprisonment in a penal institution therefor." From the judgment, as modified, this appeal is prosecuted.

At the time the judgment was so modified, the statute provided: "Whenever after sentence, and before the sentence has expired, it shall be discovered that the indictment or information on which defendant was convicted did not charge all felonies of which defendant had theretofore been convicted, either in this state or elsewhere, it shall be the duty of the district attorney of the county wherein defendant was sentenced to cause to be filed a supplemental information setting up such prior conviction or convictions. * * * If defendant admit the prior conviction or convictions charged, the court shall resentence him to the sentence which would have been legal if such prior conviction or convictions had been admitted at the time of defendant's conviction, and such resentence shall operate as of the date of the original sentence."

In 1931, this section of the Penal Code was amended (St. 1931, p. 1060) so as to eliminate the portion above quoted and all of the remainder of said section, except the portion preceding the above quotation. As the section now reads, it provides only for an amendment of a pending indictment or information so as to set forth the prior conviction or convictions.

The determination of this appeal is important only as affecting the rights of this defendant, and others similarly situated, if any, under the section as it existed prior to the amendment in 1931.

[1] The point which first arrests our attention is the contention that since the supplemental information was filed and proceedings were had thereon, including the modification of the judgment, after the appeal from the original judgment was taken and while said appeal was pending, the trial court was without jurisdiction to modify or otherwise change the judgment in a matter of substance and so as to affect prejudicially the rights of the defendant under the original judgment. It cannot be doubted that the modification of the judgment in this case would vitally affect the rights of the defendant. For example, it would affect the term of his minimum sentence as provided by section 1168 of the Penal Code, and might influence the place of confinement.

The defendant cites and relies upon numerous cases in this state commencing with Bryan v. Berry, 8 Cal. 130, and ending with People v. Martin, 199 Cal. 240, 248 P. 908, to the effect that, after an appeal has been taken, the judgment or order appealed from is removed from the jurisdiction of the superior court and cannot be modified or changed pending appeal so as to affect the substantial rights of the parties. This would be especially true when, as here, the subject-matter of the change or modification depended upon facts found after the appeal had been taken and during the pendency thereof.

[2] Assuming that the effect of said section 969a as enacted in 1927 was to modify the general rule relied upon by the defendant to the extent of continuing the jurisdiction of the trial court, notwithstanding the appeal, for the purpose of entertaining the supplemental information and proceedings thereunder, such assumption should go no further than the plain terms of the statute would permit, and the language of the Code section would necessarily govern in the subsequent proceedings. The language therein employed unmistakably provides that, when the defendant admits the prior conviction as charged, "the court shall resentence him to the sentence which would have been legal if such prior conviction or convictions had been admitted at the time of defendant's conviction."

It nowhere appears in the record that the defendant was resentenced as required by the statute. Indeed, there is no contention that he was resentenced. The only action taken or order made was to modify the original judgment by inserting therein the paragraph above quoted. This failure to follow the terms of the Code section was fatal to the proper operation of the law as written.

It follows that the defendant stands convicted under the original judgment as affirmed by this court, and he is not bound by the attempted modification thereof.

The judgment as modified on February 27, 1931, is therefore reversed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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214 Cal. 418

D. N. & E. WALTER & CO. v. ZUCKERMAN.

L. A. 13078.

Supreme Court of California.

Dec. 15, 1931.

Rehearing Denied Jan. 14, 1932.

1. Guaranty 🔑50.

Where principal did business as Home Builders' Supply Company when guaranty to pay for merchandise was executed, but principal organized one-man corporation under same name and bought goods involved thereafter, guarantor was not released.

2. Corporations 🔑1.

Separateness of one-man corporation and owner is not recognized where inequitable results would follow.

3. Guaranty 🔑36(5).

Corporation subsequently organized as alter ego of principal *held* included within sale guaranty.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the D. N. & E. Walter & Co., against H. Lew Zuckerman. From a judgment for defendant, plaintiff appeals.

Reversed.

Superseding opinion in 299 P. 765.

Ben C. Cohen and Thos. L. Nair, both of Los Angeles (Leo Shapiro, of Los Angeles, of counsel), for appellant.

Samuel W. Newman and Newman, Haas & Schwartz, all of Los Angeles, for respondent.

SHENK, J.

This is an appeal from a judgment in favor of the defendant Zuckerman.

The plaintiff seeks to hold said defendant on his written guaranty that Joe Goldberg, doing business under the name of "Home Builders' Supply Co.," would pay for goods supplied him. The defense interposed was that the balance of $2,567.22, admittedly due the plaintiff, was for goods furnished to "Home Builders' Supply Co.," a corporation, whose account it was claimed the defendant, Zuckerman, had not guaranteed.

[1] The essential facts are not disputed. For many years Joe Goldberg was engaged in business under the name of "Home Builders' Supply Co." On December 5, 1924, and while Goldberg was so engaged, Zuckerman executed the guaranty relied upon. From that time forward the plaintiff furnished merchandise to "Home Builders' Supply Co.," on an open book account. On May 3, 1926, Goldberg duly filed articles of incorporation of "Home Builders' Supply Company." All of the capital stock of the corporation excepting shares to qualify directors was, pursuant to a permit issued by the commissioner of corporations, issued to Goldberg, and he has continued to hold all of said capital stock. The merchandise on account of which the balance of the purchase price is now sued for was furnished after the organization of the corporation. The account during said time as theretofore was billed to "Home Builders' Supply Co.," at the same address. Before the incorporation, payment checks were issued to the plaintiff and signed "Home Builders' Supply Co., by Joe Goldberg." After the incorporation, the checks were signed "Home Builders" Supply Co., a corporation, by Joe Goldberg, president." It may fairly be said that the plaintiff had at least constructive notice of the incorporation, but it was not shown that the plaintiff did not continue to rely on the guaranty of Zuckerman. Goldberg became involved financially, and the plaintiff sued Zuckerman as guarantor of the account. Findings and judgment went for said defendant on the theory that the incorporation and Goldberg's transaction of business under the name of the corporation so changed the relationship of Zuckerman as to release him as guarantor. Whether such was the effect is the main subject of controversy.

[2] We think the trial court was in error in its conclusion on the undisputed facts. The corporation was distinctly a one-man corporation. It was Goldberg's alter ego, completely owned, dominated, and controlled by him. This was also true as to the business formerly conducted by him under the same name. To all intents and purposes Goldberg at all times involved herein continued to transact business under the name of "Home Builders' Supply Co." The separateness of the person and the corporation would of course be recognized if no inequitable results would follow. But, where, as here, an inequitable result would follow, the two should be considered as one, and the doctrine of Minifie v. Rowley, 187 Cal. 481, 202 P. 673, and Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 227 P. 723, would apply.

[3] The defendant, Zuckerman, stresses the strictness with which the law regards the rights of a guarantor, and argues that the obligation should not be extended in favor of any person other than the one expressed in the agreement. But under the facts of this case we are of the opinion that the corporation, as the alter ego of Goldberg, was necessarily included within the terms of the guaranty.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

214 Cal. 420

HARRIS v. HENSLEY.

L. A. 11458.

Supreme Court of California.

Dec. 15, 1931.

1. Judgment 🔑429.

Party losing right to appeal through her fault could not, in action to set aside judgment, claim court, on retrial, did not follow reviewing court's suggestion.

2. Appeal and error 🔑1195(4).

Reviewing court's opinion on fact question does not become law of case when additional evidence is introduced on retrial.

3. Appeal and error 🔑931(1), 934(2).

Absent contrary showing, it must be assumed that judgment which became final was supported by findings, and that evidence supported findings.

In Bank.

Appeal from Superior Court, Kern County; Robert D. Lambert, Judge.

Action by Daisy Lee Harris against W. J. Hensley. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Stephen Monteleone, of Los Angeles, for appellant.

Siemon & Garber, of Bakersfield, for respondent.

SHENK, J.

This is an appeal from a judgment of dismissal after the sustaining of a demurrer to the amended complaint, as amended, without leave to amend.

The plaintiff was formerly the wife of the defendant. After their divorce, the plaintiff brought an action against the defendant to establish a lien on real property and for an accounting. On the first trial of that action judgment went for the plaintiff, and the defendant appealed. The judgment was reversed. Harris v. Hensley, 83 Cal. App. 283, 256 P. 832. On the second trial, the court found for the defendant and entered judgment accordingly. From that judgment, the plaintiff appealed. On motion of the defendant, the second appeal was dismissed by this court on August 6, 1928, for failure of the appellant to file a transcript.

Thereafter, the plaintiff commenced the present action to set aside the former final judgment as null and void, and to obtain the relief sought in the original action. The order sustaining the demurrer without leave to amend in this action is now asserted to be error.

The record discloses that upon the retrial after the reversal of the first judgment the cause was tried de novo. In support of the present appeal, it is contended that the trial court was without jurisdiction to enter upon such a retrial by reason of the language of the decision and the order of the District Court of Appeal in reversing the first judgment. This contention is based first on the plaintiff's construction of the language of the decision of the District Court of Appeal, wherein it is claimed that said court limited the retrial to the two specific issues of the amount the court should find the plaintiff had contributed to the defendant's former business, and to the interest on a further and separate amount to which the court found on the first trial the plaintiff was entitled, computed from a date to be ascertained on the retrial. And, secondly, on the order of the District Court of Appeal as follows: "The judgment of the trial court is reversed, with directions to proceed in accordance with the suggestions contained in this opinion, and to take such evidence as may be necessary to determine the matters therein indicated." It is therefore insisted that the trial de novo and the judgment denying any relief to the plaintiff is inconsistent with the directions of the reviewing court and is a nullity.

[1-3] It cannot be questioned that the trial court on the retrial had general jurisdiction of the subject-matter of the action and of the parties thereto. To what extent the court was limited in the exercise of this jurisdiction, in view of the language of the decision of the reviewing court, was in the first instance for the trial court to determine. The trial court had the power to place its construction on the meaning, extent, and limitations of the language of the decision and the judgment of the District Court of Appeal, and if its determination in that respect were erroneous the error was in the exercise of its jurisdiction, and the plaintiff had a remedy by an appeal from the judgment. Ludlum v. Fourth District Court, 9 Cal. 7, 13; Randall v. Duff, 107 Cal. 33, 36, 40 P. 20; Dixon v. Risley, 114 Cal. 204, 46 P. 5; Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 310, 57 P. 69; Lambert v. Bates, 148 Cal. 146, 82 P. 767; 4 C. J. pp. 1211, 1243. This remedy the plaintiff herein sought by an appeal from said judgment, but the appeal was ineffectual, and the judgment became final by reason of the dismissal of the appeal. Where the reviewing court expresses an opinion on a question of fact, such opinion does not become the law of the case and is not binding on the trial court when further and additional evidence on the issue may be and is introduced on the retrial. Allen v. Bryant, 155 Cal. 256, 100 P. 704. In the absence of a showing to the contrary, and there is none, it must be assumed that the judgment which

has become final was supported by the findings, and that the findings were supported by the evidence.

Furthermore, the judgment of the District Court of Appeal was not a direction to enter a different or any judgment. If the trial court erred in its determination of the extent to which, if at all, it was bound by the suggestions of the reviewing court, the remedy was by the appeal which the plaintiff sought but lost through her own fault.

Under all of the facts stated in the plaintiff's pleadings, we fail to discover any ground for equitable or other relief upon which to base the present action.

No other points require discussion.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; RICHARDS, J.

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119 Cal.App. 91

TRUSSLESS ROOF CO. et al. v. STATE INDUSTRIAL ACCIDENT COMMISSION et al. (five cases).

Civ. 8003–8007.

District Court of Appeal, Second District, Division 1, California.

Dec. 9, 1931.

Rehearing Denied Jan. 6, 1932. Hearing Denied by Supreme Court Feb. 4, 1932.

1. Master and servant ⚷375(2).

Under Workmen's Compensation Act, injuries received by employee using, to and from job, transportation furnished and controlled by employer, as such, are compensable (St. 1917, p. 831).

2. Master and servant ⚷405(4).

Evidence warranted Industrial Commission's conclusion that employer, as such, furnished vehicle transporting workman from job and employed one to drive others.

> The employment contracts provided that employer would furnish transportation to jobs beyond the ten cent fare limit. The recognized practice was for one of the employees to take the others in his automobile, being reimbursed, at employer's option, either at six cents per mile or by a sum equal to trolley fares of those carried. The employees themselves decided from day to day on automobile which was to take them, without advising employer.

Proceedings under the Workmen's Compensation Act by Esther Moreno, Clarice G. Shupe, George C. Sturtz, Wilfrid Dumaine, and Clinton Rhodes, a minor by his guardian ad litem, George T. Rhodes, claimants, opposed by the Trussless Roof Company, employer, and the Pacific Employers' Insurance Company, insurer. From awards made by the Industrial Accident Commission the employer and insurer petition for certiorari.

Awards affirmed.

F. Britton McConnell, of Los Angeles, for petitioners.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Everard L. McMurrin, of Los Angeles, for respondent Esther Moreno.

BISHOP, Justice pro tem.

But one question is presented by these five proceedings to annul as many awards made by the respondent commission. A collision between an interurban car and a passenger automobile containing five homeward bound employees of the petitioner Trussless Roof Company resulted in injuries to all five. The question presented is, Were these injuries compensable under the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831)? The respondent commission had jurisdiction to make the affirmative answer they did.

[1] Without tracing the steps whereby the principle has been developed, it suffices to note that it is now established that injuries received by an employee, while making use of transportation furnished by and under the control of his employer, as such, are compensable under the Workmen's Compensation Act, though the employee at the time was not at work, but was going to or from the place of employment. Dominguez v. Pendola (1920) 46 Cal. App. 220, 188 P. 1025; and a multitude of cases reviewed in the notes found in 10 A. L. R. 169, 21 A. L. R. 1223, 24 A. L. R. 1233, and 62 A. L. R. 1438. The use of the words "as such" is necessary because courtesy rides given by the employer do not give rise to liability under the statutes. Boggess v. I. A. C. (1917) 176 Cal. 534, 169 P. 75, L. R. A. 1918F, 883; Gruber v. Mercy (1929) 145 A. 106, 7 N. J. Misc. R. 241. In other words, the transportation has to be furnished as a part of the contract of employment, to come within the rule. In re Donovan (1914) 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778.

[2] The commission was warranted by the evidence in concluding that a term of the contracts of employment between petitioner Trussless Roof Company and the five injured men was that on a job beyond the ten-cent fare limit transportation would be furnished. In a few instances it had been furnished by the use of company trucks. The recog-

nized practice, however, was for one or more of the men to take others, he who furnished the conveyance to be reimbursed on one of two bases, at the option of the employer; either six cents a mile for the distance driven, or a sum equal to what would have been the round-trip fares of those taken, had the trolley lines been used. No man paid fare to any one, nor was any one paid anything by the company with respect to transportation except those who furnished conveyances, and that as indicated. The particular automobile to be used was decided upon from day to day by the men themselves, the employer not knowing in advance, unless incidentally, who was to take whom. Once a week a report was made as to the amount of transportation each one had furnished, and the subsequent pay check was increased by the amount allowed for furnishing transportation. The looseness of the arrangements thus appearing is made the basis of an argument by the petitioner: First, that there was no agreement to furnish transportation; but more earnestly, that in the instant case the transportation was not under the control of the employer. Neither conclusion follows. Two agreements, it seems to us, were entered into with each employee: (a) You shall have your transportation free; (b) I shall pay you, if you take a fellow employee. That the men decided among themselves which promise they would rely upon each day does not destroy the binding effect of the promises. The one who drives becomes, that day, the agent of the employer in furnishing the promised transportation. And as such he meets the requirement that the vehicle be within the control of the employer. We doubt if this requirement goes further than to distinguish between public means of travel paid for by the employer and that privately furnished by him. In the case of public transportation there is no liability under the rule which we find governs here. See Dominguez v. Pendola, supra, and Highway Com. v. I. A. C. (1923) 61 Cal. App. 284, 214 P. 658. In any event, we think it cannot be said that the employer, to be liable, must himself own the vehicle used, nor need he himself drive it. In McClain v. Kingsport Imp. Corp. (1922) 147 Tenn. 130, 245 S. W. 837, the employee was himself driving the horse provided for his transportation when it took fright and caused his death. His immediate control did not relieve his employer. In Littlefield's Case (1927) 126 Me. 159, 136 A. 724, a fellow employee had been asked by the employer to take petitioner to work. On the way the fellow employee left his automobile at a garage for repairs, and the two proceeded in a garage car driven by a garage helper. It was held that this was transportation furnished by the employer and injuries received were compensable; Dominguez v. Pendola, supra, being cited in support of the conclusion. In the instant cases the vehicle used was known by the employer-petitioner to be one of those which would be used. He could have inspected it, along with the others being used from time to time, and, if not satisfied that it was safe, he could have withdrawn his agreement to pay for its further use until it was made safe. He knew the men who were driving, and, had he cared not to take the risk incident to their operation of an automobile, he could have declined to employ them as drivers any longer. The situation was within his control, within the reason for the rule given in Highway Com. v. I. A. C., supra, as follows (page 288 of 61 Cal. App., 214 P. 658, 660): "The logic and reason of charging an employer in a case where an employee is injured while riding on an instrumentality provided by said employer is that said employer has such instrumentality under his control. He may inspect and repair it; he must see that it is driven by competent and careful drivers. It is his business to look after such a conveyance, just as it is his business to look after the safety of the premises where his employees work."

We are satisfied that the petitioner Trussless Roof Company was shown to have furnished, as employer, the vehicle in which four of the five injured men were riding home from their work, and that it had employed the fifth man to drive the other four home. Consequently, the five awards are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

119 Cal.App. 96

McCORMICK SAELTZER CO. v. HAIDLEN et al. (two cases).

BUESE et al. v. HAIDLEN et al.

MILLER v. SOUTHERN SURETY CO. et al.

Civ. 4352–4355.

District Court of Appeal, Third District, California.

Dec. 9, 1931.

As Modified on Denial of Rehearing Jan. 8, 1932. Hearing Denied by Supreme Court Feb. 4, 1932.

1. Highways 🔑113(5).

Bonds under Public Works Act are liberally construed to cover everything contributing to, whether directly entering, or indirectly consumed in, the improvement (St. 1917, p. 487, § 1, as amended by St. 1925, p. 538).

2. Highways 🔑113(5).

Charges for hotel equipment, as dishes, food for operating hotel, contractor's equipment as small tools and coal, consumed by highway contractor *held* recoverable against surety on highway contractor's bond (St. 1917, p. 487, § 1, as amended by St. 1925, p. 538).

3. Highways ⚷113(5).

Material claimants *held* entitled to recover against highway contractor's surety for supplies furnished messhouse, notwithstanding transients were accommodated there (St. 1917, p. 487, § 1, as amended by St. 1925, p. 538).

> The record showed that the accounts for supplies to messhouse operated by highway contractor had been paid; that transients accommodated there amounted to less than one per cent. of operations of the messhouse; and that the bulk of the provisions for the messhouse had been purchased from firms not claimants in actions involved. There was no showing that food furnished by material claimants went to men of other employers.

Appeals from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Four actions by the McCormick Saeltzer Company, the McCormick Saeltzer Company, J. N. Buese and George J. Miller, respectively, against A. Haidlen and others. The defendants, the Department of Public Works and B. B. Meek, director thereof, interpleaded and paid funds into court. The cases were consolidated, and H. F. Mielink, as trustee in bankruptcy of A. Haidlen Company and of A. Haidlen and Fred Fracaro, individual partners of A. Haidlen Company, was made a party defendant. From judgments against the trustee in bankruptcy of the contractor and against the Southern Surety Company, the surety company appeals.

Judgment in each case affirmed.

George A. Work and Hall & Work, all of San Francisco, for appellant.

Carr & Kennedy of Redding, and W. L. Southwell, and Gaylord & Smith, all of San Francisco, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

The above-entitled actions were consolidated and tried together by the court without a jury. Judgments went in favor of the plaintiffs in all the cases. From these judgments, defendant Southern Surety Company alone prosecutes this appeal.

These actions are by various material claimants against Southern Surety Company, A. Haidlen Company, a partnership, and other formal defendants, growing out of materials and merchandise furnished in connection with the performance of a contract, dated June 23, 1927, made by A. Haidlen Company with the department of public works of the state of California, for the construction of a part of the state highway in Shasta county, between La Moine and "Gunshot Creek."

The defendant and appellant Southern Surety Company furnished the labor and material bond upon the contract. The contractor entered upon the performance of the contract, but before its completion became financially involved and was unable to complete the work and on February 20, 1928, appellant through its representative, Mr. U. S. Marshall, took over the work and completed the contract.

The various claimants herein filed withhold notices with the department of public works, and thereafter a number of the claimants assigned their claims to plaintiffs herein, and these actions followed. The department of public works and B. B. Meek, the director thereof, who were named defendants in these actions, filed proceedings to interplead and substitute the various claimants, who had filed notices against the retained percentage, and sought permission to pay such funds into court. These proceedings were entitled and filed in the action brought by plaintiff, the McCormick Saeltzer Company, to recover the Frank M. Brown account, and is the second action mentioned in the caption of this opinion. The court made an order for such substitution and interpleader, whereupon the funds, $15,345.52, were paid into the superior court of Shasta county by said department of public works, and said funds are still on deposit with the clerk of that court.

After the payment of said funds into court, and after an order was made for the consolidation of these four cases, H. F. Mielink, as trustee in bankruptcy of A. Haidlen Company, and as trustee in bankruptcy of A. Haidlen and Fred Fracaro, the individual partners in the A. Haidlen Company, was brought into these actions as a party defendant. Said trustee in bankruptcy, upon being served, appeared and filed an answer in all the above-entitled cases, denying the various allegations of the complaints.

The court after trial awarded judgments against said trustee in bankruptcy of the contractor and appellant Southern Surety Company for the full amounts claimed by the various claimants.

The judgment, in each case, provided that the amount recovered by plaintiffs should be paid out of the funds paid into court by the said department of public works. The money paid into court far exceeds the aggregate amount of the awards to all claimants. No appeal has been taken by the trustee in bankruptcy. Therefore as to the amounts awarded, and the payment of the same out of retained percentage paid into court, the judgments are final as to him.

The claims of plaintiff and respondent McCormick Saeltzer Company are for merchandise of various kinds furnished to the contractor and subcontractor, and used by them in the progress of the work of the construction of said highway embraced in the contract.

The claim of plaintiffs and respondents Buese and Verran, in addition to such merchandise as was furnished by McCormick Saeltzer Company, includes items for rental or structures used by the contractor for a mess hall and storage and for power and lights.

Plaintiff and respondent Miller is an assignee of a large number of claimants who sold provisions and provender and performed labor, rented teams, implements, and other materials to said contractor, all of which were used and consumed by the contractor in the performance of the contract.

If all the contentions made by appellant on this appeal were sustained by this court, the result would be only a slight modification of each judgment. They are all to the effect that the trial court included items not properly chargeable against the surety or the fund paid into court.

Appellant conceded liability for all articles furnished by the various claimants after it took charge of the work, without regard to whether they constitute a liability against it under the Public Works Act or not. Therefore we are only concerned on this appeal with articles used and consumed in the performance of the contract while the contractor was in charge of the work.

The bond involved in these actions was given in compliance with the Public Works Act as it stood in 1925 (St. 1925, p. 538). This act provides: "Every contractor, person, company, or corporation, to whom is awarded a contract for the improvement, erection or construction of any building, road, bridge or other structure * * * for this state, or for any political subdivision or agency of the state shall, before entering upon the performance of such work, file with the commissioners, managers * * * or other body by whom such contract was awarded, a good and sufficient bond, to be approved by such contracting body, officers or board, in a sum not less than one-half of the total amount payable by the terms of the contract; such bond shall be executed by either two or more good and sufficient sureties or by corporate surety as provided by law, in an amount not less than the sum specified in the bond, and must provide that if the contractor, person, company, or corporation, or his or its subcontractors, fail to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor thereon of any kind, that the surety or sureties will pay for the same, in an amount not exceeding the sum specified in the bond, and also, in case suit is brought upon such bond, a reasonable attorney's fee, to be fixed by the court. Such bond must by its terms inure to the benefit of any and all persons, companies and corporations entitled to file claims under this act so as to give a right of action to them or their assigns in any suit brought upon said bond."

Appellant contends that the following items are not proper charges against the surety or the fund: (a) Hotel equipment, such as dishes, sheets, etc.; (b) food furnished for the operation of the hotel; (c) contractor's equipment and parts, such as small tools, rope, coal, etc.

We find no merit in any of these contentions.

[1] The rule seems to be now well established that bonds furnished under the Public Works Act of this state are to be liberally construed to effect the manifest purpose of the statute; the theory being that the statute here under consideration was intended to cover all those things which contributed to the improvement, whether directly by physically going into the construction, or indirectly, by being entirely used or consumed in the construction. Pacific Wood & Coal Co. v. Oswald, 179 Cal. 712, 178 P. 854; Sherman v. American Surety Co., 178 Cal. 286, 173 P. 161; French v. Powell, 135 Cal. 636, 68 P. 92; Associated Oil Co. v. Commary-Peterson Co., 32 Cal. App. 582, 163 P. 702; A. L. Young Mach. Co. v. Cupps et al. (Cal. Sup.) 2 P.(2d) 321; J. F. Tolton Inv. Co. v. Maryland Casualty Co. (Utah) 293 P. 611; Williamson v. Egan, 209 Cal. 343, 287 P. 503; Bricker v. Rollins & Jarecki, 178 Cal. 347, 173 P. 592, 594; Peoples' Nat. Bank v. Southern Surety Co., 105 Cal. App. 731, 288 P. 827; Ryan v. Shannahan, 209 Cal. 98, 285 P. 1045.

In a number of these cases, it was held that rental of machinery money expended on the hiring of teams, money spent for provisions, equipment, etc., are all recoverable against the surety.

In Bricker v. Rollins & Jarecki, supra, the Supreme Court, in construing the original Public Works Act defined the scope of the word "supplies" as follows: "The ordinary meaning of this term [supplies] in its general and accepted use is such as to include goods, wares, and merchandise of almost every kind and nature, whether used in the household or on the farm, or in any sort of productive or constructive work requiring the labor or service of men or animals or machinery. In the instant case they were furnished to be used and were actually used in advancing the work to be done under this contract, and in that sense entered into and became a component part of it and of the thing produced by it. This being so, we are of the opinion that as to the above classes of claims the trial court was correct in their allowance."

It was expressly found by the court upon ample evidence that "said materials, provisions, provender and other supplies were furnished to A. Haidlen Company and to Southern Surety Company to be used and the same were actually used by said defendants in, upon, for and about the performance of the work. * * *"

[2] Tested by the rules clearly announced in the foregoing authorities, and in view of the court's finding that all articles objected to were actually used and consumed by the contractor in the construction of said highway, we see no escape from the conclusion that all such articles are recoverable against the surety.

[3] Appellant also contends that respondents were not entitled to recover for the supplies furnished for the messhouse, because transients were occasionally accommodated there.

There is likewise no merit in this contention for at least two good and sufficient reasons:

First. The accommodation of transients at the messhouse or hotel occurred during the first two months of the work, and the accounts of respondents for those two months were fully paid by the contractor, and are in no way involved in the cases at bar.

Second. Under the uncontradicted evidence, such transient accommodation amounted to less than one per cent. of the operations of the messhouse.

Furthermore, the evidence shows that the bulk of the provisions for the messhouse were purchased by the contractor from various wholesale houses in Sacramento and San Francisco, and those firms were evidently paid, and are not claimants in these actions. There was no showing that the food furnished by respondents, and the various claimants represented by them, went to feed the men of other employers.

A further discussion of the various items claimed to be improperly charged against appellant is entirely unnecessary. Suffice it to say, we have examined them all with care, and find the learned trial court was exceedingly careful, and no injustice was done appellant; no item of any consequence was improperly charged against it.

Considering the large number of accounts involved, the record is singularly free from error.

The respondents and the claimants whom they represent are justly entitled to the full amount of the judgments rendered, and the liability of appellant in each case was clearly established.

We find no merit whatever in the appeal.

The judgment in each case is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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119 Cal.App. 122

McCABE v. WILLARD et al.

Civ. 6865.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1931.

Rehearing Denied Jan. 7, 1932. Hearing Denied by Supreme Court Feb. 8, 1932.

1. Appeal and error ⚷173(2).

Objection to qualification of newspaper in which notice of trustee's sale was published could not be presented for first time on appeal.

2. Mortgages ⚷356.

Publication of notice of trustee's sale three times at weekly intervals in newspaper wherein sale was fixed for date over twenty days after first publication *held* sufficient (Civ. Code, § 2924; Code Civ. Proc. § 692, subd. 3).

3. Mortgages ⚷356.

Error in affidavit describing premises on which notice of trustee's sale was posted *held* not fatal under circumstances.

> Affidavit of posting made by person who posted notice on property sold by trustee under trust deed erroneously described property as being "129 North Weatherly Drive", but in his testimony as a witness he corrected that statement and testified that in fact the place of posting was "129 South Weatherly drive", which was the correct street number of premises to be sold.

4. Mortgages ⚷356.

Finding that notice of trustee's sale was posted in three public places as required by law, *held* sustained.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by John A. McCabe against Jess Willard and another. From an adverse judgment, defendants appeal.

Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellants.

Dan J. Chapin, of Los Angeles, for respondent.

CONREY, P. J.

Defendants executed to plaintiff's assignor their note for money loaned and secured the same by a deed of trust of real property in the city of Los Angeles. Following default in payment of the note, the property was sold at trustee's sale for a sum less than the balance due on the note. This action was brought to recover that balance. From a judgment rendered in favor of the plaintiff, the defendants appeal.

In effect, the defense to the action presented was that the sale by the trustee was void, and that, consequently, the plaintiff was not entitled to recover judgment as for a balance due after trustee's sale. The grounds upon which appellants contend that the sale was void relate to alleged defects in the publication of the notice of sale and in the posting of copies of the notice of sale.

[1] Concerning the publication, the points are that the notice was not published for the period required by law, and that the publication was not shown to have been in a newspaper of general circulation published in the city of Los Angeles or county of Los Angeles. At the trial no point seems to have been made with respect to the qualification of the newspaper for the purposes of such notices. If there was any defect in the proof, it was not called to the attention of the court. If the record does not contain any direct testimony on the subject, the omission was one which might have been supplied if any question had been raised on that point. We think that such an objection should not be presented for the first time on appeal, or be considered as a sufficient foundation for reversal of the judgment.

[2] In order to authorize the sale, it was necessary that the notice of sale be posted "for twenty days," and also be published "once a week for the same period" in a newspaper of general circulation printed and published in the city in which the property was situated. Civ. Code, § 2924; Code Civ. Proc. § 692, subd. 3. The notice in question was published once a week for three successive weeks, namely, on April 26, May 3, and May 10, 1928. The day of sale was to be May 22, 1928, and the sale actually took place at that time. It thus appears that the full period of twenty days elapsed between the first publication of the notice and the day when the sale was made as provided in the notice. This was a sufficient compliance with the requirements of the statute as to period of publication of the notice. We think that the decision in Seccombe v. Roe, 22 Cal. App. 139, 133 P. 507, 508, relied upon by appellants, does not sustain their contention. In that case the trustee's sale was one in which the publication of notice was required to be at least once a week for four successive weeks. The sale took place after the fourth publication, but within less than four weeks from the time of first publication. The court held that when the stipulation in the deed of trust was that the publication was to be once a week for four weeks, it meant four weeks of seven days each, "or that 28 days shall elapse from the date of the first publication to the date when authority was given to make the sale, and that a sale made within less than 28 days from the first publication was without authority upon the part of the trustee." But in the case at bar the requirement of the statute was that notice of the sale be posted for twenty days, and that a copy thereof be published "once a week for the same period," etc. We are of the opinion that when the publication was made three times at weekly intervals in a newspaper of weekly publication and the sale was fixed for a date more than twenty days after the first publication of the notice, the law respecting times of publication and period of publication was satisfied, and the publication was sufficient.

[3] The next point of appellants is that no notice was posted on the property as required by law. This point rests upon an affidavit of posting made by the person who posted the notice of sale. In his affidavit he stated that he had posted the notice on the property to be sold as described in the notice, "such place being 129 North Weatherly Drive." But in his testimony as a witness at the trial he corrected that statement and testified that in fact the place of posting was 129 South Weatherly drive, which is the correct street number of the described premises. The sale in question is not one of that class of proceedings in which an error in an affidavit filed constitutes a fatal defect in the transaction. It is sufficient that the evidence proves that in fact the notice was posted in accordance with the statutory requirement.

[4] Finally, it is contended that the notice of sale was not posted in three places in the county, as required by law, for the full period of twenty days. The court made findings to the contrary. The evidence shows that the notice was posted, one at the east entrance of the courthouse, one at the county recorder's office, one at the south entrance of the hall of justice, and one on the bulletin board of the city hall. This would constitute three public places, even though the east entrance of the courthouse and the county recorder's office should be regarded as one place.

In Standley v. Knapp (Cal. App.) 298 P. 109, cited by appellants, it was found by the court, presumably upon evidence, that the courthouse and hall of records of Los Angeles county "is a public place," and that the posting of notices at the three entrances of said courthouse and in the county clerk's office in the hall of records amounts to posting in one place only. In the case at bar the court upon the evidence before it found that the posting of notices, done in the manner which we have described, was a posting in three public places. The court in Standley v. Knapp did not decide those facts as a subject of judicial cognizance without evidence, but merely as a fact based upon evidence. It was for that reason that the finding was sustained. For a like reason, in the present action the finding of the court must be sustained, and it is no answer to say that in another action relating to the same question of fact a contrary finding was made. But it is further a sufficient answer to the contention that in the case before us the posting was done at four public places, of which at least three were in fact distinctly separate places not at or within parts of one and the same building.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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119 Cal.App. 129

NATIONAL BANK OF COMMERCE OF LOS ANGELES v. BLAIR et al.

Civ. 8042.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1931.

Appeal and error 🔑1151(2).

On appeal from judgment on pleadings involving attorney's fees only, attorney's fee *held* reduced to amount admitted by answer, on respondent's motion.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the National Bank of Commerce of Los Angeles against George D. Blair and others. Judgment for plaintiff, and defendants appeal. On motion for an order approving respondent's request for a modification of the judgment, and affirming as so modified.

Affirmed as modified.

Fall & Fall, of Los Angeles, for appellants.

Faries & Williamson, of Los Angeles, for respondent.

PER CURIAM.

In this action to recover on a $5,000 promissory note which provided for a reasonable attorney fee in such action, the complaint asked for such fee and alleged that $750 is a reasonable fee. The only defense stated in the answer was that the attorney fee demanded, or any sum greater than $100, is excessive. The plaintiff moved for judgment on the pleadings. The court granted the motion and allowed the sum of $220 as attorney fees. Defendants appeal from the judgment.

The opening brief of appellants shows that the only ground of appeal is that upon the motion for judgment on the pleadings, the court had no right to determine the issue raised by the answer concerning the amount allowable as a reasonable attorney fee. Now comes the respondent and requests that the amount of the attorney fee given by the judgment be reduced to $100 (the amount admitted by the answer), and that the judgment as so modified be affirmed.

Accordingly, it is ordered that the judgment be modified by reducing the amount provided therein as attorneys' fees from $220 to $100.

As thus modified, the judgment is affirmed, without costs to either party.

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119 Cal.App. 130

ANDERSON v. BROADWELL et al.

Civ. 594.

District Court of Appeal, Fourth District, California.

Dec. 10, 1931.

1. Quieting title 🔑44(4).

In quiet title action, evidence supported finding that one-half interest in real estate was conveyed to plaintiff by trustee pursuant to agreement.

2. Deeds 🔑164.

Provision in deed conveying undivided interest that property should not be transferred or incumbered except by consent of both parties expired on death of one of parties.

3. Deeds 🔑149.

Provision in deed conveying undivided interest that property should not be transferred or incumbered except by consent of both parties did not nullify deed.

4. Deeds 🔑90.

Deeds are liberally construed against grantor (Civ. Code, § 1069).

5. Deeds 🔑210.

Evidence *held* to show that deed to undivided half interest in real property was supported by valid consideration.

Grantor and grantee were brothers-in-law, and had long been intimately associated in business. Owner of property conveyed it on promise of other that he would clear up title for one-half interest. This was done, and first grantee then conveyed half interest to first grantor.

6. Husband and wife 🔑249.

Property held in trust by husband is not "community property," so as to make wife's signature to deed necessary.

[Ed. Note.—For other definitions of "Community Property," see Words and Phrases.]

7. Husband and wife 🔑265½.

Disclaimer and acquiescence of wife in undivided half interest in land conveyed by husband and receipt of half interest from husband's estate preclude deceased husband's heir and privy from attacking deed because not signed by wife (Civ. Code, § 172a).

8. Tenancy in common 🔑55(6).

Evidence *held* to show that cotenant was not guilty of laches in nonpayment of taxes nor in claiming undivided half interest in real estate distributed in estate of deceased tenant in common.

Surviving tenant left ample funds with deceased tenant to pay taxes before leaving for Mexico, where he remained for more than two years. He did not know that his half interest was being carried in decedent's estate, and did not return from Mexico until after distribution of it. There was never any dispute between cotenants. Surviving tenant did not learn facts until shortly before filing suit. Remittances were made to him while in Mexico by cotenants from avails of property and even by his cotenant's heirs. Surviving tenant's title was matter of record.

9. Limitation of actions 🔑44(3).

Action to quiet title to undivided interest in land erroneously distributed in deceased cotenant's estate was not barred by limitations, where surviving tenant held warranty deed from deceased.

10. Tenancy in common 🔑15(10).

Evidence *held* to show that heirs of deceased tenant in common did not obtain title by prescription to entire property erroneously distributed in decedent's estate.

There was no proof of adverse claim until less than a year before action to quiet title was filed. Deceased's cotenant had ample funds belonging to survivor to pay taxes while latter was in Mexico. Actual possession was held by lessee. Survivor's title was of record.

11. Appeal and error 🔑728(1).

General assignment that court erred in admitting evidence of acts and declarations of parties subsequent to deed will not be considered, where no specific declarations are pointed out.

12. Appeal and error 🔑1011(1).

Decision of trial court on conflicting evidence is conclusive.

13. Trusts 🔑357(1).

Heir of deceased tenant in common *held* not innocent purchaser for value of survivor's interest erroneously distributed in deceased cotenant's estate.

Heir had both actual and constructive notice of surviving tenant's interest. There was no evidence that heir, daughter of deceased, had any title. She did not produce alleged deed from mother, she could not remember its date, nor consideration other than it was "sufficient to make it legal."

14. Tenancy in common 🔑30.

Where tenants in common divided joint funds, it will be presumed that taxes, assessments, and other charges on property owned by them were also adjusted.

15. Tenancy in common 🔑30.

Evidence *held* to show that privies of deceased cotenant had no claim for taxes, assessments, or other charges against surviving tenant.

Before leaving for Mexico, surviving tenant left ample funds with deceased to pay taxes. Privies of decedent adduced no proof of payment of taxes for survivor's account.

16. Executors and administrators 🔑224.

Claim by surviving tenant in common for half of royalties under oil lease *held* not required to be presented to deceased tenant's executor, where royalties were personally received by deceased tenant's heirs.

17. Trusts 🔑358(1).

Surviving tenant in common, claiming half of royalties under oil lease which were paid to deceased tenant's heirs, and seeking only money judgment, *held* not required to trace payments into any particular fund.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by August Anderson against Helen Lea Broadwell and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

L. G. Shelton, of Glendora, for appellants.

J. E. Ricketts and Walter C. Maloy, both of Covina, for respondent.

BARNARD, P. J.

This action and two companion cases 6 P.(2d) 267, 269, involve the title to three pieces of real property situated in Los Angeles county. The three cases were consolidated for trial, and, while separate judgments were entered and separate appeals taken, by stipulation, all three cases have been here presented upon a single transcript and one set of briefs. All of the parties are closely related, and, as frequently happens in such cases, the actions have been fought with much zeal and some bitterness. The plaintiff, August Anderson, is the brother of the defendant Sofie A. Broadwell, who is the widow of W. B. Broadwell. The defendant Helen Lea Broadwell is the daughter of Sofie A. Broadwell and the niece of the plaintiff.

The plaintiff and his brother-in-law W. B. Broadwell, now deceased, had been friends for forty years and during most of that time they had either been partners in operating stores in various localities in California and Nevada, or the plaintiff had been employed by his brother-in-law in operating such stores. The plaintiff, however, had been something of a wanderer, living most of the time in desert towns or in mining districts. In 1916 the plaintiff closed out a business he had in Arizona and decided to go to Mexico. At that time he owned an acre of land on Signal Hill in Long Beach, and a lot at San Pedro. According to the evidence, the Long Beach property was then worth $2,500 and the San Pedro property from $2,500 to $3,000. In December, 1916, he mortgaged the Long Beach property for $500, payable in three years, and the San Pedro property for $750, payable in three years, after which he gave Broadwell his power of attorney, left $500 in his hands with which to take care of his business, and went to Mexico. In August, 1917, the plaintiff returned and went to work for Broadwell as manager of his store in Hemet, Cal. Shortly after this an arrangement was made between them which the plaintiff testified to as follows: "Mr. Broadwell told me that we should clear up the titles to the properties in Long Beach and San Pedro that I owned at that time; and I told him I was willing. And I made a proposition, if he would pay off the mortgages and the indebtedness against the property—there was some street assessments on the San Pedro property; the Long Beach property was clear; and I told him I would give him a half interest in the property for paying off the mortgages. He said, 'All right; you deed them over to me, and I'll take care of it; and then when it is all settled up and cleared up, I will deed half of it back to you.' And he being my brother-in-law, I did."

The plaintiff conveyed to Broadwell the Long Beach property by a deed dated October 4, 1917, and the San Pedro property by a deed dated January 14, 1918. The record shows that an action which had been brought to foreclose the mortgage on the Long Beach property was dismissed November 17, 1917, that the mortgage on the San Pedro property was released on February 13, 1920, and that a delinquent tax sale for the year 1918 was redeemed August 22, 1921. The plaintiff continued as manager of Broadwell's Hemet store for seven years, and late in the fall of 1924 again went to Mexico, returning to California in the fall of 1927. In the meanwhile Broadwell died on February 28, 1926, and it is conceded that his estate was probated and that the real estate involved in these actions was distributed to his widow. Helen Broadwell, the daughter, claims to have received deeds from her mother covering the properties in question, although the deeds were not admitted in evidence.

This particular action relates to the Long Beach property. In the complaint, filed October 23, 1928, a first cause of action contains the usual allegations of a quiet title suit. In the second cause of action it is alleged that the plaintiff, prior to October 14, 1917, was the owner of the real property in question; that on that date he conveyed the same to Broadwell, who was then his brother-in-law, and in whom he reposed great trust and confidence; that the property was so conveyed upon the express condition, agreement, and understanding between them that the said Broadwell would pay and procure the release of records of certain incumbrances upon the two pieces of real property, and would thereafter hold an undivided one-half interest in the same for the use and benefit of the plaintiff; that on September 16, 1921, the said Broadwell and his wife leased the property to the Shell Oil Company, a corporation; that on December 13, 1922, in pursuance of the agreement and understanding between them, the said Broadwell executed and delivered to the plaintiff a grant deed conveying to him an undivided one-half interest in and to the property, which deed was recorded; and that on September 2, 1924, a written agreement was executed, acknowledged, and recorded, wherein it was expressly agreed that the said Broadwell and the plaintiff were each the owners of an undivided one-half interest in the real property in question. It is then alleged that, by reason of the lease referred to and the drilling of oil wells upon the property, large sums of money were received by Broadwell as royalties, which amounts were equally divided between Broadwell and the plaintiff up to July 21, 1924; that on that date an agreement was made between them whereby Broadwell should collect and receive such royalties, and should hold the plaintiff's one-half thereof for his use and benefit, to be repaid to the plaintiff on demand, together with interest at 6 per cent.; that Broadwell died on February 28, 1926; that since that time the defendants have received and collected all of said royalties, the amount of which is unknown to the plaintiff; that the plaintiff is entitled to one-half of said moneys; and that neither of the defendants have paid to the plaintiff any part of the same. The prayer is that the defendants be required to set forth the nature of their several claims; that the plaintiff's title to a one-half interest in the property be quieted; that the defendants be adjudged to hold one-half of all royalties received by them in trust for the plaintiff; and that the plaintiff have judgment for one-half of said royalties when the amount thereof is determined.

In their answer, the defendant Sofie A. Broadwell disclaims any interest in the property, and alleges that the defendant Helen Lea Broadwell is the owner and in the exclusive possession thereof. The defendant Helen Lea Broadwell denies practically all of the allegations of the complaint which tend to show any interest in the property in the plaintiff, and alleges that the property was conveyed absolutely by the plaintiff to Broadwell, without condition, and that the same was the community property of W. B. Broadwell and Sofie A. Broadwell. It is then alleged that the plaintiff's cause of action is barred by the various statutes of limitation.

The court found that the plaintiff was the owner of the property on October 14, 1917, and on that date conveyed the same to Broadwell by grant deed; that Broadwell had then been the brother-in-law of the plaintiff for more than thirty years; that for more than thirty years prior thereto, except for brief intervals, the plaintiff had been associated in business with Broadwell; that at that time the plaintiff was employed by Broadwell as manager of his store at Hemet; that the plaintiff and Broadwell mutually reposed great trust and confidence in each other; and that, prior to the execution and delivery of the deed, Broadwell had expressly agreed with the plaintiff that he would pay off and cause to be released of record certain incumbrances upon the real property, and would thereafter hold an undivided one-half interest in the same for the use and benefit of the plaintiff, and would thereafter reconvey a one-half interest therein to him. The court also found that on September 16, 1921, with the consent of the plaintiff, Broadwell leased the property to the Shell Oil Company, in which lease Sofie A. Broadwell joined as the wife of W. B. Broadwell; that an undivided one-half interest in the real property was and became their community property, and the other undivided one-half interest in said real property was held in trust by Broadwell for the plaintiff; that Sofie A. Broadwell at no time had any right or interest in the undivided one-half of said real property so held in trust; that, in so far as the one-half interest was concerned, the said Broadwell entered into the lease with the Shell Oil Company for the use and benefit of the plaintiff; that oil was discovered on the property, and from August 16, 1922, until the death of Broadwell in February, 1926, checks for royalties were sent to Broadwell regularly each month; that between December 16, 1922, and August 19, 1924, eleven of said checks were indorsed by Broadwell and his wife and sent to the plaintiff, and were by him deposited in a savings account in a bank at Hemet in the name of Anderson & Broadwell; that four other such checks were likewise sent to him and deposited by the plaintiff in a savings account in a bank at San Pedro in the name of Anderson & Broadwell; that these checks aggregated $13,840.37; and that, in addition thereto, a further sum of $2,130.95 from the same source was deposited in the Hemet bank in the name of Anderson & Broadwell. The court also found that on December 13, 1922, in performance of, and in pursuance to, their agreement and understanding, and on the demand of the plaintiff, Broadwell executed and delivered to the plaintiff an instrument reading as follows:

"This indenture, made and entered into this 13th day of December, 1922, by and between Walter B. Broadwell, party of the first part and August Anderson, a single man, party of the second part.

"Witnesseth: That for and in consideration of the sum of Ten ($10.00) Dollars, an undivided one-half interest, and is as a part of the consideration that during the life of both the Grantor and Grantee, the title to the property may not be transferred, sold, leased or mortgaged or assigned or encumbered in any way save by the consent of both parties. That is that title if as above must pass by the consent of both, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties of the first part do hereby grant to the party of the second part, the following described real property, (here follows description).

"To have and to hold to the party of the second, his heirs and assigns forever.

"In witness whereof, the parties of the first part have hereunto subscribed their names and seals, the day and year in this instrument first above written.

"Walter B. Broadwell."

This instrument was acknowledged and recorded on July 7, 1924. The court also found that on September 2, 1924, a written agreement was executed and delivered, reading as follows:

"Agreement

"Covina, California, September 2nd, 1924.

"It is agreed between W. B. Broadwell, the party of the first part, and August Anderson, the party of the second part, first: that a certain 4½ of five acres of land at Arcadia and on record in the name of R. A. Broadwell, A. Anderson and W. B. Broadwell, in Los Angeles County, first: that the interest of A. Anderson is a one half interest and the interest of the other two is a one half interest; second, that a certain business block at 111 Pacific Avenue, San Pedro, described as Lot 26, Block 2, Arcadia Park Tract, San Pedro and on record in the name of W. B. Broadwell and A. Anderson, that the interest of each is a one half interest; third, that a certain oil lease at Signal Hill, known as the Crisson Community Lease, that the interest of each of the two parties above mentioned, W. B. Broadwell and A. Anderson is a one half interest each.

"[Signed] W. B. Broadwell,
"A. Anderson."

This instrument was acknowledged and recorded on September 5, 1924. The court found that no action was ever commenced by Sofie A. Broadwell to cancel either of said instruments; that no claim to the said undivided one-half interest in the real property and in said oil and gas lease adverse to the plaintiff was made by Sofie A. Broadwell or Helen Lea Broadwell until the month of December, 1927; that W. B. Broadwell died testate on February 28, 1926; and that during his lifetime he admitted, and never to the knowledge of the plaintiff denied, the claim of the plaintiff to an undivided one-half interest in the real property in question and in the oil lease covering the same. The court further found that from December, 1924, until October, 1927, the plaintiff was living in Mexico, and that he did not return to California until long after the estate of Broadwell had been settled and distributed; that he knew of the death of Broadwell; that the defendant Sofie A. Broadwell had disclaimed any right or interest in or to the one-half interest in the real property claimed by the plaintiff; and that the defendant Helen Lea Broadwell has no right or interest in or to said one-half interest. It was further found that on October 14, 1917, the real property in question was of the value of not less than $2,500; that the incumbrances thereon did not then exceed the sum of $750; that all amounts paid by W. B. Broadwell were in fact less than the value of the one-half interest in said land intended to be conveyed to him; and that the other one-half interest in the real property in question was never at any time the community property of Broadwell and his wife. The court further found that on July 21, 1924, the plaintiff and Broadwell entered into an oral agreement by the terms of which Broadwell should collect all royalties from the oil lease and should hold the plaintiff's one-half thereof for his use and benefit, to be repaid to him on demand, with interest at 6 per cent; that the said Broadwell collected said royalties until the day of his death; that shortly after the making of said agreement the plaintiff went to Mexico; that no claim for his share of such royalties was presented by the plaintiff to the executor of Broadwell's estate; that within two years of the commencement of this action the defendants collected and received certain specific royalties from the Shell Oil Company; and that the plaintiff's cause of action was not barred by the various statutes of limitation. Judgment was entered that the plaintiff is the absolute owner of the one-half interest in question, quieting his title thereto, and for an amount equal to one-half of the royalties collected by the defendants after the death of Broadwell. From that judgment this appeal is taken.

[1-4] It is first argued that the judgment cannot be sustained upon the theory of a trust of any kind. Many citations and arguments are set forth showing the fine technicalities that are sometimes necessarily used in passing upon the various kinds of express, constructive and resulting trusts. Most of these, while in the main correct, are not applicable to the case before us. Appellants' main contention upon this point is that there could have been no constructive trust because no fraud was shown. If it could be held that the property had not been conveyed back to respondent by Broadwell, we think the circumstances here shown would establish an involuntary or constructive trust within the meaning of section 2224 of the Civil Code, since the failure of Broadwell to reconvey the property in accordance with his agreement, would be a sufficient showing of fraud. 25 Cal. Jur. 159, § 31, and cases cited. However, the trial court found that, while Broadwell at first held the property in trust for the respondent, and while so holding it leased it to an oil company for the mutual benefit of both, he later conveyed a one-half interest in the property to the respondent, in pursuance of his agreement, and the court drew the conclusion of law that the respondent was the owner of an undivided one-half interest therein. In our opinion, these findings are supported by the evidence, and the conclusion drawn is correct. The respondent testified that he first deeded the property to Broadwell upon his agreement to clear up the incumbrances and later reconvey to him a one-half interest. The last of the incumbrances was not released from record until August 22, 1921. On December 13, 1922, the very date on which the lease to the oil company was recorded, Broadwell executed and delivered to respondent the instrument above set forth. Appellants contend that this instrument was of no legal ef-

fect and conveyed no interest, with which contention we cannot agree. The instrument is in the usual form of a grant deed, and purports to convey to the respondent an undivided one-half interest in the property in question. The only irregularity in its form is that, in reciting the consideration for which it was given, and as one of a number of considerations, it is set forth that the title to the property shall not be transferred or incumbered except by consent of both parties, so long as they both live. This provision was never violated, and, if it had any force at all, it ended upon the death of Broadwell. In our opinion, the insertion of this clause did not nullify the deed, and any attempted limitation upon a transfer, even if it ever had any validity, has expired. The granting clause is unequivocal. Courts are liberal in construing deeds so as to give them effect, and a deed is to be interpreted against the grantor and in favor of the grantee. 8 R. C. L. 1049–1052, Deeds, §§ 103, 104; Civ. Code, § 1069. The subsequent conduct of Broadwell indicates that he interpreted this instrument as a deed. He sent to the respondent every one of the invoices which accompanied the royalty checks until respondent went to Mexico in August, 1924. Most of the royalty payments were deposited in a bank in the name of Anderson & Broadwell. The payments that were not so deposited and which were retained by Broadwell were used by him in paying part of the cost of erecting a building on the San Pedro property, which will be considered in one of the other cases. A part of the money deposited in the bank in the name of Anderson & Broadwell was used to pay the rest of the cost of erecting this building; another large part was used in purchasing certain real property near El Monte, which property is involved in the third of these suits; and the balance of the money remaining in the bank was equally divided between Broadwell and the respondent, just before he went to Mexico. Broadwell again confirmed this interpretation when he included in the agreement of September 2, 1924, a statement that he and the respondent each had a one-half interest in the oil lease at Signal Hill.

[5-7] It is contended by appellants that there was no consideration for the deed of December 13, 1922. The deed itself recites as a part of the consideration that it was given for an undivided one-half interest in the property. It requires no further review of the evidence to show that an ample consideration existed for the making of the deed. It is also insisted that the deed is void, since it purported to convey community property, and was not signed by Broadwell's wife, one of the appellants. Not only is it true, as found by the court, that Broadwell's wife did not bring any action within one year after the instrument was filed for record, in accordance with the terms of section 172a of the Civil Code, but it conclusively appears, as also found by the court, that, in so far as this one-half interest in the property is concerned, it was never community property. During the time that title to this half interest remained in Broadwell, he held it in trust for the respondent, and as the learned trial judge remarked during the course of the trial: "The property that we call community property can never rise higher than the fountain of title, and the fountain of title is impinged by a trust." It would further appear that in any event the appellants could not avail themselves of such a contention at this time, for the double reason that Sofie A. Broadwell has disclaimed any present interest in the property, and that she has received a full half interest therein.

[8] The next point raised by appellants is that respondent is estopped by laches from asserting any claim to the property in question. The only acts of the respondent relied upon as showing laches are that he paid no taxes on the property after 1917, that he made no claim to the property until this suit was filed, and that he permitted the property to be distributed in the estate of Broadwell. It appears that in August, 1924, Broadwell and the respondent divided the money left in their joint account, and that thereafter Broadwell received the royalties from the oil lease and rent from the building at San Pedro, until his death. The respondent testified that Broadwell had enough of his money on hand at all times to pay his share of the taxes, and we cannot find this denied in the record. The respondent went to Mexico in 1924, and the court found that he did not return to California until after the estate was distributed. He returned to California in October, 1927, and the record shows all of the properties involved in these actions were distributed to the widow by a decree of partial distribution filed on February 15, 1927. We are referred to no evidence even indicating that the respondent knew that the property was being carried through the estate as having belonged entirely to Broadwell. The evidence shows that the incumbrances on the property were not removed of record until August 22, 1921; that the respondent demanded and received a deed to his half interest in December, 1922; that this deed was recorded; that an invoice of each royalty payment was sent to him as fast as received; that most of the royalty payments up to August, 1924, were received by him and deposited in a joint account, and that all of the proceeds from the oil lease up to August, 1924, were divided or expended with the respondent's consent upon projects in which he and Broadwell were jointly interested; that before he went to Mexico in 1924 the respondent demanded, received, and recorded another agreement showing his interest in the properties; and that he then made an agreement with Broadwell for the handling of the proceeds of the oil lease and

the rental from the San Pedro property during the time that he should be away. It further appears that the respondent did not return to California until about a year before this action was begun. It is in evidence that his claim was never disputed by Broadwell in his lifetime, and that no dispute on the part of these appellants was brought to his attention until shortly before this suit was filed. The evidence shows that, while he was in Mexico, in accordance with their agreement, Broadwell sent him $100 per month, and that after his death this amount was sent him monthly for some time by the appellants. When they ceased to send him such amounts, he returned to California, and, when he first took the matter up with the appellants, they merely told him he would have to wait until they got the money in the bank. Even if the claim of the respondent rested upon the establishment of a trust instead of upon a record title, in order to establish estoppel by laches it would be incumbent upon the appellants to show the lapse of an unreasonable time, knowledge upon the part of the respondent of the facts, and resulting prejudice to the appellants. None of these elements here appear, and we fail to see how the respondent could be required to have been any more diligent than he was in asserting his rights, under the circumstances shown by the record.

[9] It is next insisted that this action is barred by the statute of limitations. Under the view we take, that a half interest in the property had been deeded back to the respondent, this defense is not available to the appellants. In any event, if it should be considered that the trust continued until the bringing of this action, the statutory time had not yet expired. Taylor v. Morris, 163 Cal. 717, 127 P. 66; Arnold v. Loomis, 170 Cal. 95, 148 P. 518.

[10] Appellants urge that they have acquired a prescriptive title to the entire property in question. Not only is this disposed of by what we have previously pointed out, but it nowhere appears in the evidence that either Broadwell or his successors ever claimed adversely to the respondent until less than one year before this action was filed. It does not appear that Anderson neglected to pay the taxes for five years or that Broadwell paid such taxes out of his own funds. No tax receipts were admitted in evidence, and the respondent testified: "Mr. Broadwell took care of all that business, being down at that end of it, and he took care of the taxes, supposed to pay the taxes for the different properties. He had plenty of money in his hands all the time that belonged to Anderson and Broadwell." It further appears that the appellants were not in possession of the property other than through the lease to the oil company, and that any constructive possession was participated in as much by the respondent as by them, through the various recorded instruments.

[11] Without setting forth what statements are objected to, appellants urge that the trial court erred in admitting in evidence testimony as to the acts and declarations of the parties subsequent to the original deed from the respondent to Broadwell. By their objections, the appellants raised the point that the deed from Broadwell to respondent dated December 13, 1922, was ambiguous, and the evidence which is apparently objected to was properly admitted for the purpose of clearing up this ambiguity. The particular acts or statements objected to not being pointed out, we do not feel called upon to hunt out and comment upon each particular one.

[12] A number of findings are objected to as not supported by the evidence. We have carefully examined all of these, and each material finding is amply supported by the evidence. The matters pointed out by appellants raise no more than questions of conflicting evidence which have been decided adversely to them by the trial court.

[13] Appellants complain of the failure of the trial court to find that Helen Broadwell was an innocent purchaser for value. Not only was no evidence at all introduced by the appellants of any title in Helen Broadwell, but there is no evidence in the entire record which would have justified such a finding. Not only did she have constructive notice from the recorded instruments, but her own testimony shows that she had actual notice of the claims of the respondent and of the making of the agreement of September 2, 1924, on the very day it was executed, which was many years before she claims to have acquired the property from her mother by a deed which was never produced, the date of which she could not remember, and the consideration for which she could not remember other than the fact that it was "sufficient to make it legal."

[14, 15] It is next urged that respondent's claim is barred by his failure to do or offer to do equity; it being claimed that he made no offer to repay such taxes, assessments, and other expense on the various properties as were paid by Broadwell and the appellants. It will have to be assumed, in the absence of evidence to the contrary, that these matters were adjusted in 1924, when the balance of their joint funds was divided. Thereafter the respondent was in Mexico, and by agreement Broadwell was to collect the royalties from the oil lease and the rentals from the buildings in San Pedro. No account of these matters was ever made so far as shown by the record, and the respondent's testimony that Broadwell at all times had sufficient of their funds in his hands to pay the taxes is not contradicted. The record contains no proof of any amounts paid for taxes or other purposes by Broadwell or the appellants.

[16, 17] Two objections are raised to that portion of the judgment covering one-half of

the amount of royalties from the oil lease collected by the appellants within two years prior to the bringing of this action. It is first urged that this portion of respondent's claim is barred by his failure to present a claim therefor to the executor of the estate of Broadwell. The findings and the evidence show that the items which went to make up this portion of the judgment were for royalty payments made after the death of Broadwell, which never came to the hands of the executor, but which were personally received by the appellants. The other objection is that respondent failed to trace these royalty payments into any particular fund. This is completely answered by the stipulation of appellants' counsel that appellants received this money and spent it, and by the fact that the respondent, in that part of the action, is seeking only a money judgment, and is not attempting to impress any particular fund with a trust. If, as we think, the court correctly found that the respondent was the owner of a one-half interest in the property and that he was entitled to half of the royalties derived therefrom, he was entitled to recover these amounts from the parties who received them.

The record in this case is very voluminous, and not only are the material findings of the trial court supported by the evidence, but it is difficult to see how a contrary conclusion could have been reached in any court of equity.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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119 Cal.App. 150

ANDERSON v. BROADWELL et al.

Civ. 595.

District Court of Appeal, Fourth District, California.

Dec. 10, 1931.

1. Deeds 🔑136.

Where several grantees are named in deed, and their respective interests are not set forth therein, presumption is that each takes an equal interest.

2. Deeds 🔑136.

Presumption that grantees in general deed have equal interests is rebuttable.

3. Deeds 🔑136.

In absence of other controlling facts, respective interests of common grantees are determined by proportion of purchase price paid by each.

4. Deeds 🔑118.

Evidence *held* to show that plaintiff was owner of undivided one-half interest in real estate deeded to father, son, and plaintiff (Civ. Code, § 853).

> Plaintiff paid one-half of purchase price. The other half of purchase price was paid by the father, whose son paid nothing. Plaintiff's interest was thereafter set forth in recorded writing, executed and acknowledged by father, who was plaintiff's brother-in-law. Plaintiff had protested after learning that son was also named as grantee. Widow and daughter of deceased father claimed that plaintiff had only one-third interest. Both had actual and constructive notice of plaintiff's interest.

5. Trusts 🔑79.

Where plaintiff paid one-half of purchase price, but other party who paid half took deed in name of self, son, and plaintiff, there was resulting trust in favor of plaintiff against such party for one-sixth interest (Civ. Code, § 853).

6. Trusts 🔑365(1).

Where trustee of resulting trust took title to interest in land for plaintiff, latter had right to demand conveyance at any time (Civ. Code, § 853).

7. Limitation of actions 🔑103(2).

Statute of limitations does not apply until trustee of resulting trust has repudiated obligation to convey (Civ. Code, § 853).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by August Anderson against Robert Broadwell and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

L. G. Shelton, of Glendora, for appellants.

J. E. Ricketts and Walter C. Maloy, both of Covina, for respondent.

BARNARD, P. J.

This action was tried with Anderson v. Broadwell (Cal. App.) 6 P.(2d) 260, and Broadwell v. Anderson (Cal. App.) 6 P.(2d) 269, this day decided, and relates to what was called by the parties the "El Monte property." In his complaint, the plaintiff seeks to have his title quieted to an undivided one-half interest in the property, alleging title in himself in a first cause of action, and, in a second cause of action, that he paid one-half of the purchase price of the property upon the understanding and agreement that he was to have an undivided one-half interest therein. In their answer the defendants admit that the plaintiff has a one-third interest in the property, and allege that Robert Broadwell and Helen Lea Broadwell have each a one-third interest.

The following facts appear: In July, 1923, the plaintiff and W. B. Broadwell had more than $6,700 in a bank account in Hemet in the name of Anderson & Broadwell; the money having come from royalties from an oil lease on property they owned in Long Beach, and belonging equally to the two. About this time the two looked at the real property involved in this action, and decided to buy it. The plaintiff left the matter of the purchase of the property to W. B. Broadwell, and he in turn left the escrowing of the matter largely to his son Robert Broadwell. In the escrow papers, instructions were put in that the property was to be deeded to W. B. Broadwell, Robert Broadwell, and the plaintiff. On July 9, 1923, the plaintiff received from W. B. Broadwell a letter reading in part as follows:

"I bought the 5 acres at 6700. It is the corner piece and has about a $200 crop on it—It will divide into 5 lots now and sell for 2500 a lot. The Shell Co. tried to lease it several years ago without a drill clause. The party selling knew of oil tank. They had held it a long time and wanted to get out. We pay cash as we got 100 off. So get Dfts for 6700 and send me—*Title to A A and myself. I have let Robert in on my half.* If oil is discovered we can turn it in 10 days if we want to at 8900." (Italics ours.)

On the next day the plaintiff drew $6,700 from the Anderson & Broadwell account, and sent it to W. B. Broadwell, and the evidence shows that $6,700 constitute the entire purchase price of the property. The property was deeded to W. B. Broadwell, Robert Broadwell, and the plaintiff, with nothing contained in the deed to show the respective interest of each of the grantees. Robert Broadwell testified that his interest in the property was a gift from his father; that he had paid nothing on the purchase price; that he had never paid any part of the taxes, nor received any part of the rents; and that his father told him on September 2, 1924, that he had given a one-half interest in this property to Anderson. When the plaintiff later learned that Robert was named in the deed, he protested to W. B. Broadwell, and was told by him: "It doesn't make any difference; I'll settle with Robert. You get your half interest. I'll settle with Robert." Later, in an agreement dated September 2, 1924, and subsequently recorded, which agreement is set forth in full in the opinion in the first of these three cases, W. B. Broadwell subscribed to the following: "First, that a certain 4½ or five acres of land at Arcadia and on record in the name of R. A. Broadwell, A. Anderson and W. B. Broadwell, in Los Angeles County, first, that the interest of A. Anderson is a one-half interest."

The court found in accordance with the foregoing facts, and decreed that the plaintiff is the owner of an undivided one-half interest in the property, from which judgment this appeal is taken.

[1-4] The appellants maintain that the deed is conclusive evidence that each of the grantees named therein took a one-third interest.

It may be conceded that, where several grantees are named in a deed, and their respective interests are not set forth therein, it will be presumed that each takes an equal interest. 7 R. C. L. 818; 18 Cor. Jur. 329, and cases therein cited. Not having been made conclusive by our Codes, this presumption may be overcome by evidence to the contrary. When so overcome, in the absence of other controlling facts, the respective interests must be determined by the relative proportion of the purchase price paid by each. Huffman v. Mulkey, 78 Tex. 556, 14 S. W. 1029, 22 Am. St. Rep. 71. In the case before us, not only does the evidence show that half of the purchase price was paid by the respondent, but his testimony that he was to receive a one-half interest in the property is most solemnly and conclusively corroborated by W. B. Broadwell's letter to him telling him to send the money with which the land was bought, and by his subsequent agreement, which was acknowledged and recorded, in which it is set forth that the respondent has a one-half interest in the property. Without regard to any interest that Robert Broadwell had in the property, it fully appears that W. B. Broadwell had at the time an interest sufficient to cover the difference between respondent's presumptive interest under the deed and the interest it was agreed he was to receive. Not only was constructive notice of respondent's claims and rights given by the recording of the contract of September 2, 1924, but, under the circumstances shown by the record, no claim of being an innocent purchaser for value can be successfully maintained by the appellants Helen Lea Broadwell and Sofie A. Broadwell.

[5-7] Irrespective of the legal situation, the respondent's equitable right to a one-half interest in the property was sufficiently shown to sustain the judgment. One-half of the consideration having been paid by the respondent, and the title, in so far as a one-sixth interest in the property is concerned, having been taken in the name of another, a trust is presumed to have resulted in favor of the respondent. Civ. Code, § 853; Campbell v. Freeman, 99 Cal. 546, 34 P. 113. In addition to this presumption, the evidence, oral and written, abundantly established such a trust. The respondent had the right to demand a conveyance of the other one-sixth interest at any time. Campbell v. Freeman, supra. W. B. Broadwell took title to that one-sixth in-

terest with the implied promise to convey it to the respondent, and the statute of limitations would not apply until the obligation was repudiated. Arnold v. Loomis, 170 Cal. 95, 148 P. 518. The appellant Sofie A. Broadwell has disclaimed all interest in the property, and the appellant Helen Lea Broadwell, although claiming under W. B. Broadwell, has not shown that she is a purchaser for value, and she is shown to have had both constructive and actual notice of the agreement of September 2, 1924.

Not only is the judgment sustained by the evidence and the findings, but it would seem from the facts recited that a contrary conclusion would have been a serious reflection upon a court of equity.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

119 Cal.App. 145

BROADWELL v. ANDERSON et al.

Civ. 596.

District Court of Appeal, Fourth District, California.

Dec. 10, 1931.

1. Quieting title ⚿44(4).

In quiet title action, evidence sustained findings of trial court that plaintiff was owner of undivided half interest in certain real property.

2. Trusts ⚿357(2).

That deed conveying undivided half interest to plaintiff was not recorded through inadvertence is immaterial, where grantor's heirs had actual and constructive notice of plaintiff's interest.

3. Quieting title ⚿47(2).

Findings as a whole for plaintiff *held* sufficient to sustain judgment quieting title to half interest in property against deceased grantor's heirs.

> Court found that plaintiff deeded property to deceased on latter's agreement that he would discharge incumbrances and reconvey one-half interest to plaintiff. This was done. After delivery of deed, plaintiff gave it to deceased to have it recorded. Through inadvertence this was not done. Deceased and plaintiff thereafter erected and paid for building on premises. Deceased executed and acknowledged writing setting forth plaintiff's interest and referring to deed that was supposed to have been recorded. After completion of building, deceased, pursuant to agreement, collected rents, paid taxes, and remitted plaintiff's share to the latter in Mexico. Remittances were also made by decedent's heirs after the latter's death. Heirs had actual and constructive notice of plaintiff's right.

Appeals from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Helen L. Broadwell against A. Anderson, also known as August Anderson, who filed a cross-complaint against plaintiff and Sofie A. Broadwell. From a judgment for defendant and cross-complainant, plaintiff and cross-defendant appeal.

Affirmed.

L. G. Shelton, of Glendora, for appellants.

J. E. Ricketts and Walter C. Maloy, both of Covina, for respondent.

BARNARD, P. J.

This action, involving certain lots situated in San Pedro, Cal., was tried with the case of Anderson v. Broadwell (Cal. App.) 6 P. (2d) 260, this day decided. Much of the opinion in that case applies equally to this case. The facts are largely the same, with the two exceptions that no deed reconveying this property to Anderson was produced at the trial, and that certain evidence in relation to the conduct of the parties applies only to this case.

This action was brought by Helen L. Broadwell in the usual form of an action to quiet title. August Anderson answered, admitting that the plaintiff was the owner of an undivided one-half interest in the property, denying her title to the other half and alleging title in himself to that portion of the property. In a separate defense he alleged ownership of the property in 1917, and conveyance of the same to W. B. Broadwell on the agreement that Broadwell would pay off existing incumbrances and reconvey a half interest to him. He also alleged the construction in 1924 by himself and Broadwell of a building on the lots, and that the cost thereof was paid by them from their joint funds. He further alleged an agreement between them whereby Broadwell should collect the rents, pay taxes and expenses, and send him $100 a month, and that Broadwell and his widow and the plaintiff continued to make these monthly payments until December, 1927. A copy of the written agreement of September 2, 1924, which is set forth in the opinion in the Long Beach case, was set up in the answer. At the same time Anderson filed a cross-complaint seeking to quiet title in himself as to a one-half interest in the property.

Among other things, the court found that Anderson is the owner of an undivided one-

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half interest in the property described; that he was the owner of all of the property on November 16, 1917, which was then of the value of $3,000; that on that date he conveyed the property to Broadwell upon the express understanding and agreement that Broadwell would pay off and discharge the incumbrances of record, and would thereafter convey to him a one-half interest therein; and that these parties were brothers-in-law, had been associated in business for more than thirty years, and that each reposed the highest trust and confidence in the other. It was further found that on December 13, 1922, Broadwell executed, acknowledged, and delivered to Anderson a grant deed conveying a one-half interest in the property in accordance with his previous agreement; and that said grant deed was thereafter delivered by Anderson to Broadwell, with instructions to have the same recorded and then kept in safe-keeping for him. It was then found that on April 1, 1924, Broadwell and Anderson entered into an agreement with one Hubbard for the construction of a brick building upon the premises; that at that time Anderson and Broadwell had on deposit in a bank in their joint names $7,017.78; that at the same time they were the equal owners of other large sums of money derived from royalties from oil produced on the Long Beach property, referred to in the opinion in that case; that all bills for labor and materials in the construction of this building were with the consent and at the direction of Broadwell charged to Anderson & Broadwell; that these bills were paid by checks on their joint funds; and that Broadwell at all times during his lifetime admitted that Anderson had a one-half interest in the property. The court then found that the agreement of September 2, 1924 (which is set forth in the opinion in the Long Beach case), was on that date executed, acknowledged, and later recorded, and that the plaintiff in this action had actual notice and knowledge of the making of the said agreement, being present at the time of its execution, acknowledgment, and delivery. The court also found that, after the building on the property was completed, it was agreed by the parties that Broadwell should collect and receive the rents, should pay all taxes, assessments, and expenses, and pay to Anderson the sum of $100 per month; that said amount was paid monthly until the death of Broadwell; and that thereafter the plaintiff herein and Broadwell's widow continued to make said payments until October, 1927. It was further found that in December, 1924, Anderson went to Mexico and did not return until October, 1927. As a conclusion of law, the court found that Anderson was entitled to a decree quieting his title to an undivided one-half interest in the property, and a judgment and decree to that effect was entered, from which judgment this appeal is taken.

[1-3] The only points raised by appellants relating to this particular action are that there is no evidence to sustain the findings that Anderson was the owner of a half interest in the property, and that Broadwell made, executed, and delivered to Anderson a deed on December 13, 1922, conveying to him a one-half interest in the property. Both of these objections will be considered together. The evidence shows that in 1917 Anderson was the owner of the property which was then worth from $2,500 to $3,000, and was subject to a mortgage for $750 and a street assessment; that at or about the same time as a similar agreement in reference to certain Long Beach property, which is referred to in the opinion above mentioned, Anderson conveyed the property to Broadwell upon the agreement that he would pay off the incumbrances and later convey back a one-half interest in the same. The release of the mortgage was recorded February 13, 1920, and a certificate of redemption of a tax sale dated August 22, 1921, is shown in the record. The respondent testified that about December 13, 1922, Broadwell executed and delivered to him a deed conveying a one-half interest in this particular property; that this deed was by him intrusted to Broadwell for the purpose of recording; and that he supposed it had been recorded until this action was brought. The record shows that this deed could not be found, and it appears that it was never recorded. That both the respondent and Broadwell believed this deed had been recorded is shown by the agreement of September 2, 1924, set forth in full in the court's findings, in which the following paragraph appears: "Second, that a certain business block at 111 Pacific Avenue, San Pedro, described as Lot 26, Block 2, Arcadia Park Tract, San Pedro, and on record in the name of W. B. Broadwell and A. Anderson, at the interest of each is a one half interest."

Not only is the respondent's testimony as to the execution and delivery of such a deed corroborated by this written agreement which was itself recorded, in which it is set forth that the property in question is on record in the name of both of these parties, but it is further corroborated by many acts and declarations on the part of Broadwell, the grantor. Not only does the evidence show that a building was erected on this property in 1924 and paid for with funds jointly belonging to these two parties, but it further shows that, before the building was started, Broadwell told the contractor that he and Anderson owned the property; that he arranged for the construction of the building in the name of Anderson and Broadwell; that Broadwell instructed a broker to draw a lease in the name of Anderson & Broadwell, and a lease was drawn showing both parties as lessors; that throughout the construction of the building bills and accounts were rendered to Anderson & Broadwell; and that, upon the completion of the building, Broadwell and Anderson joined in making an affidavit of ownership and notice of completion of the building. It further appears that Broadwell and the appellants carried out Broadwell's agreement with the respondent in reference to handling the rentals from this property, by sending him $100 per month until October, 1927. While appellants claim that in fact they were unable to collect all of the rent from the San Pedro property, the fact is immaterial, since the respondent was in Mexico and knew nothing of the circumstances. We think this evidence is ample to sustain the findings attacked. The fact that the deed was not actually recorded is immaterial so far as this action is concerned, except for the matter of notice to the appellants. However, they had constructive notice, through the recording of the agreement of September 2, 1924, of the respondent's interest in the property, and the court found upon sufficient evidence that Helen Lea Broadwell had actual notice of the making of that agreement, having been present when it was signed, acknowledged, and delivered.

While we think the findings complained of, to the effect that a one-half interest in the property was reconveyed by Broadwell to Anderson, is supported by the evidence, we also think that, irrespective of, and in the absence of, any such findings, the other facts found would be sufficient to establish that the legal title to this property was held by Broadwell and his successors in trust for the respondent, and that, in any view, the findings as a whole are sufficient to sustain the judgment quieting the respondent's title to a one-half interest in the property.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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119 Cal.App. 219

McEWAN v. BRYSON.

Civ. 6918.

District Court of Appeal, Second District, Division 1, California.

Dec. 15, 1931.

1. Appeal and error ⚷994(3).

In nonjury case, credibility of witnesses' testimony is for trial judge.

2. Appeal and error ⚷994(3).

In action against administrator, where testimony of plaintiff and witness was impeached, trial court's conclusion that neither testimony of plaintiff nor witness was true, could not be disturbed.

3. Appeal and error ⚷1056(5).

Where, in action against administrator, trial court found plaintiff's testimony was untrue, error, if any, in excluding plaintiff's testimony regarding correctness of his book account, *held* harmless.

> Error, if any, was harmless, since, if plaintiff had been permitted to testify that his account against deceased was correct in every particular, such testimony could not have added weight to his case in general, but such testimony, as far as credibility was concerned, would have met same fate as did testimony of plaintiff which was admitted in evidence.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by James McEwan against Frank Bryson, administrator of the estate of Thomas Loughtwry, also known as Thomas S. Loughtwry, deceased. From an adverse judgment, plaintiff appeals.

Affirmed.

James W. Creed, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

HOUSER, J.

Plaintiff brought an action against defendant, as administrator of the estate of one Thomas S. Loughtwry, deceased, for services alleged to have been performed by plaintiff for, and at the instance and request of, said deceased, as well as for money lent by plaintiff to said deceased during his lifetime. From a judgment in favor of defendant, plaintiff has appealed to this court.

It appears that, in support of his claim against the estate of the decedent, plaintiff produced two books, one of which, kept by plaintiff, was a purported ledger account between him and Thomas S. Loughtwry, and the other a copy of the same. With reference thereto, in substance, the plaintiff testified that the ledger account between him and Loughtwry was a part of a book of accounts kept by plaintiff in connection with and in the course of his business, and that it contained the original entries as to each item therein set forth. Another witness testified to the fact that he was employed by Loughtwry to examine his account with plaintiff; also to employ the latter to repair some houses which were owned by the former; that, after having made an examination of the said

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

account in the presence of plaintiff, he "went over it with Mr. Loughtwry. * * * He (Loughtwry) stated it was O. K., * * * and asked me to see if I could get a loan to pay this claim that he owed Mr. McEwan." The witness also stated that he was present "when the biggest part of it (the money) was loaned" by plaintiff to Loughtwry, and that he saw some of the entries made in the book. On direct examination the same witness testified to other facts which tended to establish the accuracy of the claim presented by plaintiff and upon which the action depended. However, on cross-examination, the witness became very much confused, not only as to dates and events regarding which he had testified on his examination in chief, but as well on several different occasions contradicted his earlier statements in important particulars. The record also discloses the fact that, by the testimony given by two experts on handwriting, the testimony given by plaintiff was also impeached not only as to the genuineness generally of the ledger account said to have been kept by plaintiff, but particularly as to certain alleged signatures of Mr. Loughtwry which appeared in the copy of the ledger account, by each of which he was presumed to have acknowledged his indebtedness to plaintiff as to various and sundry items which appeared in said account.

[1, 2] Numerous authorities attest the general rule that the credibility to be attached to the testimony of a witness is a question solely for the determination of the trial judge. 2 Cal. Jur. 916, and authorities there cited. By the findings of fact, it appears that the trial court concluded that as a matter of fact neither the testimony given by plaintiff, nor that given by his supporting witness was true. Considering such situation, together with the rule to which attention has been directed, it becomes plain that in the exercise of the proper functions of this tribunal the conclusion reached by the trial court may not be disturbed.

[3] Appellant also complains that on the trial of the action the trial court committed error in sustaining an objection interposed by counsel for defendant by which action plaintiff was prevented from testifying regarding the correctness of his book account. But, in view of the finding of fact by the trial court, to the effect that the remainder of the testimony given by plaintiff was untrue, it becomes apparent that, had plaintiff been permitted to answer the question and had replied thereto in substance that his account against Loughtwry was correct in every particular, such testimony could have added no weight to his case in general, but that such testimony, as far as its credibility was concerned, would have met the same fate as did the testimony of plaintiff which was admitted in evidence. It therefore becomes manifest that the error, if any, to which attention has been directed, was of no moment, as far as it might have affected the judgment in the action.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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119 Cal.App. 164

CAMERON v. EVANS SECURITIES CORPORATION et al.

Civ. 564.

District Court of Appeal, Fourth District, California.

Dec. 11, 1931.

Rehearing Denied Jan. 11, 1932. Hearing Denied by Supreme Court Feb. 8, 1932.

1. Fraud 🔑45.

Complaint for fraud *held* good against general demurrer, although containing no allegation that alleged misrepresentations were known by defendants to be false and fraudulent.

2. Pleading 🔑207.

That general demurrer was interposed to each cause of action *held* not to render demurrer special.

3. Pleading 🔑207.

"Special demurrer" calls attention to some particular defect in pleading, such as alleged uncertainty specifying in what respect allegation attacked is uncertain.

[Ed. Note.—For other definitions of "Special Demurrer," see Words and Phrases.]

4. Vendor and purchaser 🔑37(3).

Alleged misrepresentation by vendor that property was free from incumbrances other than certain trust deed *held* such representation as would constitute basis for action for rescission.

5. Vendor and purchaser 🔑114.

Even if purchaser, by continuing to make payments on incumbrance, waived right to rescind for previously discovered fraud, purchaser was not precluded from rescinding for fraud subsequently discovered.

6. Vendor and purchaser 🔑37(3).

That purchaser failed to examine records showing existence of mortgage *held* not to preclude rescission for misrepresentation that premises were not incumbered except by certain trust deed.

7. Vendor and purchaser 🔑114.

Purchaser's payments on trust deed after discovery of falsity of representation concerning incumbrances *held* not to bar rescission.

> Payment on trust deed payable to third party, and which was executed prior to purchase, did not constitute affirmance of transaction as would bar action for rescission, since purchaser was entitled to make such payments for purpose of preserving property.

8. Contracts 🔑270(2).

Party seeking to rescind must act promptly on discovery of fraud.

9. Contracts 🔑270(3).

Whether delay after discovery of fraud deprives complainant of right to rescind depends on circumstances, and is primarily question for trial court.

10. Vendor and purchaser 🔑114.

Purchaser's delay for more than two months after discovery of alleged fraud *held* not to constitute waiver of right to rescind under circumstances.

> Circumstances disclosed that on December 24, 1927, the day on which purchaser first discovered the falsity of representations, purchaser consulted an attorney with view to taking action to rescind; that the attorney first consulted delayed taking action because of the pressure of other business; that on February 19, 1928, purchaser demanded his papers, and consulted another attorney; and that 10 days thereafter notice of rescission by purchaser was served on vendors.

11. Contracts 🔑266(2).

One seeking to rescind for fraud need not preserve subject-matter of contract after notice of rescission and offer of restoration (Civ. Code, § 1691, subd. 2).

12. Contracts 🔑266(2).

Offer of restoration accompanied by prompt and proper notice to rescind is sufficient to entitle complainant to remedy of rescission for fraud.

13. Vendor and purchaser 🔑118.

That purchaser giving notice to rescind for fraud, while no payments were due on trust deed, permitted property to be sold under trust deed, did not defeat right to rescind (Civ. Code, § 1691, subd. 2).

14. Witnesses 🔑336.

In purchaser's action to rescind for fraud, admitting testimony that vendor's general reputation for truth, honesty, and integrity was bad, *held* not error (Code Civ. Proc. § 2051).

15. Appeal and error 🔑1011(1).

Findings of trial court will not be disturbed, where evidence is conflicting.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by John D. Cameron against the Evans Securities Corporation and another. From an adverse judgment, defendants appeal.

Affirmed.

Clyde C. Downing, of Santa Ana, and Preston Turner, for appellants.

Raymond Thompson, of Fullerton, and McFadden & Holden and Leo J. Friis, all of Anaheim, for respondent.

JENNINGS, J.

The appeal herein is taken by the defendants from a judgment rescinding and canceling a written contract for the purchase and sale of certain real property. The amended complaint contains three causes of action separately stated. In the first cause of action it is alleged that defendants made certain representations to plaintiff respecting the area in square feet of the property which was sold to plaintiff, the freedom of the property from any incumbrances other than a specified trust deed covering a portion of it, the inclusion within the boundaries of the property of all and every part of certain poultry houses, pens, and equipment, the cost of erecting the dwelling house and the poultry houses and equipment which were standing on the premises, and the quality of the land. It is stated that each of such representations was falsely and fraudulently made with intent to deceive plaintiff, and that plaintiff relied upon them, and was thereby induced to enter into the contract for the purchase of the property. The second cause of action alleges the representation made falsely and fraudulently by defendants with intent to deceive plaintiff, that the premises comprised a tract of land of certain specified measurements. The third cause of action alleges that the property was sold by reference to an unrecorded map in violation of certain penal statutes. To the amended complaint, and to each of the three causes of action, and to certain paragraphs of the first cause of action, defendants demurred on the ground that neither the complaint as a whole nor any one of the causes of action nor the specified paragraphs of the first cause of action stated facts sufficient to constitute a cause of action. The demurrer was overruled by the court. Defendants thereupon answered specifically and fully denying the various allegations of false and fraudulent representations contained in the amended complaint. Upon trial of the issues thus raised, judgment was rendered in plaintiff's favor.

[1-4] Among the various errors relied upon by appellants as warranting a reversal of the judgment, it is first contended that the demurrer to the amended complaint was improperly overruled. It is urged that the pleading contains no allegation that the alleged false and fraudulent representations were known to be false and fraudulent by appellants or by either of them. This, it is said, constitutes a fatal defect. The precise question was decided adversely to appellants' contention in the case of Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, wherein it was held that an allegation that certain statements were "falsely and fraudulently" made implied that they were untrue, and that the person who made them either knew that they were false or made them in a manner not warranted by the information which he possessed. It was pointed out that the alleged defect might have been held fatal if the objection had been raised by special demurrer for uncertainty, but decided that, in the absence of such special demurrer specifically attacking the defect, the allegation would be held sufficient after a decision upon the merits. Appellants make the novel contention that, because the demurrer, obviously general, was interposed to each cause of action, it therefore became special. Such a contention may not be sustained. A general demurrer does not become special by reason of the fact that it attacks each one of several causes of action on the general ground that each of such causes of action fails to state facts which constitute a cause of action. A special demurrer, as its name indicates, calls attention to some particular defect in a pleading, as, for example, an alleged uncertainty specifying in what respect it is claimed the allegation attacked is uncertain. Krieger v. Feeny, 14 Cal. App. 538, 112 P. 901. Objection is also made that certain other defects which it is claimed appear on the face of the amended complaint entitled appellants to an order sustaining the demurrer. Among the allegations which are thus attacked are those relating to the cost of improvements upon the property and the quality of the soil and its freedom from alkali. It is urged that representations as to such matters constitute mere expressions of opinion, and may not form the basis of an action which is predicated upon fraud. It is also pointed out that the amended complaint alleges that respondent made an examination and inspection of the premises at the time he entered into the agreement which he now seeks to rescind. Such an allegation, it is said, conclusively negatives his claim that he relied upon the various representations whose falsity he maintains entitles him to rescind the agreement. But, as heretofore pointed out, the demurrer which was interposed was general and not special, and therefore, if in any cause of action or in the amended complaint taken in its entirety there is a sufficient allegation of a false and fraudulent representation as to a single material fact made with intent to deceive, the court's order overruling the demurrer must be sustained. At least one such allegation is contained in the specification of false representation by appellants that the property was free from all incumbrances other than a certain deed of trust, whereas it is alleged that, in addition to the incumbrance mentioned, a portion of the property was also subject to a certain mortgage described in the amended complaint.

[5-7] It is next urged that the trial court erred in denying appellants' motion for a nonsuit after respondent had presented his case and had rested. It is pointed out that the evidence produced by respondent had shown that, after he had been in possession of the property for a period of three months, appellants exercised an option reserved in the contract, and executed a deed to the property to respondent, and took back from respondent his promissory note for the unpaid balance due them on the purchase price and a deed of trust on the property to secure the payment of the note. Attention is called to the fact that respondent himself testified that he first learned of the fraud which he claimed had been practiced on him on December 13, 1927, the very day on which he executed the note for the unpaid balance and the trust deed, to secure its payment, and that for a period of two months thereafter he continued to make the monthly payments on the original deed of trust by which the property was incumbered when the contract was entered into between the parties in compliance with his agreement. By his action in this regard it is contended that respondent waived any right that he might have had to rescind the contract on the ground of fraud, and, by continuing to make the payments on the original deed of trust for two months after discovery of the fraud, it is said that he is estopped from claiming the remedy of rescission. It is to be observed that the testimony of respondent is in conflict as to the precise date on which he discovered the fraud, since in one part of his testimony he stated that he learned of it on December 13, 1927, and in another part he testified that he first learned of the fraud on December 24, 1927. The court found that he first made the discovery on December 24, 1927, and we must therefore conclude that this is the correct date. The selection of the later date obviates any claim that respondent waived his right to rescind by his action in executing the deed of trust to secure the unpaid balance due appellants under his contract of purchase. It remains to consider the legal effect of his continuing to make payments on the original deed of trust for two months after he learned of the fraud. So far as

can be gleaned from the record, the original deed of trust was one in which the beneficiary was the Pacific Coast Building & Loan Association. In this connection, it is pertinent to observe that respondent's testimony shows, and the court in conformity therewith found, that respondent did not discover the falsity of the representation respecting the nonexistence of any incumbrance other than the deed of trust in which the building and loan association was named as beneficiary until after the action was instituted, when he learned for the first time that a portion of the property was also subject to a mortgage. Thereafter, it appears, respondent filed his amended complaint in which is contained the allegations respecting the false representation as to freedom of the property from incumbrance other than the deed of trust.

Even if it should be conceded, therefore, that respondent, by continuing to make the monthly payments, had waived his right to rescind the contract on the ground of the falsity of those representations which he had discovered on December 24, 1927, he is nevertheless not precluded from seeking cancellation on the basis of the falsity of a material allegation which he did not discover until a much later date. Hunt v. L. M. Field, Inc., 202 Cal. 701, 262 P. 730. Appellants urge, however, that, since the evidence establishes that the mortgage was recorded, the means of knowledge were open to respondent, and, that, having failed to avail himself of sources of information that were known to him, he may not take advantage of his own lack of diligence. The rule in this connection is stated in Tarke v. Bingham, 123 Cal. 163, 55 P. 759, 760, in the following language: "Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that inquiry becomes a duty, and the failure to make it a negligent omission." Later decisions have approved this rule. Spreckels v. Gorrill, supra; Teague v. Hall, 171 Cal. 668, 154 P. 851; French v. Freeman, 191 Cal. 579, 217 P. 515; Lillis v. Silver Creek, etc., Water Co., 21 Cal. App. 234, 131 P. 344. In this connection, it is to be observed that the trial court made a finding "That the plaintiff, as an ordinarily prudent man, examined said premises, and made inquiries concerning them, and that he discovered nothing that caused him to disbelieve defendants' false and fraudulent representations and statements and was ignorant of their falsity." The evidence is sufficient to support the finding, therefore respondent was under no duty to investigate public records for the purpose of ascertaining whether or not the representation that the premises were not further incumbered was true. But, even if it be conceded that the contention of appellants in this regard is correct, nevertheless the payment by respondent of monthly installments due on the trust deed after discovery of the falsity of representations other than that concerning incumbrances upon the property did not constitute affirmance of the transaction which would bar his action for rescission, since he was entitled to make such payments for the purpose of preserving the property. Munson v. Fishburn, 183 Cal. 206, 190 P. 808.

[8-10] The contention is also made that respondent's delay in taking action to rescind for more than two months after discovery of the alleged fraud constituted a waiver of the right to rescission. To this contention a number of answers are immediately apparent. In the first place, it is to be remembered that the trial court expressly found that there was no discovery of the representation in regard to incumbrances until after the suit was brought. In the second place, evidence was introduced during the trial which showed that on December 24, 1927, the day on which the court found that respondent first discovered the falsity of representations other than the representation respecting incumbrances, respondent consulted an attorney with a view to taking action to rescind. In his testimony in this connection, respondent stated that the attorney whom he first consulted delayed taking action because of the pressure of other business, until finally on February 19, 1928, respondent demanded his papers and consulted another attorney. Ten days thereafter notice of rescission by respondent was served on appellants. Rescission is an equitable remedy, and, while it is true that the party who seeks to make use of it must act promptly upon discovery of the fraud on which he bases his right to rescission, it is equally true that there is no rigid rule designating a definite period within which the right to rescind must be exercised. Hunt v. L. M. Field, Inc., 202 Cal. 701, 262 P. 730. Whether there has been such delay in taking action to rescind as to deprive a complainant of the remedy depends upon the circumstances that are developed by the evidence. It is therefore primarily a question to be decided by the trial court upon the facts presented. Davis v. Butler, 154 Cal. 623, 98 P. 1047. Under the circumstances which appear herein, we are not prepared to say that there was such unreasonable delay by respondent in taking action to rescind that the trial court was required to find that respondent was guilty of laches.

[11-13] Appellants further contend that, by failing after February 15, 1928, to make the monthly payments on the trust deed in which the Pacific Coast Building & Loan Association was beneficiary, and by permitting the property to be sold by the holder of the trust deed, respondent had placed himself in a posi-

tion where it was impossible for him to return the property, should rescission be ordered. It appears, however, from the record herein that respondent made six monthly payments on account of the trust deed; that the last payment was made by him on February 15, 1928; that no payment was due at the time he gave written notice of rescission on February 29, 1928; that on February 29, 1928, he made to appellant F. O. Evans, president of appellant Evans Securities Corporation, a formal offer to restore, and tendered a deed to the property. Subdivision 2 of section 1691, Civil Code, provides that the party rescinding must restore to the other party everything of value received by him under the contract, or must offer to restore it upon condition that such party shall do likewise. We know of no rule of law that imposes upon one who seeks to rescind a contract on the ground of fraud the duty of preserving the subject-matter of the contract after notice of rescission and offer of restoration. The rule is that offer of restoration, accompanied by prompt and proper notice to rescind, is sufficient to entitle a complainant to the remedy of rescission. Loaiza v. Superior Court, 85 Cal. 11, 24 P. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197; Green v. Duvergey, 146 Cal. 379, 80 P. 234. In Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797, relied upon by appellants, the Supreme Court expressly found that there was no valid offer of restoration even after the suit was brought. The case of Delta Land & Water Co. v. Perry, 57 Cal. App. 314, 207 P. 393, cited by counsel as authority for the proposition that the duty rests upon a rescinding party to preserve property, the subject-matter of the contract, after notice of rescission, does not so hold.

[14] It is urged that the court erred in admitting certain specified testimony over the objections of appellant. It is particularly insisted that error was committed in admitting the testimony of a witness for respondent relative to the reputation of appellant F. O. Evans for truth, honesty, and integrity in the community in which such appellant was engaged in business. It is not questioned that such evidence is competent under the provisions of section 2051, Code of Civil Procedure, but it is said that certain questions propounded of the witness were not in the proper form. It appears from the record that the witness was asked if he had discussed the reputation of appellant Evans for truth, honesty, or integrity with persons residing in the city of Fullerton. This question was permitted to be answered over the objection that it was incompetent, irrelevant, and immaterial. While it may be true that such an inquiry would more properly be made on cross-examination, we can perceive no reason why it may not be made on direct examination as a foundation for the ultimate fact to be elucidated, which is that the witness knows the general reputation of the individual for truth, honesty, and integrity. The witness was then asked if he knew "that reputation," to which no objection was interposed, and the witness replied: "I know his general reputation." The next question asked was: "What is it?" No objection was made to this question, and the witness answered that it was bad. It is obvious that the witness understood that inquiry was being made as to his knowledge of the general reputation of Evans for truth, honesty, and integrity in the community. No error was committed in admitting the testimony. With respect to other testimony of whose admission complaint is made, we deem it necessary to say no more than that careful examination of the entire record has produced the conviction that whatever error may have been committed in its admission was entirely harmless.

[15] It is finally contended that the findings and judgment are not supported by a preponderance of the evidence. A most cursory examination of the record could not fail to impress the casual reader that there was a direct conflict in the testimony of respondent and that which was produced by appellants. It should not be necessary for an appellate court to reiterate with monotonous regularity the long-established rule that the findings of a trial court will not be disturbed where the evidence is conflicting. It is said the testimony of respondent was successfully contradicted and thoroughly discredited. But it was contradicted principally by the testimony of appellant F. O. Evans and the testimony of C. W. Miller, who was an employee of appellants, the agent who assisted in making the sale of the property to respondent. Surely the trial court had the right to accept the testimony of respondent, inconsistent though it was in certain particulars, in preference to the testimony produced by appellants.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

119 Cal.App. 180

SMITH et al. v. COLLISON et al.

Civ. 8144.

District Court of Appeal, First District,
Division 2, California.

Dec. 12, 1931.

1. Injunction 🔑102.

Equity may not restrain threatened violation of ordinance unless act, if consummated, would be nuisance.

2. Injunction 🔑103.

Private persons cannot resort to equity to prevent criminal acts unless they suffer special damage to property not suffered by public generally.

3. Nuisance 🔑3(5).

Erection of store, though not nuisance per se, may become such if in residential zoned area.

4. Injunction 🔑85(1).

Results following building stores in residential zone being felt more keenly by nearby owners *held* sufficient exceptional damages to support their equity suit to enforce building ordinance.

The court found that the erection of the stores would cause excessive and loud noises, impair safety of children in neighborhood, create annoyance by reason of congregation of loiterers near stores, increase dirt and rubbish, increase fire hazard, attract rodents, insects, and impair the health of plaintiffs and the outlook from plaintiffs' property.

5. Injunction 🔑128.

In suit to enjoin construction of stores as violation of "zoning" ordinance, evidence *held* to sustain finding that ordinances were part of "comprehensive zoning" plan.

"Zoning" is the division into districts of certain areas with regulatory proscription applied to the lands or buildings, the regulations having reference to and being in interest of the public, such as preservation of the peace, safety, morals, health, comfort, and convenience of the public generally; while "comprehensive zoning" is regulation with forethought to a uniform plan or design to restrict construction and development reasonably and with fairness to each district within the jurisdiction of the duly empowered legislative body.

[Ed. Note.—For other definitions of "Zone," see Words and Phrases.]

6. Municipal corporations 🔑601.

Zoning is inherent in the police power.

7. Municipal corporations 🔑625, 626.

That three corners of intersection are zoned for business and one for residence *held* not to show unreasonable, arbitrary, or discriminatory zoning.

Such a condition does not show unreasonable, arbitrary, or discriminatory zoning, since the line of demarcation must be drawn somewhere, and it seems reasonable to conclude that ordinarily where property is physically separated as by streets or lanes the damage to the community at large and to individual property owners is less than if the line should be drawn between abutting property.

8. Municipal corporations 🔑63(2).

There being possible reason for dividing line in zoning ordinance, courts will not substitute their judgment for plans of legislative bodies.

9. Municipal corporations 🔑601.

Zoning ordinance excluding all commercial enterprises should be upheld, though not designating enterprises separately unless blanket exclusion is unrelated to community's general welfare.

10. Municipal corporations 🔑625.

Best interest of entire district, rather than adaptability and suitability of particular piece of property, determines reasonableness of zoning ordinance.

11. Municipal corporations 🔑601.

Court will not invalidate zoning ordinance because defendant's property depreciated in value due to designation as residential instead of business property.

12. Injunction 🔑127.

In action to enjoin construction of stores, zoning ordinances involved being part of comprehensive zoning plan, evidence historically outlining reasons for and method of passing them *held* admissible.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Suit by Pearl M. Smith, a widow, and others, against L. G. Collison and others. From a judgment for plaintiff, named defendant and another appeal.

Affirmed.

Hill, Morgan & Bledsoe, Kenneth K. Wright, and Roscoe R. Hess, all of Los Angeles, for appellants.

Cruickshank, Brooke & Evans, of Pasadena, for respondents.

WARD, Justice pro tem.

This is an appeal from a judgment permanently enjoining and restraining defendants from constructing, maintaining, or operating any store or shop for the buying or selling of merchandise, etc., within a certain area in Altadena, Los Angeles county, Cal. Ordinances Nos. 1270 and 1306 (N. S.) provide for the zoning of approximately 59 per cent. of the territory of the section of the county known as Altadena; 41 per cent. of the territory remains unzoned. An area of about 7½ acres is zoned for business or commercial uses and approximately 2,193 acres are set aside for residential purposes. Just prior to the commencement of this litigation, defendants had begun excavation for the construction of two store buildings within the area restricted for residential purposes. Plaintiffs, the home or property owners near the location of the proposed store buildings, united to file their complaint seeking to enjoin defendants from completing the work. The complaint alleged a violation of the ordinances in question and further alleged special and irreparable injury and damage to the plaintiffs, different in degree and kind from the injury and damage sustained by the public at large. In substance the court found that the erection of the stores would cause excessive and loud noises in the vicinity by reason of automobile truck traffic, etc., and likewise impairment of safety to children residing in the neighborhood; annoyance by reason of the congregation of loiterers near the stores; the collection of dirt and rubbish blown upon plaintiffs' property; an increase in fire hazard; the attraction of rodents, insects, etc., as a menace to the health of plaintiffs; and impairment of the outlook from plaintiffs' property. Evidence, though meager in some instances, appears in the record sufficient to substantiate the findings.

[1-4] Appellant contends that the mere recital in the complaint or the findings of the court, of results attendant upon the ordinary and lawful use of business property, is insufficient to grant equitable relief to enforce a penal ordinance. It is true that equity has no jurisdiction to restrain a threatened violation of an ordinance unless the threatened act if consummated would be a nuisance. An officer or a public body authorized by law may abate a public nuisance or, if specially injurious to himself, a private person may seek to abate. Civ. Code, §§ 3493 and 3494. Private persons may not resort to equity to prevent criminal acts unless the facts substantiate the claim that the person has suffered some exceptional damage to property other than that suffered by the public generally. Perrin v. Mountain View Mausoleum Ass'n, 206 Cal. 669, at page 674, 275 P. 787. The erection of a store is not in and of itself a nuisance, but, depending upon the facts of the case, may become a nuisance if erected in a residential zoned area. The trial court found that the construction of the buildings would result in certain conditions heretofore mentioned. If these conditions should exist, it is fair to conclude that this would be offensive to the senses, injurious to health, an obstruction to the free use of their property, and, accordingly, result in a depreciation in value of the residence property. All of the property in the zoned area would not be so affected, but the residence property near the proposed stores certainly would be, and hence these respondents would suffer exceptional damage other than that suffered by the public generally in that particular community.

[5] The complaint alleged that the ordinances in question were part of a uniform and comprehensive plan for zoning, for building purposes, all of the unincorporated territory in Los Angeles county. The answer denies this allegation. The court found that the allegation was true. Appellants contend that there is no evidence to sustain this finding. Zoning is the division into districts of certain areas with regulatory proscription applied to the land or buildings. The regulations must have reference to and be in the interest of the public, such as the preservation of the peace, safety, morals, health, comfort, and convenience of the public generally. Comprehensive zoning is regulation with forethought to a uniform plan or design to restrict construction and development reasonable and with fairness to each district within the jurisdiction of the duly empowered legislative body. Changing conditions necessitate changed regulations. A comprehensive plan of zoning does not mean permanent regulation. Extensions, curtailments, and modifications are all a part of comprehensive zoning. A zoning plan cannot be made in a day. Miller v. Board of Public Works, 195 Cal. 477, at page 496, 234 P. 381, 38 A. L. R. 1479. Emergency enactments and prior regulatory measures are as much a part of a comprehensive plan as if embodied in the general zoning law provided that they were duly and regularly passed by a legislative body in contemplation of a general zoning law and prove to be reasonably related to the general plan and for the better welfare of the public. To hold otherwise would result in assisting evaders of a contemplated uniform zoning plan to destroy the very purpose of its enactment.

In this case the original ordinance and the amendment thereto was confined to a part of Altadena in Los Angeles county, and was passed and adopted in 1925. Other ordinances restricting certain nuisances had previously been adopted. The ordinances restricting building, etc., designed for special uses applying to the whole of the unincorporated area of the county of Los Angeles, did not become a law until 1927, but the regional planning commission was in existence in 1923 prior to the adoption of the Altadena ordinance and was actually making a survey of the whole county. The secretary of this board, in his testimony referring to the Altadena ordinance of 1925, used the following language: "It was the pioneer towards comprehensive zoning in the county." It may therefore be concluded that the 1925 ordinance related to the subsequent zoning ordinance of 1927 and was and is for the better welfare of the political subdivision as a whole.

The ordinance of 1927 provided in part as follows: "That the portions of said unincorporated territory hereinafter in this ordinance described are the first portions of the said territory surveyed. * * *" Appellants contend that the language of the ordinance is declarative of the fact that the 1927 ordinance was the first step in the action of the county to adopt a comprehensive zoning plan. Under the provisions of the ordinance, unincorporated territory far removed from Altadena was zoned by metes and bounds. This far-removed territory may have been the first studied or the first surveyed, but that would not interfere with or preclude the 1925 ordinance being likewise a part of the comprehensive plan if a reviewer of the history of zoning ordinance in Los Angeles county could say with confidence that the 1925 ordinance redounds to the welfare of the county as a whole and that it is reasonably related to the plan set forth in the 1927 ordinance. Miller v. Board of Public Works, supra. The court so found. There is evidence sufficient to sustain the finding.

[6-10] Zoning is inherent in the police power. The doctrine of comprehensive zoning has been sustained by the Supreme Court of this state (Miller v. Board of Public Works, supra; Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388), but when there has been an arbitrary and discriminatory exercise of police power (Pacific P. Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A. L. R. 782), or when the ordinance in question has no relation to public health, general welfare, or safety, morals, or protection of the community (Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248), or where there is an unreasonable restriction (In re White, 195 Cal. 516, 234 P. 396), the courts will interfere. Appellants contend that, in the application of the ordinance to their property, the ordinances are unreasonable, arbitrary, and discriminatory and, in particular, that one corner of an intersection is restricted to residential use when the other three corners are devoted to business uses. The line of demarcation must be drawn somewhere, and it seems reasonable to conclude that ordinarily where the property is physically separated, as by streets or lanes, the damage to the community at large and to individual property owners is less than if the line should be drawn between abutting property. However, the property here is not on the corner, but some short distance away. The first question to determine is whether the classification and districting has been applied fairly and impartially. As the district now stands, the evidence indicates that less than one-half of the business zone is unimproved, so that there is still ample space for the erection of business property. The fact that business property exists nearby or across the street is not sufficient to declare the ordinance unreasonable. Of necessity in any scheme or plan of zoning some business property must be near the residential property. In this case the level of the land may have been the reason for the designation of the particular corner as residential property. When there is some possible reason for the drawing of the dividing line, courts will not substitute their judgment for the plans considered by legislative bodies. Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716; Feraut v. City of Sacramento, 204 Cal. 687, 269 P. 537. Appellants contend further that, because certain business uses are not specifically excluded, such as moving picture studios, brickyards, factories, etc., therefore they are permitted. The ordinance excludes commercial enterprises of all descriptions, and, unless this blanket exclusion is palpably unrelated to the general welfare of the community, the ordinance should not be nullified. The plan of business and residential location here gives color to its substantial relation to the safety and general welfare of the community. The evidence shows that the Altadena district is primarily a residential district, and therefore that business and commercial establishments should be subordinate to the best interest and general welfare of the whole district. The adaptability and suitability of a particular piece of property is not controlling, but rather the best interest of the entire district.

[11] The depreciation of the value of appellants' property as residential instead of business property is not enough to declare the ordinances invalid. The exercise of the police power in zoning always affects certain parcels of land. Unless the injury is to many instead of to a few, courts will not invalidate restrictive building ordinances upon the question of depreciation of value standing alone. Zahn v. Board of Public Works, supra; Feraut v. City of Sacramento, supra; Fitzgerald v. Merard Holding Co., 106 Conn. 475, 138 A. 483, 54 A. L. R. 361. The ordinances, in their substantive matter, were reasonable at the time of adoption, and nothing has occurred since to indicate that in their application such harshness or injury has resulted as would warrant this court in substituting its opinion for the judgment of the legislative body.

[12] From what has been said heretofore in reference to these ordinances being the forerunners of the comprehensive plan subsequently adopted and therefore a part thereof, the specifications of error relative to the admissibility of evidence historically qutlining the reasons for and the method of the passage of these ordinances are not well taken. Likewise the court had a right to know as a matter of determining the reasonableness of these ordinances the important consideration given in the preparation and passage of other restrictive enactments. Counsel on each side propounded questions somewhat argumentative and calling for conclusions, but an examination of the specifications of error does not indicate the probability of a different result had the rulings of the trial court been otherwise.

Judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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119 Cal.App. 211

HANSON et ux. v. HESS et al.

Civ. 581.

District Court of Appeal, Fourth District, California.

Dec. 14, 1931.

Appeal and error ⚷770(2).

Appellants' brief was stricken from files, where not conforming to court rules respecting printing of all pertinent instructions after giving or refusing alleged erroneous instructions (Rules 8 and 10 of Supreme Court and District Courts of Appeal).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Charles Hanson and another against Julius Hess, Jr., and others. After appeal by plaintiffs from adverse judgment of the Superior Court, defendants moved to dismiss appeal and affirm judgment.

Denied. Plaintiff-appellants' opening brief stricken from files, with leave to file substitute brief.

Joseph Seymour, of Riverside, for appellants.

Estudillo & Schwinn, of Riverside, for respondents.

MARKS, J.

Respondents have filed a motion to dismiss this appeal and affirm the judgment upon the ground that appellants' opening brief does not conform to the requirements of rule 8 of Rules of the Supreme Court and District Courts of Appeal of the state of California. The appeal comes up on a typewritten record.

Under appellants' opening brief filed here, the only ground for reversal that we would be required to consider, in view of the rules of this court, is the alleged error of the trial court in giving instructions to the jury and in refusing instructions requested by them.

Appellants have presented in a supplement to their brief all or parts of nine of the instructions given, and four of the instructions which they proposed and which were refused. There were more than seventy instructions given. Instruction No. 2, requested by appellants and printed in the supplement, was upon the question of the preponderance of the evidence. Instruction No. 10, given by the trial court, was upon the same subject and is not contained in the brief or the supplement thereto. Nowhere in the brief is the substance of any instruction stated. We have not gone through the numerous instructions to determine whether or not the subjects covered by the other refused instructions were covered by any of the instructions given, nor have we determined whether there were other instructions given covering the same subjects as those given which are attacked.

Rule 8 of the Rules of the Supreme Court and District Courts of Appeal of the state of California contains the following: "Where instructions given to a jury are attacked as erroneous, all other instructions given, bearing upon that subject, must be printed in full in the appellant's brief. If it be claimed that instructions requested were erroneously refused, the refused instructions must be printed in full in appellant's brief, and all instructions given, bearing upon the subjects covered by the refused instructions, must be printed in appellant's brief in full, or the substance thereof clearly stated, with citation to the line and page of the transcript where such instructions may be found."

Rule 10 is as follows: "No transcript, or other paper or document, which fails to conform to the requirements of these rules shall be filed by the clerk."

It is clear that appellants' brief and its supplement do not conform to the requirements of rule 8. Under the authority of Richmond Terminal Corporation v. Parr Terminal Company (Cal. App.) 2 P.(2d) 579; Gross v. Wright & Callender Building Co. (Cal. App.) 2 P.(2d) 857, and Burns v. Renaker Co. (Cal. App.) 2 P.(2d) 408, we might refuse to consider the questions insufficiently presented in appellants' brief. We prefer to follow the practice adopted in Burns v. Renaker Co., supra, and strike the brief from the files. Attorneys appearing in the appellate courts should study and follow the rules adopted for these courts. Infractions of these rules are becoming so numerous that an unnecessary burden is placed upon these courts. If this practice continues, it may become necessary to enforce a more drastic remedy than we are using in the instant case.

The motion is denied. It is ordered that appellants' brief be, and it is hereby, stricken from the files, with leave, if they be so advised, to file a substitute brief within thirty days, the reply briefs to follow within the time specified in section 4 of rule 1 of Rules of the Supreme Court and District Courts of Appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

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119 Cal.App. 214

NIELSEN v. EMERSON et al.

Civ. 8179.

District Court of Appeal, First District, Division 1, California.

Dec. 15, 1931.

1. Judgment 🔑511.

Judgment, regular on face, rendered by court having jurisdiction, cannot be impeached collaterally for fraud.

2. Judgment 🔑522.

Action for money had and received, based on equitable principles, *held* collateral attack on prior judgment disposing funds involved.

"Collateral attack" on judgment is defined as an attempt to impeach it by matters dehors the record in another action.

[Ed. Note.—For other definitions of "Collateral Attack," see Words and Phrases.]

3. Attorney and client 🔑86.

Attorney acting for party had presumed authority to sign stipulation on which judgment was based, precluding questioning collaterally validity of his acts.

4. Judgment 🔑511.

Though evidence of fraud on motion to vacate judgment does not preclude such evidence on direct attack, it is precluded on collateral attack (Code Civ. Proc. § 473).

5. Husband and wife 🔑270(10).

Judgment necessarily implied that money involved was separate property, since, although not reciting its character, that was necessarily implied from allegations and denials of pleading.

6. Judgment 🔑91.

Consent judgment is as conclusive on matters in issue as one rendered on trial.

7. Judgment 🔑504(4).

Consent judgment may not be collaterally attacked for not conforming with stipulation.

8. Judgment 🔑586(2).

Judgment determining issue whether fund was community or separate property concludes parties and their privies in subsequent action involving same demand.

This is so from the general rule that a former judgment concludes parties and their privies in subsequent actions upon the same demand, as to matters actually decided, and also as to matters belonging to subject of controversy and properly within the issues which might have been decided.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Mads Nielsen, an incompetent person, by his guardian, W. E. Most, against M. L. Emerson and another. From an adverse judgment, plaintiff appeals.

Affirmed.

W. E. Most, of Oakland, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondent.

PER CURIAM.

An action against defendant as trustee under the last will and testament of B. Agnes Nielsen, deceased, to recover the sum of $2,359.26, alleged to have been had and received for the use of plaintiff.

The answer alleged that plaintiff was barred and estopped from maintaining the action by reason of two separate judgments entered in previous actions to which he was a party.

The trial court found in accordance with the allegations of the answer, and rendered judgment that plaintiff take nothing. From this judgment he has appealed.

On April 30, 1925, B. Agnes Nielsen, the wife of plaintiff, died, leaving a will in which she named defendant as executor, and by which she bequeathed all her estate, consisting of real property and certain personal property, part of which was money on deposit in the Oakland Bank and the Central Savings Bank of California, to defendant, as trustee upon certain trusts set forth in the will. On August 21, 1925, plaintiff filed an action, numbered 83206, in the superior court of Alameda county, against defendant as executor, and the Central Savings Bank, to recover the amount upon deposit in the name of decedent. At the same time he brought an action, numbered 83205, in the same court, against defendant as executor, and the Oakland Bank, to recover the sums on deposit in the latter bank; it being alleged in both actions that the deposits were the community property of plaintiff and his deceased wife. The answer filed by defendant as executor to these actions denied that the deposits were community property, and alleged the same to be the separate property of decedent. The total amount of the deposits does not appear, but it was alleged and admitted in action No. 83206 that the amount on deposit in the Central Savings Bank was $9,019.13.

On June 10, 1926, a stipulation, signed by attorneys purporting to represent the parties, was filed, by which it was agreed as a settlement and compromise of the litigation that the sum of $3,300 be transferred from either or both deposits mentioned to the separate account of the executor, that the balance of said amounts be held by the banks to the order and for the use of plaintiff, and that judgment be entered accordingly. On the same date a judgment was entered directing that the deposits be divided in accordance with the stipulation, and that the Central Bank pay therefrom to defendant as executor the sum of $3,300 and the balance to plaintiff.

On December 6, 1927, plaintiff having been adjudged incompetent, W. E. Most was appointed and qualified as the guardian of his estate. On July 5, 1928, plaintiff, by his guardian, moved the court to set aside the judgment. The motion was denied, and the present suit was commenced on August 23, 1928.

As stated, this is not an action to set aside the judgment, but for money had and received. Plaintiff contends, however, that the judgment was obtained by fraud, and that, the present action being based on equitable principles, the trial court erroneously rejected evidence offered by him to prove the fraud.

[1, 2] A judgment, regular on its face, and rendered by a court having jurisdiction cannot be impeached collaterally upon the ground of fraud (In re Estate of McNeil, 155 Cal. 333, 100 P. 1086); and a collateral attack is an attempt to impeach a judgment by matters dehors the record in an action other than that in which it was rendered (People v. Norris, 144 Cal. 422, 77 P. 998). Such is the situation here, and the case is manifestly within the above rules.

Nor is plaintiff aided by the cases on which he relies in support of his contention, namely, Spitzer v. City of Oakland, 32 Cal. App. 748, 163 P. 1044, and Fontaine v. Lacassie, 36 Cal. App. 175, 171 P. 812, as neither of those cases involved a prior adjudication.

[3] It is also contended that the judgment roll in the action shows a lack of jurisdiction because the attorney who instituted the action was not the attorney who signed the stipulation.

There is no merit in this, as the attorney appearing and acting for a party is presumed to have authority, and the validity of his acts cannot be called in question collaterally. Carpentier v. City of Oakland, 30 Cal. 439; Garrison v. McGowan, 48 Cal. 592; Hunter v. Bryant, 98 Cal. 247, 33 P. 51; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 347, 139 P. 805.

[4] The claim is made that the denial of the motion to set aside the judgment did not preclude plaintiff from introducing evidence of fraud in the case at bar, as no evidence was adduced in support of the motion. This may be conceded, as a motion under section 473 of the Code of Civil Procedure to vacate a judgment does not bar an action in equity to set aside the judgment (Herd v. Tuohy, 133 Cal. 55, 63, 65 P. 139; Estudillo v. Security L. & T. Co., 149 Cal. 556, 561, 87 P. 19; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Jeffords v. Young, 98 Cal. App. 400, 277 P. 163), but the objection to the introduction of such evidence here was that the attack was not direct but collateral.

[5] It is next urged that the judgment does not determine the character of the money in question.

That the money sought to be recovered is part of the fund adjudged to be the property of the estate is not denied; and it appears from the judgment roll in the action that the complaint alleged the same to be community property. This the answer denied, and alleged that the sums involved were the separate property of Mrs. Nielsen. While the judgment contains no recital as to the character of the particular fund apportioned to the executor, this is immaterial, as by necessary implication the judgment was based on the fact that it was decedent's separate property. Cunningham v. Harris, 5 Cal. 81; Thompson v. McKay, 41 Cal. 221.

[6, 7] It is further claimed that, the judgment having been entered by consent, it is not effective as a bar or estoppel; but, as held in the following cases, a stipulation or consent judgment as to matters in issue is as conclusive as one rendered upon contest and trial. McCreery v. Fuller, 63 Cal. 30; City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 686, 124 P. 251; Moore v. Schneider, 196 Cal. 380, 238 P. 81. Nor may such a judgment be collaterally attacked by a party to it upon the ground that it does not conform with the stipulation. While a judgment is erroneous which fails to conform with a stipulation, and the error may be corrected on appeal (People's Ditch Co. v. Fresno Canal & Irrigation Co., 152 Cal. 87, 92 P. 77), nevertheless it may not be collaterally attacked by a party on this ground (Semple v. Wright, 32 Cal. 659; Hobbs v. Duff, 43 Cal. 485).

[8] It is clear that the action mentioned was upon the same claim that plaintiff is seek-

ing to enforce in the case at bar; and it is the rule that a former judgment concludes the parties and their privies in all subsequent actions upon the same demand, not only as to all matters actually decided in the former action, but as to all matters belonging to the subject of controversy and property within the scope of the issues which might have been decided. 15 Cal. Jur. "Judgments," § 189, p. 136; Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597. Here the question whether the fund was originally separate or community property was in issue, and was litigated and determined. The facts are similar to those in Silverston v. Mercantile Trust Co., 18 Cal. App. 180, 122 P. 976, where it was held that former judgments determining the ownership of the corpus of the trust and its validity were conclusive in a subsequent action to partition the trust property.

The second judgment on which defendant relies was entered in an action brought by plaintiff against the defendant as trustee to enforce the trust and compel payment out of the trust fund of a sum monthly for plaintiff's support. It is claimed that plaintiff is estopped by this judgment from maintaining the present action, and the trial court so found; but, in view of our conclusion as to the effect of the first-mentioned judgment, it will be unnecessary to decide this question.

The testimony offered by plaintiff was, in view of the foregoing, properly rejected, and nothing is disclosed by the record which would warrant the reversal of the judgment.

The judgment is affirmed.

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119 Cal.App. 300

D. A. FOLEY & CO. v. STATE.

Civ. 7397.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1931.

Rehearing Denied Jan. 16, 1932. Hearing Denied by Supreme Court Feb. 15, 1932.

1. Limitation of actions 🔑24(6).

Contractor's claim for damages on construction contract because representations as to available filling material were not true, *held* based on breach of warranty as respects limitation (St. 1893, p. 57, § 2).

2. Limitation of actions 🔑24(6).

Contractor's claim on construction contract because representations as to available filling material were not true *held* barred, where nearly three years elapsed from date on which contractor learned representations were not true to date when it presented claim (St. 1893, p. 57, § 2).

3. Limitation of actions 🔑180(1).

Limitation defense *held* not waived because set forth in answer and not demurrer.

Such defense was not waived, where complaint was so framed that fact that its action was barred did not appear on face of the pleading so that it was not demurrable, and, even though facts appearing on face of complaint show action is barred, defense of limitations not being waived because it was set up in answer and not in demurrer.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by D. A. Foley & Co. against the State. From a judgment for defendant, plaintiff appeals.

Affirmed.

Edward J. Lynch, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Hugh K. McKevitt, of San Francisco, for the People.

STURTEVANT, J.

The plaintiff sued to recover a judgment for damages because of an alleged breach of warranty contained in a construction contract. The defendant answered, and a trial was had before the court. The court made a finding that the action was barred by the statute of limitations. The plaintiff has appealed.

[1, 2] The plaintiff frankly states that the only point in the appeal is whether the action is barred by the statute of limitations. Stats. 1893, p. 57, § 2. The alleged breach occurred in March, 1925; the contract was completed in February, 1926; the plaintiff presented his claim to the board of control (the successor of the board of examiners) on January 3, 1928; it was rejected by that board on February 16, 1928; and this action was commenced April 3, 1928. By the terms of the statute, the plaintiff was bound to commence his action "* * * within two years after such cause of action shall have accrued. * * *" The question first arises, What was the plaintiff's cause of action? The trial court remarked that it was a breach of warranty or nothing. That remark was clearly correct. The next question is, When does the statute commence to run when the cause of action is a breach of warranty? The plaintiff cites and relies on Gibbons v. U. S., 15 Ct. Cl. 174, and as reported on appeal in 109 U. S. 200, 3 S. Ct. 117, 27 L. Ed. 906. That case is not in point. It involved a claim for extra work. The question arose whether, under the facts, said work was extra. The court held that it was. But

in the case at bar the plaintiff does not claim that he built a single extra foot of highway. He claims that representations as to available filling material were not true, and therefore he was put to extra costs by reason of the breach of warranty. Similar claims have been held to rest on a breach of warranty. Lattin v. Gillette, 95 Cal. 317, 319, 30 P. 545, 29 Am. St. Rep. 115; Brackett v. Martens, 4 Cal. App. 249, 256, 87 P. 410; Crawford v. Duncan, 61 Cal. App. 647, 650, 215 P. 573; U. S. v. Atlantic Dredging Co., 253 U. S. 1, 12, 40 S. Ct. 423, 64 L. Ed. 735; 37 C. J. 835. In March, 1925, the plaintiff learned that the nature of the filling material was not as it claims it was represented to be. And it now asserts that it had a reasonable time thereafter within which to present its claim. It cites Bills v. Silver King Mining Co., 106 Cal. 9, 39 P. 43, 45, and quotes from the concurring opinion by Chief Justice Beatty as follows: "If a creditor, in cases like this, could sue 10 or 20 or any number of years after his claim accrued, and maintain his action, upon the simple allegation that he had never demanded pay until at a date within the period of limitations, the debtor would never be secure, because the issue of payment could always be litigated by simply adding the other issue,—failure to demand. For this reason it has been held in a great number of instances, and is undoubtedly the law, that the creditor, in cases of this character, must make his demand within a reasonable time after the money is received to his use. As to what is a reasonable time is ordinarily determined by the analogy of the statutory periods of limitation. *If the cause of action is barred by the lapse of two years after it becomes complete, then the demand must be made within two years after the right to make it accrues, or a valid excuse must be shown for the failure to make it within that time.*" (Italics ours.) See, also, 16 Cal. Jur. 509; 37 C. J. 953, 954. The Bills Case was cited and followed in Williams v. Bergin, 116 Cal. 56, 61, 47 P. 877, and also in Vickrey v. Maier, 164 Cal. 384, 389, 129 P. 273. The former was in turn cited and followed in Spencer v. Los Angeles, 180 Cal. 103, 179 P. 163. That was an action brought to recover payments made on an alleged void street assessment. The statute of limitations which was applicable was subdivision 1 of section 339, Code of Civil Procedure—that is, two years. The payments were made December 15, 1911. The action was commenced December 20, 1913. Ordinarily, the action would have been barred. But the court quotes the record which showed that the claims were presented long prior to the expiration of the two-year period; that under the charter of Los Angeles such claims must be acted on by several different officers and boards, and then, if not allowed, action thereon may be commenced. The court noted that the delay was two years and five days. Then at page 120 of 180 Cal., 179 P. 163, 170, the court said: "It cannot reasonably be claimed that within that five-day period the parties could have secured action upon their claims by the several city officers and board who were required to act thereon before the claim could have been paid, or that the reasonable time within which to procure action of the city authorities did expire before the expiration of the said five days. See, also, Dennis v. Bint, 122 Cal. 45, 68 Am. St. Rep. 17, 54 P. 378." In other words, something more than five days' delay was that of the officials and not of the claimants. But that rule does not help the plaintiff. The statutory period we are considering is fixed at two years. Stats. 1893, p. 57. From the date on which the plaintiff learned of the breach to the date when it presented its claim was nearly three years. As said in Bills v. Silver King Mining Co., supra, it neither pleaded nor proved "* * * a valid excuse" for not presenting its claim within two years. In the absence of making that showing, the plaintiff stood in the same position as the plaintiff in County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174. At page 409 of 139 Cal., 73 P. 174, 178 the court said: "As has been said, the failure to file and present the claim within the time prescribed by the statute as effectually barred the claim when it was presented as would the failure to begin an action thereon after such claim was presented and rejected by the board. It therefore follows that the board was acting within its powers, and that its discretion was not abused when it rejected this claim because it was not presented in time." Under similar sets of facts, like conclusions were reached in the following cases: Dennis v. Bint, 122 Cal. 39, 45, 46, 54 P. 378, 68 Am. St. Rep. 17; Jenkins v. Marsh, 22 Cal. App. 8, 10, 132 P. 1051; Caner v. Owners Realty Co., 33 Cal. App. 479, 481, 165 P. 727; Wittman v. Board, 19 Cal. App. 229, 231, 125 P. 265; People v. Cal. Safe Deposit Co., 41 Cal. App. 727, 731, 183 P. 289; Smith v. Bach, 53 Cal. App. 63, 199 P. 1106; Curtin v. Board, 74 Cal. App. 77, 83, 239 P. 355. On the other hand, when it was made to appear that the delay was not all caused by the plaintiff, but a part at least was caused by the public officials whose duty it was to audit or examine, or some other facts were shown excusing the delay, the courts have held that the delay was not unreasonable, and, in such cases, the court followed Bills v. Silver King Mining Co., supra, and granted relief. Spencer v. City of Los Angeles, 180 Cal. 103, 120, 179 P. 163; Fergus v. Venice Inv. Co., 36 Cal. App. 425, 427, 172 P. 396.

[3] Because the defendant did not plead the statute of limitations in its demurrer, the plaintiff claims that the defense was waived. There are two complete answers. In the first place, the plaintiff's complaint was so

framed that the fact that its action was barred did not appear on the face of the pleading. That being so, it was not demurrable. 16 Cal. Jur. 607. In the second place, even though the facts do appear on the face of the complaint, and the defense is not made by demurrer, it does not follow that in California the defense may not be set up in the answer or that it is waived. The plaintiff cites and relies on California, etc., v. Sierra, etc., Co., 158 Cal. 690, 112 P. 274, Ann. Cas. 1912A, 729. That case does not support the plaintiff. See page 698, of 158 Cal., 112 P. 274. It also cites cases from other jurisdictions. Certain rules are so well established in this state on the general subject that we may not ignore them to take up rules in other states. It has been directly held that the defense of the statute of limitation is a meritorious defense. Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192, 196, 106 P. 715, 21 Ann. Cas. 1279. It has also been held that, to do justice, a defendant will not be refused permission to amend by pleading the statute of limitations. Trower v. City and County of San Francisco, 157 Cal. 762, 769, 109 P. 617. The defense was therefore properly set forth in the defendant's answer.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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119 Cal.App. 287

PEOPLE v. LEON.

Cr. 226.

District Court of Appeal, Fourth District, California.

Dec. 17, 1931.

Criminal law 🔑1182.

Judgment was affirmed, where no brief was filed and no appearance made for appellant when case was called for hearing on appeal (Pen. Code, § 1253).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

E. F. Leon was convicted of forgery, and he appeals.

Affirmed.

Edgar G. Langford, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Thomas Whelan, Dist. Atty., of San Diego, for the People.

JENNINGS, J.

The defendant was convicted in the Superior Court of San Diego county of a felony, to wit, forgery.

The transcript on appeal was filed in this court November 10, 1931. The record herein shows that no brief has been filed in behalf of appellant. The cause was regularly placed on the calendar of this court for oral argument on December 8, 1931. On said date the cause was regularly called for hearing in open court, at which time no appearance was made for appellant. Pursuant to the provisions of section 1253 of the Penal Code, the judgment herein is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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119 Cal.App. 257

SELBY v. ALLEN et al.

Civ. 8059.

District Court of Appeal, First District, Division 2, California.

Dec. 17, 1931.

1. Judgment 🔑518.

Judgment, in action for accounting determining owners of, and their respective interests in, corporation's entire production, *held* conclusive on claimants not parties thereto, absent fraud; hence orders purporting to modify judgment were void (Code Civ. Proc. § 1908).

The facts disclosed that an action for accounting was instituted to have plaintiffs' interests in a certain corporation's production determined and to recover sums found owing to them; that, in accordance with the court's findings determining owners of, and their respective interests in, corporation's entire production, judgment was entered; that a receiver was appointed to carry out this judgment; that this judgment became final October 1, 1926; that thereafter a stranger to that action, claiming to represent himself and others interested in the funds in receiver's hands, petitioned for, and obtained, an order granting them an interest in such funds which the receiver refused to pay.

2. Parties 🔑42.

Claimants' failure to intervene in action, of which they had notice, for accounting to determine ownership in certain corporation's production, precluded intervention after final judgment (Code Civ. Proc. § 387).

3. Execution 🔑264.

Where receiver was appointed to carry out judgment in action determining plaintiffs' interest in corporation's production, and, after final judgment, stranger obtained order granting him interest in funds in receiver's hands, which order receiver refused to pay, stranger suing plaintiffs on such order *held* not entitled to property acquired under plaintiffs' execution against corporation's promoters.

4. Appeal and error ⚷1050(1).

That court received immaterial evidence *held* immaterial, where plaintiff not prejudiced.

5. Appeal and error ⚷1071(6).

Appellant cannot complain of failure to find on certain issues, where, if favorable findings thereon had been made, appellant would not have been entitled to judgment.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by W. W. Selby against James L. Allen and others, individually and as trustees for the owners of the Pacific Corporation Well No. 16. From a judgment for defendants, plaintiff appeals.

Affirmed.

Ben F. Gray, of Los Angeles, for appellant.

James L. Davis, of Santa Ana, and Sharpless Walker, of Los Angeles, for respondents.

STURTEVANT, J.

As assignee of certain claimants, the plaintiff sued to obtain a judgment enforcing an alleged judgment which purported to fix his interest in a certain fund. From a judgment in favor of the defendants, the plaintiff appealed.

Prior to the year 1924, the Pacific Corporation had undertaken the sinking and development of well No. 16, and had sold fractional interests in the production to a large number of persons. In March, 1924, A. J. Charle and many others claiming to hold interests commenced an action to have their interests determined, to obtain an accounting, and to recover the several sums so found to be owing to such claimants. That action was No. 16653 of the records of the Superior Court in and for the county of Orange. Thereafter that action was tried and findings in favor of the plaintiffs therein named were filed on September 3, 1925. The findings are very long. From them we gather the following facts: In 1922 Muriel S. Lieberman was the owner of the land. She executed a lease to R. C. Steel. He and his associates caused to be organized a corporation. The lease was assigned to the corporation. To the lessor the corporation assigned 22½ per cent. of the production. To Steel, Biel, and Detwiler, the organizers, it assigned 32½ per cent. of the production. The remaining 45 per cent. of the production was held for sale in units. The units were sold, and from the proceeds well No. 16 was developed, and oil and other products were taken out in large quantities. The sales of units sold as above mentioned were made to a large number of different persons. The court made a finding that Muriel S. Lieberman by the terms of the lease was the owner of 22½ per cent. Of the remaining 77½ per cent., the court made a finding in which it stated the names of the individuals and firms holding interests and the exact per cent. of each holding. The total interests so found amounted to 100 per cent. of the whole. In that list neither the name of this plaintiff nor the name of any one or all of the assignors appears. With much care the court found and determined the assets of the Pacific Corporation, and the nature, extent, value, and the name of the holder thereof. Having done so, the court proceeded to make a finding in which it listed the names of the holders of such interests and the amount of money to which each of said persons was entitled out of said fund. Neither the name of this plaintiff nor the name of any or all of his assignors appears on said list. In accordance with said findings, judgment was entered September 3, 1925. From recitals it appears that at an early date in the proceedings B. E. Tarver was appointed receiver, and by the terms of the findings he was continued in office for the purpose of carrying the judgment into effect. How long he continued to act does not appear. But it does clearly appear that, after the above-mentioned judgment was entered, the plaintiffs named these defendants as trustees for the plaintiffs in action No. 16653, that they entered upon the discharge of their duties, and thereafter acted for the said plaintiffs in the enforcement of their judgment and in operating the said well.

From the judgment, an appeal was taken. Said appeal was dismissed, and the remittitur went down and was filed October 1, 1926.

On November 9, 1926, George Cunningham presented in action No. 16653 a purported petition. Therein he claimed to represent himself and certain other persons who claimed to hold interests in said funds hereinabove described, and he asked to have their interests determined. An order to show cause was issued directing both the plaintiff and the defendants to show cause why the petition should not be granted. On December 16, 1926, the petition was heard, and the court made an order purporting to grant said petition. On the same day in the same action the court made an order purporting to settle the final account of the receiver, who was represented by Mr. Gray. As a part of the order settling the receiver's account, directions were inserted authorizing and directing the receiver to pay the Cunningham claims as so allowed.

Later, on August 13, 1928, this plaintiff, as the assignee of Cunningham, commenced this action to enforce the order of December 16, 1926, which purported to grant the petition of Cunningham. He named the said trustees as defendants. The defendants answered, and a trial was had. The court made findings in favor of the defendants, and from the judgment entered thereon this appeal was taken.

The plaintiff asserts that action No. 16653 "was instituted by certain plaintiffs in their behalf, and on behalf of all similarly situated." An inspection of the records shows that it was commenced by a large number of persons as the named plaintiffs, and that some others, also named, came in, but that all plaintiffs acted in behalf of themselves and not otherwise. In this action the trial court made findings to the same effect. The distinction will be found to be of importance as we proceed.

[1, 2] In his first point he asserts that the order, December 16, 1926, was a judgment, and that he is entitled to enforce it as such. He cites and relies on De Forrest v. Coffey, 154 Cal. 453, 98 P. 27; Pacific Railway v. Wade, 91 Cal. 455, 27 P. 768, 13 L. R. A. 754, 25 Am. St. Rep. 201; 22 Cal. Jur. 460. The defendants reply that said authorities are not applicable, because they are concerned solely with actions under the Bank Act or federal statutes providing for the creation of receiverships, whereas action No. 16653 was an action to establish a fund and to determine the rights of the owners therein, and that the appointment of a receiver was purely ancillary thereto. The distinction is clearly correct, and the rule applicable in the instant case is to be found in 22 California Jurisprudence, 432, 433. In other words, action No. 16653 was brought for the purpose of having ascertained the fact whether the plaintiffs named owned an interest in the fund, and that fact was so ascertained by the judgment dated September 3, 1925, and that judgment became final October 1, 1926. By that judgment interests in the sum of 100 per cent. were so determined. In the absence of fraud, those facts could not be again taken up and determined by the parties. Code Civ. Proc. § 1908; Sharon v. Sharon, 79 Cal. 633, 22 P. 26, 131; 14 Cal. Jur. 1064. Much less could it be done by a stranger. 1 Black on Judgments, § 317. The plaintiff's clear remedy was intervention. Code Civ. Prac. § 387. He knew the action was pending, and did not examine the record to see that he was not a party. He waited till the judgment became final. At that time he could not intervene. Kelly v. Smith, 204 Cal. 496, 268 P. 1057; Mack v. Eummelen, 31 Cal. App. 506, 160 P. 1096. It follows that the orders of December 16, 1926, in so far as they purported to change or modify the final judgment, were void. In the Matter of the Estate of England (Cal. Sup.) 5 P. (2d) 428. As this plaintiff and his assignees were not parties, they are not bound by the judgment dated September 3, 1925, but, if they claim any rights, such rights can be determined only in some action to be instituted by them against those liable to them.

[3] After the judgment was rendered in action No. 16653 giving the plaintiffs a money claim, they obtained permission from the court allowing them to take out an execution against the interests owned by the promoters. Those interests were sold and bought in for the plaintiffs in that action. Clearly the plaintiff in this action did not acquire, and may not assert, any rights in or to that property.

The plaintiff claims the evidence was insufficient to justify the findings made in this case. There is no merit in any of his attacks. The plaintiffs in action No. 16653 offered in evidence the files in that action as proof of their defense in this action. From the face of that record, their defense was fully established.

[4] The plaintiff also claims that the trial court erred in receiving evidence. The burden of these attacks is that the trial court received evidence that was immaterial. Conceding, but not deciding, that it did so, the fact remains that the defense was proved by evidence that was competent, material, and relevant, and this plaintiff was not prejudiced.

[5] The plaintiff claims the trial court failed to find on certain issues. However, the issues found support the judgment. If the other issues had been found in favor of the plaintiff, he would not have been entitled to judgment. He may not complain. 2 Cal. Jur. 1032, 1033. We find no error in the record.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

119 Cal.App. 290

ALDERMAN v. McCARDIA et al.

Civ. 616.

District Court of Appeal, Fourth District, California.

Dec. 17, 1931.

1. Mechanics' liens ⚷281(5).

In action to foreclose mechanic's lien, evidence justified court's conclusion that repairs to leased house at lessee's request were not of character to impute to lessor knowledge that tenant must and would make repairs in such haste as to preclude giving notice (Civ. Code, § 1942).

2. Mechanics' liens ⚷281(5).

In mechanic's lien foreclosure action, condition of repair of leased dwelling house *held* not shown to be such as to constitute constructive knowledge on lessor's part that improvements would be made (Code Civ. Proc. § 1192).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by L. L. Alderman against W. J. McCardia and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Forgy, Reinhaus & Forgy, of Santa Ana, for appellant.

George H. Gobar, of Fullerton, for respondent.

BARNARD, P. J.

The defendant Heil leased to the defendant McCardia a ranch situated in the county of Orange, upon which was a dwelling house. McCardia employed the plaintiff, who is a painter and general contractor, to make certain repairs to this house, which repairs, according to the evidence, were worth $213.45. The bill not being paid, notice of lien was recorded, and this action brought against the lessee and the lessor for the purpose of foreclosing a mechanic's lien on the property. At the close of the plaintiff's evidence, a nonsuit was granted as to the defendant lessor, and, from a subsequent judgment in her favor, this appeal is taken.

It does not appear from the evidence that the respondent had any actual notice of the improvements in question, and the only contention raised by the appellant is that the respondent had constructive notice by reason of the fact that the dwelling house on the property was in such a state of repair as to make it untenantable, and that she was therefore charged with constructive knowledge that the tenant would make the repairs which were made.

As to the condition of the house, the appellant testified as follows: "Well, it was dirty and the paper was off and the paint was all scarred and I would say it was in very bad condition. The cloth that was on the boards to hold the paper was rotten and torn and hanging down from the ceiling, not from the ceiling, from the side walls and there was glass broken out and siding loose and cracks where you could see right through and see outdoors, right through where the siding would be loose and the nails were out, and I think there was one board or two boards broken."

He further testified that he painted all of the interior woodwork, including the floors; put new cloth on the side walls and repapered them; and that this work was worth $185. He also testified that he put new screens on the windows, doors, and back porch; that he put on one new side board and nailed some other boards back in place; and that the value of this material and labor was $28.45.

Appellant cites certain cases where a provision in a lease requiring or permitting a tenant to erect improvements upon real property is held to be constructive knowledge on the part of the lessor of the doing of the work, within the meaning of section 1192 of the Code of Civil Procedure. In all of the cases cited, notice of nonresponsibility, as provided for in that section, was not filed. In this case, the answer of the respondent alleges that she had no knowledge of said improvements until January 2, 1929, and sets up a copy of a notice of nonresponsibility which was posted and recorded by her on January 8, 1929. While respondent insists that these allegations in the answer may not be considered on this appeal, in effect, he concedes that this is the situation, and states that the only issue to be determined is whether the facts he has presented are such "as would put a reasonable person owning property on notice that labor would be expended upon his property." It is argued that a reasonable person would anticipate that a tenant would have to protect himself against the inclemencies of an approaching winter.

The lease was not introduced in evidence, and there is neither evidence to show that the condition of the house, as testified to by the appellant, existed when the lease was made, nor to show that the respondent knew, or had opportunity to know, of its condition.

[1, 2] A further consideration is that the only protection against the rigors of winter shown by the record to have been included in the work performed consisted in the nailing on of one new board and the renailing of some others. What the new board cost does not appear, but it does appear that the nails and tacks used on the entire job cost 20 cents, and that the appellant charged $4 for

these repairs to the outside of the house, including the work of putting on all of the new screens. The trial court was justified in concluding that the redecoration of the house was the real object of the tenant, and that the trivial repairs were incidental thereto, and not of a character to impute to the owner the knowledge that the tenant must and would make repairs in such haste as to preclude the giving of notice and the getting of the landlord's consent. Civ. Code, § 1942. The appellant testified that he found out that respondent owned the property the next day after the work was begun, but he said he could not remember whether he ever attempted to get in touch with her, up until the time his attorney wrote her a letter telling her the lien had been filed. We conclude that the facts here shown are not such as to put this lessor upon notice that these repairs must be, and were being, made.

Conceding, but by no means deciding, that the condition of repair of a dwelling house could ever constitute constructive knowledge on the part of a lessor of the making of improvements, within the meaning of section 1192 of the Code of Civil Procedure, the showing made here was not sufficient to justify the relief asked for, and the order and judgment of the trial court cannot be reversed.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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119 Cal.App. 362

BAY LUMBER CO. v. EATON et al.

Civ. 4465.

District Court of Appeal, Third District, California.

Dec. 22, 1931.

Rehearing Denied Jan. 21, 1932. Hearing Denied by Supreme Court Feb. 18, 1932.

1. Mechanics' liens ⚷281(1).

In action to foreclose mechanic's lien, evidence supported finding that materials furnished were used.

2. Mechanics' liens ⚷239.

There being no direction regarding application of payments by contractor constructing several buildings, materialman *held* entitled, as against owners of one of buildings, to apply payments to accounts maturing earliest (Civ. Code, § 1479).

Evidence disclosed that owners of one of buildings in question had made payments to contractor, which, if applied to account for materials used in their building, would have extinguished or materially reduced amount for which materialman filed lien, but that contractor at no time designated any particular account to which payments should be applied, and no direction regarding application of payments was given by owners to contractor, nor was any information ever given to materialman regarding particular source from which any particular payment was received by contractor.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by the Bay Lumber Company against Albert M. Eaton and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Samuel J. Crawford, of Santa Monica, for appellants.

Fogel & Beman, of Los Angeles, for respondent.

PLUMMER, J.

The plaintiff had judgment in an action to foreclose a mechanic's lien, from which judgment the above-named defendants appeal.

The record shows that Arthur P. Creel, Tommie Creel, his wife, L. Q. Brenson and Cora Brenson, his wife, entered into an agreement with a contractor by the name of Albert M. Eaton for the construction of a building upon certain real estate belonging to the appellants; that thereafter, Albert M. Eaton, as such contractor, purchased of and from the plaintiff, lumber and materials for use in the construction of said building, to the value of $1,563.04, upon which there was a credit of $151.12, leaving due the plaintiff the sum of $1,411.92. The court found that the lumber furnished by the plaintiff was used in the construction of the building belonging to the defendants, and that plaintiff was entitled to a foreclosure of the mechanic's lien filed by the plaintiff, and directed sale of the lot upon which the building was erected, to satisfy the claim of the plaintiff.

Upon this appeal, two grounds only are urged for reversal, to wit: That the testimony does not show that the lumber furnished by the plaintiff was used by the contractor Eaton, and entered into the erection of the building for the defendants; and that payments made by the defendants to the contractor should have been applied toward payment for the materials furnished by the plaintiff to the contractor Eaton for the construction of the building.

[1] A short recitation of the testimony, however, will show that the finding of the court to the effect that the materials furnished by the plaintiff were used in the construction of the building, and became a part

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

thereof, is amply supported. The testimony of the foreman on the job is as follows: After being shown the delivery slips for the material, forty-five in number, furnished by the plaintiff, the foreman testified as follows:

"Q. Will you look at 14819 and going down to the end, which is 16849, will you examine those and then state whether all of them were received on the job, and whether all went into the building? If not, if any are there which you did not receive or not received on the job, or did not go into the building, indicate? A. I find two slips number 14951 and number 15000; both have my signature, and they are both for the same amount of lumber and same material, and I do not see how there could be two of the same kind.

"Q. You are referring to slip 14951, dated December 17, 1927, and slip 15000, dated December 19, 1927? A. Yes, sir.

"Q. You say they are both for the same amount? A. The same material.

"Q. The same material. And you don't see how they could both go into the building? A. No, sir.

"Q. As to the others you have examined, you say that material was received by you on the job? A. Yes, sir.

"Q. And did it go into the building? A. Yes, sir; that is why I was hesitating on these because I can recall everything in the building.

"Q. The credit slip 15226 was included in those you have examined? A. Yes, sir.

"Q. And that lumber was returned to the Lumber Company, was it? A. Yes, sir.

"Q. And the credit given? A. Yes, sir."

The same witness further testified:

"Q. Returning to the sheet number 14591 and sheet number 15000, will you state to the court what that first one, 14951, is for? A. That one is for sheeting on the roof.

"Q. Sheeting on the roof? A. Yes, sir.

"Q. And what was the second for? A. I don't know what the second was for; it is for the same thing.

"Q. It is also for sheeting on the roof, isn't it? A. Yes, sir. But it would not come that way, I would not think.

"Q. Did you know how much sheeting was put on the roof of that building? A. I don't know.

"Q. Returning to the third sheet, being number 14140, with the signature 'Albert M. Eaton,' do you know Mr. Eaton's signature? A. Yes, sir.

"Q. Is that his signature? A. Yes, sir.

"Q. That is the contract? A. Yes, sir.

"Q. Do you know whether or not that lumber came on the job? A. Yes, sir."

Witness Gaskell, driver for respondent, testified as follows:

"Q. I show you the first sheet of plaintiff's exhibit No. 3 for identification, and ask you to examine this sheet which is number 14030, for $40.83. I will ask you if you ever saw that sheet before? A. Yes, sir, I have.

"Q. Do you notice the items of lumber mentioned on that sheet? A. I do.

"Q. Did you deliver that load of lumber? A. I did, yes, sir.

"Q. Where? A. On that Annex Building at Fourth and Broadway.

"Q. Where, in relation to the building, did you deliver it? A. I put it in at the back of it; there was an opening in the back end of the brick walls, to deliver lumber; the lumber was delivered inside of the building.

"Q. You left it there, did you? A. Yes, sir."

As to the delivery of the other items, the record shows as follows:

"Mr. Crawford: We will stipulate the drivers will testify they delivered this lumber in the building. A. In the building.

"Q. Mr. Crawford: Drove in between the walls of the building; the building was not up; they drove in between the walls and dropped it."

"Mr. Carroll further testified:

"Q. You stated you were in charge of the lumber and directed the carpenters working there what pile to go to? A. Yes, sir.

"Q. Was that during all through the job? A. Yes, sir.

"Q. Did you check the lumber as it came in? A. Yes, sir.

"Q. Did you at any time notice any loss of lumber on that job? A. I did not.

"Q. Did anybody else furnish any lumber on that job besides the Bay Lumber Company? A. Not until the finish, until the finishing lumber, but not rough lumber.

"Q. Not any of this lumber? A. No.

"Q. There was no other rough lumber on the job? A. No, sir."

The testimony of Sammons, a witness for the plaintiff, was that, according to their books, lumber to the value of $1,563.04 had been furnished upon the job in question, upon which there had been paid the sum of $151.12.

[2] As to the finding of the court regarding nonpayment and application of funds, the record shows that the contractor Eaton was engaged in the construction and completion for the defendants of jobs known as "Job No. 1" and "Job No. 2," and also was engaged in the construction of that certain other building known as the "Pat Doherty" job; also upon the construction of another building known as the "Todd" job. The record further shows that the contractor, in receiving payment for his work, deposited all the payments to his credit in a general account at the bank with which he was doing business,

and that from time to time he drew checks on this account in payment for materials furnished by the plaintiff. That there was never any designation by the contractor in making payments, as to what account the payment should be applied, nor does the record show that any information was ever given to the plaintiff as to the particular source from which any particular sum of money was received by Eaton, the contractor, when making payments to the plaintiff.

The record further shows that the defendants made payments to the contractor in sums which, if applied by the contractor, would have extinguished or at least materially reduced the amount for which the plaintiff filed its lien, and for the foreclosure of which it had judgment.

The record shows that the last items of material furnished on both the Doherty and Todd jobs were prior in point of time to the last item of material furnished by the plaintiff for the construction of the defendants' building involved in this action. At the time of a certain payment of $2,000 by the defendants to the contractor Eaton, on December 10, 1927, there was due on the Todd job $3,820. An application of the $2,000 paid by Eaton to the plaintiff was made as follows: $1,500 on the Todd job, and $500 on the Pat Doherty job. The last item for material on the Doherty job was June 10, 1927, at which time there was due the sum of $1,091.48. At the time the last payment was applied on the Todd job, there was due $820. "At the time we received some machinery which was turned over, we applied $320.09 on the Todd job; at that time that sum was still due. The rest of the machinery which the contractor turned over, in the sum of $420.48, was applied on the Doherty job." As stated above, the Todd and Doherty jobs were prior in point of time to the delivery of the items making up the several deliveries of lumber by the plaintiff to the defendants in this action. At the time of receiving payments, there being no direction from anyone as to how the payments should be applied, the plaintiff applied the several payments to the accounts which were earliest in maturity, in strict accordance with the provisions of section 1479 of the Civil Code, and strictly in accordance with the opinion of this court in the case of Madera Sugar Pine Co. v. Adams, 68 Cal. App. 111, 228 P. 544. There is nothing in the case of Hammond Lumber Co. v. Fanta, 179 Cal. 652, 178 P. 503, which conflicts with the holding of this court in the Madera Sugar Pine Case. The case of Hammond Lumber Co. v. Fanta, supra, shows distinctly that the owner of the premises indicated to the lumber company by the assignments of payments specified in the contract that the moneys should be applied upon the payments mentioned in the assignment, and that the lumber company had full knowledge thereof; and, as cited in the case of Hammond Lumber Co. v. Henry, 87 Cal. App. 231, 261 P. 1027, the appellants might have given notice to the plaintiff or taken proceedings such as to convey notice to the plaintiff as to the application of the funds. But as no direction was given either to the contractor, and no knowledge conveyed to the plaintiff concerning the payments, the section of the Civil Code which we have cited is controlling. The fact that the plaintiff knew that there were different sources from which the contractor Eaton might receive money is not equivalent to notice or knowledge that the contractor had received any particular payment from any particular source.

In view of section 1479, Civil Code, we do not deem it necessary to extend the length of this opinion by citing authorities supporting the action of the trial court.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PRESTON, P. J.

119 Cal.App. 253

ZIMMERMAN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7850.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1931.

Rehearing Denied Jan. 16, 1932. Hearing Denied by Supreme Court Feb. 9, 1932.

1. Insurance 🔑435.

Partner entering partnership after copartner had taken out compensation insurance in own name as individual *held* not protected thereby (St. 1917, p. 831, as amended).

> Facts disclosed that Z. was engaged in business of painting, decorating, and paper hanging, under fictitious name "Royal Paint and Wall Paper Company," and was insured by State Compensation Insurance Fund against liability under Workmen's Compensation Act (St. 1917, p. 831, as amended), by policy naming him as an individual. Later Z. took in S. as partner, and they continued to operate the business under the same name and with some of same employees. Insurance carrier was not notified of S.'s association in the business.

2. Insurance 🔑332¼.

Insured's act in taking in a partner *held* not to avoid workmen's compensation insurance policy as to insured (St. 1917, p. 831, as amended).

Proceeding under the Workmen's Compensation Act by one Andronoff, claimant, opposed by Sam Zimmerman and S. Stern, employers, and State Compensation Insurance Fund, insurer. To review a decision of the State Industrial Accident Commission absolving the State Compensation Insurance Fund, as insurance carrier, from all liability, and holding employers solely responsible, employers bring certiorari.

Decision annulled in part and remanded in part.

Alfred F. Breslauer, of San Francisco, for petitioners.

Edward O. Allen and A. I. Townsend, both of San Francisco, for respondent Industrial Accident Commission.

Henry G. Sanford, of San Francisco, for respondent State Compensation Insurance Fund.

KNIGHT, J.

This is a proceeding in certiorari to review a decision of the Industrial Accident Commission absolving the State Compensation Insurance Fund as insurance carrier from all liability for the payment of an award made by the commission to an injured employee, and holding the employers alone responsible therefor.

The facts are as follows: Zimmerman, one of the petitioners herein, was engaged in the business of painting, decorating, and paper hanging. He conducted the business under the fictitious name "Royal Paint & Wall Paper Company," and was insured by the State Compensation Insurance Fund against all liability arising under the Workmen's Compensation Act (St. 1917, p. 831, as amended) by a policy issued to him on March 4, 1930, naming "Sam Zimmerman (an individual) doing business as Royal Paint & Wall Paper Company" as the insured. About September 1, 1930, he took in Stern as a partner, and they continued to operate the business under the same name and with some of the same employees. The insurance carrier was not notified of Stern's association in the business. About ten days later and on September 10, 1930, one of their painters, named Andronoff, who had been in the employ of Zimmerman up to the time the partnership was formed, fell from a building and was severely injured. He applied for and was awarded compensation, but, as stated, the commission absolved the State Compensation Insurance Fund from all liability for the payment thereof, holding that under the foregoing facts the employers were uninsured.

[1] We are of the opinion that so far as Stern is concerned the commission's decision should be sustained, because, as will be noted, the policy designated Sam Zimmerman, an individual, as the insured; and, under no possible theory, therefore, can the fact that Stern afterwards entered into a partnership with Zimmerman operate as a matter of law to extend the terms of the insurance contract to cover Stern, individually or otherwise.

[2] But as to Zimmerman the situation is entirely different, and, in view of the law as declared in the recent case of First National Trust & Savings Bank of San Diego v. Industrial Accident Commission (Cal. Sup.) 2 P.(2d) 347, it is evident that the commission's conclusion that Zimmerman's act in taking in a partner avoided the policy as to him, cannot be sustained. In that case a policy was issued to two individuals, naming them, doing business as partners, and subsequently one transferred his interest to the other, who continued to operate the business under the same name; and it was held that as to the remaining partner the transfer of such interest did not avoid the policy, that he continued as the employer named therein. The same principle applies here. Zimmerman was insured as an individual while doing business under a certain trade-name against liability for industrial accidents to employees, and after taking in a partner continued in the operation of the business under the same trade-name; therefore, under the doctrine of the case above mentioned, although he transferred an interest in the business to Stern, he continued as an employer in the operation of the business under the same trade-name, and consequently to the extent that he may be required to respond in the matter of the payment of said award is entitled to the full protection afforded by his policy.

At the time the present proceeding was argued orally before this court, the case above cited was under submission before the Supreme Court, after judgment in the District Court of Appeal (the judgment of the latter court having been rendered shortly after the commission made its findings in the present proceeding); and at that time counsel for the commission frankly conceded that in principle that case was basically the same as the present one, and that the decision of the District Court of Appeal therein was adverse to the views adhered to and applied by the commission in deciding the present proceeding. Since then the Supreme Court not only confirmed the conclusions reached by the District Court of Appeal, but adopted as its own the opinion rendered therein.

Counsel for the insurance carrier seeks to differentiate the two cases upon various grounds. But the argument made in that behalf is based mainly upon the assumption that in that case "a partnership was originally insured," and such was not the fact, for, as expressly stated in the court's opinion, "* * * in naming the employer, this policy has insured two individuals, Charles Hascall and S. W. Powell, while they are doing business as Hascall & Powell. In other words, they are each insured while doing business under that firm name."

For the reasons stated, that portion of the commission's decision absolving the insurance carrier from liability so far as Zimmerman is concerned is annulled, and the application of Andronoff is remanded to the commission for further proceedings in accord with the views herein expressed.

We concur: TYLER, P. J.; CASHIN, J.

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119 Cal.App. 335

SINTZEL et al. v. WAGNER et al.

Civ. 8148.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1931.

1. **Pleading** ⚷249(3).

In action for rescission and general relief, if court concludes that rescission cannot be had, amended complaint for breach of contract may be filed.

2. **Judgment** ⚷251(1).

Pleading ⚷237(6).

Where original complaint was sufficient to warrant judgment for damages, but rescission and general relief were asked, court might grant any relief consistent with pleadings or permit pleadings to be amended.

3. **Evidence** ⚷445(2).

In action to rescind contract for purchase of land with fruit trees, second agreement between same parties for care of trees by vendors *held* admissible (Civ. Code, § 1642).

Second agreement was admissible because second contract was one of the considerations for purchase; it was intimately connected with first contract, related to same subject-matter, and supplemented rather than superseded first contract.

4. **Vendor and purchaser** ⚷351(1).

Measure of damages for vendors' failure to care for trees, all of which died, is difference in value of lot with trees and without, or replacement value of the trees (Civ. Code, § 3300).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Thomas Sintzel and another against E. S. Wagner and another. From judgment for plaintiffs, defendants appeal.

Affirmed.

Lewis & Lehman, of Los Angeles, for appellants.

Samuel J. Crawford, of Santa Monica, for respondents.

WARD, Justice pro tem.

The first complaint filed in this action was in equity for a rescission of a contract. Upon issue raised by answer a trial was had and the cause submitted for decision. Subsequently the court ordered plaintiffs to amend the complaint. Plaintiffs filed an amended complaint praying for damages upon a breach of contract alleging that defendants induced plaintiffs to purchase a lot with fruit trees thereon and that defendants agreed to care for the property for three years by irrigation, cultivation, etc. The amended answer set out the copy of the contract, denied that any contract to care for the trees was part of the consideration for the sale of the lot, and that the only agreement for the care of the trees was embraced in a subsequent contract. The court found that the representations as to care of the trees were made for the purpose of inducing plaintiffs to execute the contract of purchase; that defendants failed to irrigate, cultivate, etc., and fixed damages.

[1, 2] In an action where the complaint asks for rescission and for such other relief as may be equitable and just if the court should conclude that rescission could not be had, an amended complaint may be filed presenting the question of damages for breach of contract. Masero v. Bessolo, 87 Cal. App. 262, 262 P. 61, and Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29. In the original complaint in this action there are allegations sufficient to warrant a judgment for damages, but plaintiffs demanded rescission and prayed for "other and further relief as may be just and necessary." When the answer was filed and the issues raised, the court had the right to grant any relief consistent with the pleadings or to order or permit the pleadings to be amended so as to fully present the real question involved. Masero v. Bessolo, supra.

[3] Subsequent to the execution of the contract of purchase, the grantors in a written instrument agreed to care for the trees for a period of three years. This was in accordance with the understanding reached by the sellers or their agents and the buyers prior to the execution of the agreement to purchase. This was simply reducing to writing one of the considerations for purchase which was not made a part of the original agreement. There would be no purpose in agreeing

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to care for the trees unless made as an inducement to purchase. The contracts were not made upon the same date, but the second only modified and did not supersede the first. It simply added the offer made before the first contract was executed that the sellers would care for the trees for a specified period. It did not diminish, contradict, change, or alter the terms of the original purchase. The two contracts are related and connected and deal with the same subject matter. It was one transaction, the two contracts may be considered together (Merkeley v. Fisk, 179 Cal. 748, 178 P. 945; Spotton v. Dyer, 42 Cal. App. 588, 184 P. 23; section 1642, Civ. Code), and therefore the court did not err in receiving the second agreement in evidence.

[4] The findings and judgment are in accord with the provisions of section 3300 of the Civil Code. The rule of damages in this case is the difference in the value of the lot with the trees on it, in the condition in which they were as testified to by the witnesses, and the value of the lot had the defendant properly cared for the trees. In other words, it would be the difference in the value of the land with the trees and the value of the land without the trees. The evidence proved that the trees were dead or worthless and that it would cost $950 to replace them. If so, then the land would be worth $950 less in value if it had no trees on it. This is the amount which the court found would compensate the plaintiffs for the detriment proximately caused.

Judgment affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

119 Cal.App. 338

PEOPLE v. HOOVER.

Cr. 1179.

District Court of Appeal, Third District, California.

Dec. 21, 1931.

1. Indictment and information 🔑122(3).

Conviction for second degree murder *held* not void on theory defendant was held for murder of "Roy" and tried for murder of "Ray" Smith.

> Criminal complaint was filed charging murder of Roy Smith. Preliminary examination followed and accused were held to answer for murder of Roy Smith, and thereafter district attorney filed information charging defendant with murder of Ray Smith. On the morning of the trial, however, the information was amended to read, "Roy Smith."

2. Indictment and information 🔑161(6).

Information for murder containing clerical error as to decedent's name was not void and could be amended to correct error (Pen. Code, § 1008).

> The information contained a clerical error, in that name of decedent was given as "Ray" S., instead of "Roy" S., or, to be exact, the letter "a" was inserted for the letter "o" in the Christian name of the murdered man.

Appeal from the Superior Court, Yolo County; W. A. Anderson, Judge.

James Hoover was convicted of murder in the second degree, and, from an order denying his motion to set aside the judgment of conviction, he appeals.

Affirmed.

See, also, 107 Cal. App. 635, 290 P. 493.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

[1, 2] Defendant James Hoover was convicted by a jury in the Superior Court of Yolo county on April 7, 1930, of murder of the second degree. Having suffered a prior conviction, he was sentenced to imprisonment in the state prison at Folsom, and is now incarcerated there. Long after this judgment had become final, and on September 11, 1931, he filed a motion in the Superior Court of Yolo county to set aside and vacate said judgment of conviction of murder upon the ground that he was held to answer to the Superior court for the murder of *Roy* Smith and was tried in the superior court and convicted of the murder of *Ray* Smith. The motion was denied by the learned trial judge on September 21, 1931. From the order denying said motion the defendant prosecutes this appeal.

These additional facts appear in the record: A criminal complaint was filed against said defendant under the name of Jimmie Ray on February 3, 1930, in the justices' court of Washington township, Yolo county, charging him and a man called Lester Ray with the murder of *Roy Smith*, a human being. A preliminary examination followed, and they were held to answer to the Superior Court for the murder of Roy Smith. Thereafter the district attorney filed an information in said Superior Court charging defendant, whose true name is James Hoover, with the murder of *Ray Smith* instead of Roy Smith. Defendant James Hoover was duly arraigned upon this information, and, without objection of any kind, entered a plea of not guilty. On the morning of the trial, the following proceedings were had in said court:

"The Court: Are you ready, gentlemen?

"Mr. Chalmers (district attorney): We are ready.

"Mr. McDonald (attorney for defendant): Ready.

"Mr. Chalmers: If the Court please, in looking over the information, I find that it describes the party killed as 'Ray Smith.' That is a typographical error. It should be 'Roy Smith,' and we move to amend the information to read 'Roy Smith.'

"Mr. McDonald: No objection.

"The Court: Very well."

The minutes of said court also show the following:

"In the Superior Court of the State of California, in and for the County of Yolo.

"The People of the State of California vs. James Hoover and H. L. Hoover, Defendants.
"April 2, 1930.
"W. A. Anderson, Judge.

"This cause came on regularly for trial this day at 10 a. m. The District Attorney and the defendants and their counsel, C. C. McDonald, and the venire of jurors are present in Court and ready for trial.

"The District Attorney moved the court for an amendment of the information to show the true name of the deceased to be 'Roy Smith,' instead of 'Ray Smith', which motion was granted by the Court, and the Clerk amended the information accordingly."

After this amendment the case proceeded to trial, and defendant James Hoover was, as above stated, convicted of murder of the second degree. He contends on this appeal that the verdict and judgment of conviction of murder is void, because he was held to answer to the Superior Court for the murder of Roy Smith and was tried, convicted, and sentenced by said Superior Court for the murder of *Ray* Smith.

It is also contended by appellant that the information was void and could not be amended. There is absolutely no merit in any of these contentions. The information was not void. It only contained a clerical error, in that the word *Ray* Smith was used instead of *Roy* Smith, or, to be exact, the letter "a" was inserted for the letter "o" in the Christian name of the murdered man.

A court would have inherent power to permit such a clerical error to be corrected, but section 1008 of the Penal Code expressly authorizes the court, in its discretion, to allow such amendment, as here under consideration, where it could be done without prejudice to the substantial rights of the defendant.

There was no prejudice to the substantial right of the defendant by the amendment—he knew, and everybody else connected with the case knew, that he was charged with the murder of one human being by the name of *Roy Smith and no one else*, and that the name *Ray* Smith in the information was a mere typographical error. Indeed, the record above set forth shows that his own counsel knew that the name *Ray* Smith was an error, and it should be *Roy* Smith, for he expressly stated that there was no objection to the amendment. The amendment was fully justified. See People v. White, 47 Cal. App. 400, 190 P. 821; People v. Tomsky, 20 Cal. App. 672, 130 P. 184; People v. Jensen, 82 Cal. App. 489, 255 P. 781; People v. Harrison, 14 Cal. App. 546, 112 P. 733.

Defendant cannot escape punishment, which the record in this case shows he so richly deserves, through any such flimsy technicalities as here presented.

The trial court acted wisely in denying the motion, and its order in so doing should be affirmed, and it is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

119 Cal.App. 273

EDGERTON v. SCAMMON et al.

Civ. 4347.

District Court of Appeal, Third District, California.

Dec. 17, 1931.

1. Fraudulent conveyances ⚿299(9).

Evidence sustained finding that sale of personal property as respected rights of execution creditors was not followed by immediate delivery and actual and continued change of possession (Civ. Code, § 3440).

2. Fraudulent conveyances ⚿308(9).

Whether sale of personal property was accompanied by immediate delivery and actual and continued change of possession is question of fact (Civ. Code, § 3440).

3. Fraudulent conveyances ⚿132(3).

Recordation of bill of sale of personal property without immediate delivery was no defense as against execution creditor (Civ. Code, § 3440).

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action by A. L. Edgerton against E. G. Scammon and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

J. T. Sharp, of Alturas, for appellants.

J. S. Henderson, of Alturas, for respondent.

TUTTLE, Justice pro tem.

This is an action to recover upon judgments rendered in the justice court, and to subject certain personal property to sale under executions levied pursuant to said judgments.

The complaint contains two counts. The first alleges the rendition of judgment in the justice court in favor of the assignor of plaintiff and against Modoc Moulding & Lumber Company; that this judgment was entered April 18, 1929, and was for the sum of $273.55; that execution on the judgment was levied upon certain personal property alleged to belong to the lumber company; that E. G. Scammon, defendant herein, filed a third party claim, and that the property was delivered to him upon the filing of a bond; that Scammon claims to be the owner thereof; that at all times mentioned the lumber company was in possession of said personal property, claiming to own the same; that defendants Gibson and Laird are sureties upon the said bond. The second count, based upon another judgment, is practically the same as the first, except that the judgment was obtained on July 25, 1927, and the amount was $272.15.

The answer denied the possession of the lumber company, and its title to said property, and in this behalf alleges that defendant Scammon became the owner thereof, under a bill of sale, on April 27, 1927, and that he took immediate possession thereof, and was in possession of said property at the time of the levy of the executions under said judgments.

The court found for plaintiff upon all the issues, and entered judgment accordingly. Defendant now appeals from the judgment.

In the fall of 1925, Scammon, Lopstead, and Payne organized the Modoc Moulding & Lumber Company, a corporation, which equipped and ran a mill in Modoc county. In 1926, Payne bought the stock of the other two, leaving him the owner of 98 per cent. of the corporate stock. Payne continued to supervise operations, being upon the ground at all times, and in possession of all equipment. Upon April 27, 1927, Payne executed a bill of sale in favor of defendant Scammon, covering all machinery and equipment of every character belonging to the lumber company. Scammon did not take possession of the property, and Payne continued in sole possession thereof, for a period of three months after the sale. Payne testified that he had a verbal agreement to buy it back. At the expiration of the three months, Payne left the premises, and Campbell, Archer, and Davis leased the mill from Scammon, and operated the property until the spring of 1928, when Payne again took possession, under what he stated was a verbal agreement with Scammon. Payne finally gave up possession upon April 12, 1929.

The personal property sought to be made subject to the execution in this case is a portion of the equipment of the lumber company, and is included in the bill of sale to Scammon. It also appears that this property was being purchased under a conditional sales contract, and title had not passed to the lumber company, and never did. Defendant Scammon. after he secured the bill of sale, paid up the balance due upon this contract. It amounted to some $900. It appears that the lumber for which the judgments in the justice court were given, was sold to the lumber company in the summer of 1926.

The sole contention of appellant is that the following findings lack support in the evidence:

"That on or about the ——— day of April, 1927, the Modoc Moulding and Lumber Company, through its president and general manager sold the above named property to defendant Scammon, but did not deliver possession thereof, but on the contrary remained in the actual and exclusive possession for a period of three months thereafter.

"That the sale of said property by the said Modoc Moulding and Lumber Company to said Scammon was not accompanied by any immediate or actual delivery thereof to him, nor was it followed by any actual delivery thereof to him, nor was it followed by any actual or continued change of possession thereof."

[1, 2] Section 3440 of the Civil Code provides, in part, as follows: "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

Witness Payne, who owned practically all the stock of the lumber company, testified that he was in possession of the property when the bills (upon which the judgments were based) were contracted. This was in the summer of 1926. Payne continued in possession until the summer of 1927. The bill of sale was executed in April, 1927. Defendant Scammon does not claim that he was in the actual possession of the property at the time the bills were incurred. The first time that he had any sort of possession was through his lessees, and this was three months subsequent to his bill of sale. It thus appears that there is substantial evidence in the record to justify the findings in question. The question as to whether the sale was accompanied by an immediate delivery and followed by an actual and continued change of possession is one of fact for the determination of the trial court. Hickey v. Coschina, 133 Cal. 81, 65 P. 313.

[3] The argument of appellant is that the recordation of his bill of sale "would tend to put any prudent man in inquiry as to the ownership of the property." But the statute quoted makes no exception in a case where the bill of sale is recorded. A creditor has the right to rely upon possession only. He is not called upon to search the records. The law says that under these circumstances he is entitled to presume that possession means ownership as between his debtor and the transferee of the debtor. Consequently, constructive notice by recordation is, in itself, no defense.

Other facts are pointed out by appellant as tending to prove possession by appellant. As we have stated, these facts were duly weighed by the trial court, and we cannot disturb the finding.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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118 Cal.App. 344

CLARK v. PACIFIC GAS & ELECTRIC CO.

Civ. 4415.

District Court of Appeal, Third District, California.

Dec. 16, 1931.

Hearing Denied by Supreme Court Jan. 14, 1932.

Electricity 🔑19(2).

Electric company's answer *held* to raise no issue respecting applicability or inapplicability of railroad commission's order regulating height of steps on pole.

> Complaint of plaintiff, a minor, who was injured when he climbed pole and came in contact with wire, alleged that electric company caused steps to be maintained on poles within 3 feet of ground, contrary to railroad commission's order requiring at least 7½ feet between ground and lowest step, and company's answer denied that steps were maintained within 3 feet of ground, and alleged that lowest step was placed in substantial compliance with such order.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 5 P.(2d) 58.

Thomas J. Straub, of San Francisco, and W. R. Dunn, of Sacramento, for appellant.

E. S. Mitchell, of Eureka, for respondent.

PER CURIAM.

Appellant again contends that there was no testimony showing the date of the construction of the pole involved in this action, and therefore that general order 64–A of the railroad commission did not apply, and that the trial court and this court were both in error in assuming that it did.

A consideration of the pleadings which was given in the first instance, and are now referred to, shows that the appellant's contention is untenable, as only one question in relation to the pole was tendered, to wit: Whether the steps on the pole were lower than 7 feet, and were down to within 3 feet of the ground. The allegations of the complaint in paragraph IV are as follows: "That said defendant caused steps to be maintained on said poles from the top to within 3 feet of the ground, the first step being less than 3 feet, contrary to General Order 64–A of the Railroad Commission and contrary to all rules of safety and carefulness; that General Order 64–A, effective March 1, 1929, issued by the Railroad Commission, provides that for any overhead line constructed conducting electricity, the lowest step on any step-pole shall not be less than 7 feet 6 inches from the ground, and a space between steps on the same side of the pole shall not exceed 36 inches, which said General Order or rule was well known to the defendant herein." The appellant's answer reads as follows: "Answering the allegations contained in Paragraph IV of the plaintiff's first cause of action, said defendant denies that it caused steps to be maintained on any part of said pole from the top to within 3 feet of the ground, and in this connection defendant alleges that the lowest step on each of said poles was placed and maintained at least 7 feet above the ground and in substantial compliance with the said General Order 64–A of the Railroad Commission referred to in said complaint."

It will thus be seen that no issue was tendered by the denials of the appellant as to the application of general order 64–A of the railroad commission, and the only testimony required on the part of the plaintiff was to show that the steps on the pole came down below the prohibited distance from the ground, and within 3 feet thereof, as alleged.

The petition for rehearing is denied.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

119 Cal.App. 288

GUTTING v. GLOBE INDEMNITY CO. et al.

Civ. 6888.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1931.

Costs 🔑48.

Court cannot allow costs to a defendant on dismissal of an action for want of jurisdiction (Code Civ. Proc. §§ 1022, 1024).

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by M. E. Gutting against the Globe Indemnity Company and others. The action was dismissed, and defendants filed a cross-bill, and, from an order denying plaintiff's motion to strike the memorandum of costs, plaintiff appeals.

Reversed.

James E. Mahon, of Los Angeles, for appellant.

Joseph W. Pierce, of El Monte, for respondents.

PER CURIAM.

The court, by a minute order made in response to a motion of the defendant, dismissed the action "without prejudice" and "for want of jurisdiction." Thereafter the defendant filed a costs bill, claiming them as of course. The plaintiff moved to strike this memorandum of costs. The court denied the motion. The appeal, as stated in the notice of appeal, is "from the judgment and order of the court taxing costs in the above entitled action * * * and from the order denying plaintiff's motion to strike from the records and files in said action the memorandum of costs and disbursements claimed by defendants."

There was no appeal from the judgment of dismissal. We therefore have directly presented the question of the right of the court to allow costs to a defendant upon dismissal of an action for want of jurisdiction. Presumably this was a determination of want of jurisdiction of the subject-matter of the action. Section 1024 of the Code of Civil Procedure provides that "costs must be allowed of course to the defendant upon a judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings." One of the actions described in section 1022 is an action for the recovery of money or damages, and this was an action of that character. We are of the opinion that the allowance of costs as authorized by said section 1024 is confined to cases of which the court has jurisdiction. It has been held by the Supreme Court that there can be no judgment for costs, except as a part of the judgment upon the issues in the action, that they are but an incident to the judgment, and, if the court loses power to render a judgment between the parties upon the issues before it, it is equally powerless to render a judgment for the costs incurred therein. Begbie v. Begbie, 128 Cal. 154, 60 P. 667, 49 L. R. A. 141. To like effect see Thurston County v. Scammell, 7 Wash. 94, 34 P. 470.

The orders are reversed.

I dissent: YORK, J.

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119 Cal.App. 305

ERICSON v. STEINER et al.

Civ. 4457.

District Court of Appeal, Third District, California.

Dec. 18, 1931.

1. Judgment 🔑214.

Vacating minute order which announced judgment would be rendered for defendant, and permitting counsel to argue case, was within court's discretion, minute order not being final determination.

> Such minute order was not decision of court, and until findings were adopted and filed there was no decision of the court. The minute order was entered after cause had been hastily tried and submitted without argument in suit for rescission of contract for purchase of personal property.

2. Appeal and error 🔑907(2).

Reviewing court assumes finding adequately supported where evidence is not before it.

3. Appeal and error 🔑931(6).

Where decision of court without jury is supported by evidence, it is presumed incompetent evidence or extrajudicial statements made to judge were disregarded.

> Under this rule, reviewing court may not presume that decision of court was controlled by statement of counsel to judge that loss of case would be great hardship on plaintiff, or that sympathy of judge outweighed natural sense of justice and judicial obligations.

4. Trial 🔑404(1).

Language of finding will be reasonably construed to uphold judgment.

5. Sales ⚷130(3½).

In suit to rescind sale contract, finding was not fatally defective for stating defendants "advised" plaintiff falsely respecting income from business and amount of merchandise on hand.

> Defendants contended that use of word "advised" amounted only to finding that defendants expressed opinion, but common synonym for word "advise" is "inform" or "acquaint," and this is evidently sense in which word was used by court.
>
> [Ed. Note.—For other definitions of "Advise," see Words and Phrases.]

6. Sales ⚷130(2).

It is not essential that every alleged fraudulent misrepresentation shall be proved to sustain judgment of rescission of sale contract for fraud.

> It may be sufficient if one or more material allegations are proved, provided they become substantial inducement for the execution of the contract upon which the purchaser relies.

7. Appeal and error ⚷1071(6).

In suit to rescind sale contract for fraud, failure to adopt finding favorable to plaintiff on certain specific allegations will not require reversal where findings adequately support judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Suit for rescission of contract for purchase of personal property brought by A. E. Ericson against Nina C. Steiner and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Samuel D. Weil, of Los Angeles, for appellants.

H. L. Breidenbach, of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment of rescission of a contract to purchase personal property. It is contended the findings fail to support the judgment, and that the appellant was prejudiced by irregularity of proceedings by means of which a minute order reciting that judgment would be awarded the defendants was set aside, and findings and judgment were subsequently adopted and rendered in favor of the plaintiff. The appeal is presented on the judgment roll alone.

The complaint alleges the execution of a contract between the parties hereto for the purchase and sale of a "grocery, lunch and gas business" together with "all stock fixtures and equipment" thereof, for the sum of $1,975; that the defendants fraudulently represented and stated to the plaintiff that the "net profit of the business * * * had been, was and would be $400.00 per month, and that the gas pump had [been] and was earning * * * $100.00 per month; that the stock in trade would at that time inventory at wholesale prices, not less than $500.00." Other allegations of fraud were specified, which are unnecessary to recite for the purposes of this appeal. The defendants' answer controverted the necessary allegations of the complaint. The cause was hastily tried and submitted without argument. A minute order was first entered, reciting that judgment would be awarded the defendants. Findings of facts were not adopted, nor was a judgment rendered pursuant to this order. On motion of the plaintiff, and upon due notice thereof, the minute order was vacated, and the cause was subsequently argued by respective counsel and again submitted to the court for decision. Thereafter findings of facts were adopted favorable to the plaintiff, and a judgment of rescission was accordingly rendered against the defendants. From this judgment, an appeal was perfected.

[1] The court found that "defendants and their agent, Rodney S. Rose, made certain representations to the plaintiff relative to the income from the business and the value of the stock of merchandise. * * * [They] advised plaintiff that the net income from the gasoline pump was at that time not less than one hundred ($100.00) dollars per month, and that the value at wholesale prices of the merchandise on the shelves was not less than five hundred ($500.00) dollars." The court further found "that the value of the goods on the shelves as of the 26th day of March, 1928, was two hundred ninety-three and 08/100 ($293.08) dollars, and no more. That the gasoline pump had for three (3) months previous to plaintiff's taking possession averaged a monthly net profit of less than seventy ($70.00) dollars." There was no error in setting aside the minute order announcing that judgment would be rendered in favor of the defendants and directing findings to be prepared accordingly. No findings were adopted by the court in accordance with the order. The vacating of that order, under the circumstances of this case, was discretionary with the court. There was no abuse of discretion on the part of the court in setting aside the order and permitting respective counsel to argue the case. The minute order was not a final determination of the case. It was not the decision of the court. Until the findings were adopted and filed, there was no decision of the court. Canadian & Am. Mtg. & Trust Co. v. Clarita Land & Inv. Co., 140 Cal. 672,

677, 74 P. 301; United Taxpayers' Co. v. City & County of San Francisco, 55 Cal. App. 239, 243, 203 P. 120.

[2, 3] It is asserted the court was guilty of prejudicial misconduct which prevented a fair and impartial trial. This misconduct is alleged to have consisted of listening to a statement made by the attorney for plaintiff, out of the presence of the defendants or their attorney, subsequent to the entry of the minute order referred to, in which conversation the plaintiff's attorney unduly appealed to the sympathy of the judge by saying that a loss of the case would be a great hardship on plaintiff, and that a failure to recover the $1,500 which he had paid on account of the purchase price of the property would ruin him financially. Assuming these statements were made to the trial judge, we may not presume, on appeal, that the decision of the court was controlled by these statements, or that the sympathy of the judge outweighed a natural sense of justice and judicial obligation based upon adequate competent evidence to support the findings of facts and the judgment which was rendered, in every essential element. The case is presented to this court on the judgment roll alone. The evidence is not before this court. We must therefore assume that the findings are adequately supported by the evidence in every necessary respect. 2 Cal. Jur. 877, § 514. Where there is ample competent evidence to support the decision of a court sitting without a jury, in the absence of a showing to the contrary, it will be presumed incompetent evidence or extrajudicial statements made to the judge were disregarded in the determination of the case. Watt v. Copeland, 92 Cal. App. 161, 170, 267 P. 928; Roth v. Thomson, 40 Cal. App. 208, 216, 180 P. 656; Ann. Cas. 1917C, 663, note; Davis v. Seattle, 134 Wash. 1, 235 P. 4, 44 A. L. R. 1490.

[4, 5] The appellants contend that the finding of the court that defendants "advised plaintiff that the net income from the gasoline pump was at that time not less than $100 per month, and that the value at wholesale prices of the merchandise on the shelves was not less than $500," amounts merely to a finding that the defendants expressed an opinion to that effect, and is not a positive assertion that the pump had produced a net income of $100 per month, or that the value of the merchandise was $500 or more. It is insisted the word "advised," as it is used in this finding, must be construed to mean that defendants surmised or expressed their opinion or judgment to the effect that the gas pump had produced $100 income a month, and that the merchandise was worth $500. It is true, this word is commonly used to convey the meaning suggested by the appellants. It was probably not the choicest word which might have been selected to convey the meaning evidently intended by the court. Webster's International Dictionary, however, also gives the following meaning to the word "advise": "To give information or notice to; to apprise, inform." A common synonym for the word "advise" is "inform" or "acquaint." This is evidently the sense in which the word was used by the court. By the very language of the complaint, these alleged fraudulent misrepresentations were relied upon by the plaintiff. The defendants' answer specifically denied these allegations. These alleged false declarations regarding the value of the merchandise and the income from the gas pump became vital issues in the case. The language of a finding will be reasonably construed to unhold rather than to upset a judgment. This challenged finding is therefore not fatally defective.

[6, 7] The appellants seek to reverse the judgment for the reason that the court failed to adopt specific findings upon certain other alleged misrepresentations. It is true that other alleged fraudulent statements of the defendants were recited in the complaint, upon which the court failed to make findings. But this is not fatal to the validity of the judgment. In an action to cancel a contract for the purchase of personal property on the ground of fraud, it is not essential that every alleged fraudulent misrepresentation shall be proved to sustain a judgment of rescission. It may be sufficient if one or more material allegations are proved, provided they become substantial inducement for the execution of the contract upon which the purchaser relies. On the same principle, it follows that a failure to adopt findings favorable to the plaintiff upon certain specified allegations of fraud will not require a reversal of the judgment, where the court's findings adequately support the judgment regardless of the effect of the omitted findings. 2 Cal. Jur. 1033, § 614; Layne v. Malmgren, 99 Cal. App. 742, 746, 279 P. 670; French v. Freeman, 191 Cal. 579, 590, 217 P. 515, 519. In the case last cited it is said:

> "Nor was it necessary that the court should make a finding as to each ground of fraud alleged in the complaint, since, if the findings in plaintiff's favor as made support the judgment * * * a finding against him upon the remaining charges of fraud would not affect his right to the relief given."

In the present case, findings favorable to the defendants upon the allegations of fraud, the omission of which is assigned as reversible error, would not affect the plaintiff's right of rescission. The judgment is adequately supported by the findings which were adopted.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

119 Cal.App. 310

PEOPLE v. THOMPSON.

Cr. 1645.

District Court of Appeal, First District, Division 1, California.

Dec. 19, 1931.

1. Criminal law 🔑304(4).

Meaning of English words and phrases and of idioms of vernacular language are proper subjects of judicial notice.

2. Criminal law 🔑1144(13).

Appellate court must assume in favor of verdict existence of every fact which jury could have reasonably deduced from evidence.

3. Criminal law 🔑565.

In prosecution for escaping from jail, evidence sustained jury's implied finding that defendant remained out of state sufficiently long to prevent running of three-year statute (Pen. Code, §§ 800, 802).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

George Thompson was convicted of escape from a county jail, and he appeals. Affirmed.

Garth V. Lacey, of Salinas, for appellant.

U. S. Webb, Atty. Gen., and Seibert Sefton, of San Francisco, for the People.

PER CURIAM.

It was charged in an amended information filed in the superior court of Monterey county that defendant, on or about September 9, 1927, escaped from the county jail of that county, and that ever since the commission of the offense and until on or about March 1, 1931, he was out of the state. He was convicted of the offense, and has appealed from the order denying his motion for a new trial and from the judgment entered on the verdict.

[1-3] He claims that the evidence was insufficient to sustain the implied finding that he remained out of the state sufficiently long to prevent the running of the statute which provides that an indictment or information for any felony other than murder, the embezzlement of public money, or the falsification of public records must be found or filed within three years after its commission. Pen. Code, §§ 800, 802.

The evidence shows that he escaped on September 9, 1927, and was arrested and returned to jail in March, 1931. The original information was filed after this date and before April 17, 1931, when he was arraigned. The amended information was filed October 9, 1931, and the time which elapsed between the escape and the filing of this information was four years and one month.

It was testified that defendant admitted to certain officers that he left California immediately after the escape and went to Nebraska, where later he committed an offense and was confined in the penitentiary, further stating that he "was grabbed as soon as he lit in California."

The meaning of English words and phrases and of idioms of the vernacular language are proper subjects of judicial notice (10 Cal. Jur. "Evidence," § 41, p. 717); and by his last statement defendant clearly meant that he was arrested as soon as he arrived in California. Defendant having admitted that he left the state immediately after his escape, the presumption existed that his absence continued (Estate of Dolbeer, 149 Cal. 227, 250, 86 P. 695, 9 Ann. Cas. 795; Commonwealth v. Pollitt [Ky.] 76 S. W. 412), and the presumption is made stronger by the circumstances attending his departure. We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence (People v. Tom Woo, 181 Cal. 316, 184 P. 389); and the evidence fairly supports their conclusions.

The order and judgment are affirmed.

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119 Cal.App. 326

CHRISTIN v. STORY.

Civ. 8057.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1931.

1. Vendor and purchaser 🔑78.

Provisions in contract for purchase of real property that time is of essence, and providing for forfeiture for failure to pay as agreed, are valid.

2. Vendor and purchaser 🔑101.

Vendor's right of forfeiture under real estate contract may be revived by notice and demand, even though it had been waived in respect of previous defaults.

3. Vendor and purchaser 🔑101.

Evidence *held* to show that vendor had revived right of forfeiture under real estate contract by definite notice and demand for payment.

On May 8, 1928, vendor gave purchaser notice that, unless payment was made within a reasonable time, the property would be turned over to vendor's agent for disposal. After purchaser defaulted on payment due on June 1, 1928, and vendor learned on June 8 that taxes had not been paid, vendor gave final notice on June 11 that, unless all defaults of interest and taxes were paid by June 30, vendor would demand possession of premises on July 1.

4. Vendor and purchaser 🔑95(3).

Vendor's revived right of forfeiture for purchaser's nonpayment after definite demand and notice was not waived by subsequent extension, where payment was not made within extended time.

5. Vendor and purchaser 🔑99.

Purchaser who has neither made nor offered to make full compensation to vendor, nor alleged readiness or ability to make payments due, *held* not entitled to relief from forfeiture (Civ. Code, § 3275).

6. Vendor and purchaser 🔑99.

Statute relieving against forfeiture is equitable in nature, and he who seeks benefits must show readiness, willingness, and ability to do all that could reasonably be required under circumstances (Civ. Code, § 3275).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Estelle Porter Christin against Charles W. Story. From a judgment for plaintiff, defendant appeals.

Affirmed.

See, also, 211 Cal. 381, 295 P. 515.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Knight, Boland & Christin and Arthur Dunn, Jr., all of San Francisco, and Horace S. Wilson, of Los Angeles, for respondent.

SPENCE, J.

Plaintiff brought this action to obtain possession of certain real property, and to have all rights of the defendant under a contract of sale declared forfeited because of the failure of defendant to make the payments required by the contract. The cause was tried by the court sitting without a jury, and from a judgment in favor of plaintiff defendant appeals.

The contract between the parties dated June 8, 1927, provided for a purchase price of $100,000 payable on or before June 1, 1930, "together with interest on said sum of one hundred thousand dollars, or any unpaid portion thereof, at the rate of seven per centum per annum, payable semi-annually on December 1st and June 1st of each year." It further provided for the payment of all taxes by the purchaser. Time was made of the essence by the following clause: "It is especially agreed that time is of the essence of this agreement, and that if second party shall fail to pay any sum of money hereinbefore mentioned at the time agreed to be paid, then upon such failure to pay said sum, or at any time thereafter, first party shall have, at her option, the right to immediately enter into and take possession of said premises, * * * and first party shall thereafter occupy, possess, enjoy and be seized in fee of said property and every part thereof as of her original estate therein, anything herein to the contrary in anywise notwithstanding, and shall retain all moneys theretofore paid by second party, * * * and second party hereby waives all right to recover the same by law or otherwise."

During the year following June 8, 1927, defendant admittedly did not make the interest payments as agreed, and admittedly did not pay either installment of taxes, but made only a partial payment of $1,000 on account of the $3,500 interest due on December 1, 1927, which partial payment was received and accepted by plaintiff on February 28, 1928. No further payment was made or tendered to plaintiff, and after numerous communications between the parties, as hereinafter set forth, plaintiff commenced this action. At that time defendant was in arrears $6.000 in the payment of interest, and about $3,200 on delinquent taxes.

[1] Appellant does not question the propriety of the provisions of the contract making time of the essence, and providing for forfeiture in the event of failure to make the payments as agreed, and it is now well settled that such provisions are valid. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Odd Fellows' Savings Bank v. Brander, 124 Cal. 255, 56 P. 1109; Oursler v. Thacher, 152 Cal. 739, 93 P. 1007; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 P. 363; Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 P. 420; Fresno Irr. Farms Co. v. Canupis, 39 Cal. App. 184, 178 P. 300. However, appellant contends that respondent, by her conduct, had waived her right to declare a forfeiture, citing Stevinson v. Joy, 164 Cal. 279, 128 P. 751; Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126, and similar cases. The trial court found against appellant on the issue of waiver, and in our opinion these findings are amply sustained.

In support of appellant's contention that respondent had waived her right of forfeiture, our attention is called to the fact that respondent accepted the partial payment of $1,000 when the interest payment of $3,500 was over two months past due, and to the further fact that the present contract followed a former similar contract between the parties for the purchase of the property dated February 17, 1922, and that overdue interest payments were frequently made by appellant and accepted by respondent under the former contract. Appellant claims that the conduct of respondent, evidenced by the acceptance of these overdue payments and the communications between the parties, was such as to constitute a waiver of respondent's right of forfeiture as a matter of law.

Assuming, without deciding, that the conduct of respondent under the former contract as well as the present contract may be considered in determining the issue of waiver, we will proceed to a consideration of the communications between the parties, as shown by the evidence, eliminating therefrom irrelevant matter and the numerous letters of appellant endeavoring to excuse his delays on the ground that he had no available funds with which to make the payments.

The communications on behalf of respondent were handled by Mr. Charles A. Christin, who was at all times the attorney in fact of respondent. On February 17, 1927, he wrote to appellant accepting payment on account and saying, "I must have at least half of the balance before the first of March, and the balance by March fifteenth." On March 29, 1927, he again wrote, "I must insist upon the balance now overdue being paid by the first of April. I shall also have to insist that the payment on June first be met. I cannot longer afford to carry you indefinitely on in this matter. You realize that we are not getting any principal, and if it be impossible for you to meet the interest payments, I cannot see much to be gained by prolonging the contract. Will you please give this matter immediate attention?" The principal sum on the original contract was to become due on June 1, 1927, but apparently respondent was willing to make the new contract upon payment of the interest. On May 31, 1927, Mr. Christin wrote to appellant as follows: "I received your letter. I am enclosing a new contract of sale with reference to a three-year contract of purchase of the land belonging to Mrs. Christin. By sending you this, I make no representation that your default will not be taken advantage of. In order to protect your position, you must send the interest now due, together with the enclosed document signed and acknowledged by you. Mrs. Christin will then execute and send to you a copy thereof. In the meantime, you are delaying at your peril." Appellant delayed the execution of the new contract and the payment of the balance of the last installment of interest due on the former contract until November, 1927. In the meantime, a telegram had been sent to appellant on July 26, 1927, reading, "How long do you think I am going to wait?" Again on October 25, 1927, Mr. Christin had written making an appointment to meet appellant in Los Angeles the following Monday, saying, in part, "There simply has to be some more definite arrangement about payments, and I shall determine upon what course to pursue on Monday." On December 2, 1927, following the failure of appellant to pay the interest installment due under the new contract on December 1st, Mr. Christin wrote, "Permit me also to advise you that your interest is now delinquent, and you will please remit." On December 8, 1927, a wire was sent, saying, "Must have interest payment at once." This was followed by a letter on December 13, reading as follows: "You realize, of course, that your failure to meet the interest payment entirely vitiates your rights under the contract of sale, and I desire to advise you that by not immediately cancelling the contract, Mrs. Christin in no way waived her right to refuse any payments hereafter, or to cancel the contract at any time for the breach." As hereinbefore stated, appellant finally made a partial payment of $1,000 on February 28, 1928, which partial payment was accepted by respondent. On May 8, 1928, Mr. Christin wrote, "I presume you realize that the first of June there is another installment of interest due, and that there will then be due Mrs. Christin $6,000. I do not know what you think we use for money up this way, but the time has come when I simply cannot tolerate your delays. If you cannot meet these interest payments, I do not see how you can hope to continue. Unless you can pay the balance due and meet the next installment within a reasonable time, I am going to turn the property over to my Los Angeles agent for disposal. I must have money." On Friday, June 8, 1928, Mr. Christin made a trip to Los Angeles and had a conference with appellant. At this conference Mr. Christin learned for the first time that appellant had failed to pay either of the last two installments of taxes. He told appellant, "This can go no further * * * those must be paid immediately. * * *" Upon his return to San Francisco, Mr. Christin sent the following letter on June 11th, "After talking with you on Friday, I have come to the fixed conclusion that something must be done with reference to putting your contract with Mrs. Christin in order. You are now in default of the sum of $6,000 in interest, and the taxes have not been paid for the last two installments. You will please consider this is final notice to you that all defaults, both the payment of interest and the payment of delinquent taxes, must be made by you on or before June 30th. Otherwise I shall have to ask you to turn possession of the premises over to me on July first." No response was made to this letter, and on June 29 Mr. Christin wired appellant as follows, "You must pay up before Monday as set forth in my letter." Again on July 1 the following wire was sent, "Pursuant to my letter and wires you must pay delinquencies on or before Monday July 2 or your contract is forfeited and I will bring appropriate actions for Mrs. Christin's protection. This is final." No response being made to these telegrams, and no payment having been made, the complaint in this action was filed on July 21, 1928.

[2] It may be conceded, under the rule laid down in the authorities cited by appellant, that respondent's conduct in accepting overdue payments and treating the contract as subsisting without insisting upon the right of forfeiture was such as to constitute a temporary waiver of the right to rely upon the strict terms of the contract relating to forfeiture. But such temporary waiver or temporary suspension of the right of forfeiture, as it has been termed, was neither absolute nor permanent, and the right of forfeiture could be revived. The nature of such waiver was considered by the Supreme Court in denying hearing in De Bairos v. Barlin, 46 Cal. App. 665, 190 P. 188. There the District Court of Appeal had said, "the vendors accepted overdue payments from time to time under the contracts, *and thus waived the provision that time was of the essence of the contracts*." Referring to this statement the Supreme Court said at page 674 of 46 Cal. App., 190 P. 188, "The language we have italicized is not a correct statement of the law without further qualification. Acceptance of overdue instalments of the price, on an executory contract for the sale of land, waives any right to declare a forfeiture on account of the previous failures to pay when due. But such acceptance alone does not change the terms of the contract as to forfeiture for future failures, nor eliminate the provision that time is of the essence of the contract. There may be conduct and acquiescence by the vendor sufficient to justify the inference by a court as a matter of fact that the vendor has waived the conditions of a contract regarding a forfeiture, which he afterward claims the right to enforce, and when in such a case the waiver had continued until after all instalments are due, the condition cannot be revived except by notice to the vendee. (Citing cases.) *But none of these cases holds that such waiver is absolute, or that the provision cannot be revived and a forfeiture produced by a notice requiring performance within reasonable time.*" (Italics ours.)

[3, 4] Here the issue before the court was not whether there had previously been a temporary waiver or suspension of the right of forfeiture, but whether such temporary waiver or suspension continued to exist at the time respondent sought to exercise the right of forfeiture. The fact that there may have been a prior temporary waiver would become immaterial if the right of respondent to enforce the provisions of the contract relating to forfeiture had been revived by notice requiring performance within a reasonable time. Apparently conceding this general proposition, appellant contends that he received no definite notice that forfeiture would be declared, and that he was not given a reasonable time within which to comply with the demand made upon him. These contentions are without merit. On May 8, 1928, he received notice that unless payment was made "within a reasonable time" the property would be turned over to respondent's Los Angeles agent for disposal. After again defaulting on the interest payment due on June 1, 1928, and after respondent had learned on June 8 that the last two installments of taxes had not been paid, appellant was given "final notice" on June 11 that unless all defaults of interest and taxes were paid by June 30, respondent would demand possession of the premises on July 1. There is nothing indefinite or uncertain about the "final notice" contained in the letter of June 11 and the time given within which to comply with the demand was entirely reasonable, more particularly in the light of the warning given to plaintiff in the letter of May 8 demanding payment within a "reasonable time." Assuming that the right of forfeiture had been temporarily waived or suspended, it was effectively revived by the notice and demand contained in the letter of that date. In our opinion the further offer in the wire of July 1 to permit appellant to make the delinquent payments on or before Monday, July 2, did not prejudice respondent's right to declare a forfeiture in the event that payment was not made on that day.

[5, 6] Appellant further contends that even if there has been a forfeiture he should be relieved therefrom under the provisions of section 3275 of the Civil Code, which reads: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." This contention is sufficiently answered by the fact that appellant has done nothing to entitle him to relief under that section. He has not made or offered to make "full compensation" to respondent. He had made neither a tender to respondent nor into court, and has failed to plead or prove that he is ready, willing, and able to make the payments due. In this connection, we may note that on November 15, 1928, being the last day of the trial and before the submission of the cause, respondent, through her attorney, offered in open court to dismiss the action upon payment of the delinquent interest and taxes, and further introduced testimony to show that a similar offer had previously been made to appellant during the pendency of the action. Neither offer was met by any payment or tender, but, in response to the offer made at the trial, counsel for appellant merely insisted that the offer of respondent to accept the delinquent payment "recognized the existence of the contract" and "is consistent with our defense and tends to show a waiver

more than the evidence in the record." As above stated, the right of forfeiture, if temporarily waived at any time, had been effectively revived and exercised by respondent, and she is to be commended and not penalized by her further offers of indulgence during the pendency of the action. Appellant cites no authority holding that he is entitled, under the circumstances, to relief under such section 3275 of the Civil Code, and we are satisfied that he is not entitled thereto. The provisions of that section are equitable in their nature, and he who seeks their benefits must at least show that he is ready, willing, and able to do all that should reasonably be required of him under the circumstances. Appellant made no such showing.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

In re LAYTON'S ESTATE. *

Civ. 8029.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1931.

Rehearing Denied Jan. 13, 1932.

Hearing Granted by Supreme Court Feb. 11, 1932.

1. Wills 🔑535.

Clause disinheriting heirs except as otherwise mentioned in will did not require that testator's brother and sisters be named to take under will.

2. Wills 🔑506(2).

Ordinarily, word "heirs" means persons who would be entitled to estate of one who died intestate (Civ. Code, § 1334).

[Ed. Note.—For other definitions of "Heirs," see Words and Phrases.]

3. Wills 🔑439, 440.

Will must be construed according to testator's intention as expressed therein, and such intention must be given effect as far as possible (Civ. Code, §§ 1317, 1318).

4. Wills 🔑535.

Under will giving illegal excess over bequest to church to then living heirs, clause disinheriting all heirs at law except as otherwise mentioned in will did not disinherit brother and sisters (Civ. Code, § 1386, subd. 2).

Under the will, testator, leaving wife and child, expressly disinherited his child, and, since testator did not expressly provide that any illegal excess over bequest to church should go to wife, he did not intend that any invalid portion should go to wife alone, and in using the words "then living heirs" he did so intending to designate persons, excluding his daughter, who should be alive at termination of trust, and who at that time might come within term "heirs," and therefore brother and sisters were "mentioned" in will.

[Ed. Note.—For other definitions of "Then Living," see Words and Phrases.]

5. Wills 🔑663.

Testator's brother and sisters not shown to have knowledge of will contest, and not cited, could not be held to have acquiesced in or failed to defend contest so as to be excluded from provisions of will (Code Civ. Proc. § 1328).

Besides the fact that daughter contesting father's will failed to notify testator's brother and sisters of contest, the contest was dismissed, so that there was no means of knowing whether, had such dismissal not taken place, the brothers and sisters would not have successfully defeated attack on will.

6. Judgment 🔑312.

Court could amend order admitting will to probate by changing finding respecting testator's residence (Code Civ. Proc. § 473).

7. Judgment 🔑323.

Amendment of order admitting will to probate by changing finding regarding testator's residence was not invalid, because testator's brother and sisters not named in will were not personally notified (Code Civ. Proc. § 1304).

8. Executors and administrators 🔑523.

Where executor's act in turning property over to domiciliary was in accordance with law, court order was unnecessary.

9. Executors and administrators 🔑519(1).

Act of executor of nonresident's estate in taking possession of intangible property did not operate to convert property into part of California estate.

10. Wills 🔑2.

Charitable bequests in will of nonresident probated in state are invalid to same extent as in case of domestic will (Civ. Code, §§ 1285, 1313).

11. Courts 🔑8.

Legislature's rights regarding disposition of estates of deceased nonresidents can affect only property within state.

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*For subsequent opinion see 19 P.2d 793.

12. Wills ⚷2.

Rule that intangible property has situs for all purposes, including administration in decedent's domicile, applies to case involving bequest to charity violating statute (Civ. Code, §§ 946, 1313).

13. Wills ⚷251.

Notes secured by mortgages and executed by residents of state belonging to estate of nonresident was not property having situs in state (Civ. Code, § 946).

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Edwin C. Layton, deceased. From an order settling the account of the executor and distributing the estate, Alice B. Layton, the widow, and the Christian Science Church, beneficiary, appeal, and Ernest H. Layton and others cross-appeal.

Affirmed.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for appellants.

Arthur W. Eckman and Melvin T. Dunlavy, both of Los Angeles, for respondents and appellants.

FRICKE, Justice pro tem.

Edwin C. Layton died in Los Angeles, leaving him surviving his wife, Alice B. Layton, a daughter, Marguerite Layton (also known as Marguerite Nolan), and a brother and two sisters, Ernest H. Layton, Grace Layton Laughlin, and Maude Layton Clendenin, referred to in this opinion as the contestants. The deceased left a will nominating Security Trust & Savings Bank as executor. One appeal is by Alice B. Layton and First Church of Christ Scientist, both specifically made beneficiaries, and the other appeal is by the brother and sisters, who claim an interest in the estate under the will.

After provisions immaterial here, including the bequest of all clothing, jewelry, and personal belongings, the will provided that all of the remainder of the estate should go to the Security Trust & Savings Bank, in trust, to pay from the net income to Emerick Brown and Layton Brown the sum of $75 per month for a period of two years or until their prior death, and to pay the balance of the net income to the wife during her life or until her remarriage, with authority to use portions of the trust property for her necessary needs and comforts, if the trustee should so determine. The will further provided that, upon the death or remarriage of the wife, the trust should terminate, and the entire trust estate be distributed to the First Church of Christ Scientist in Boston, Mass., with the following proviso "Fourth: If for any reason the devise and bequest to the Christian Science Church, hereinabove mentioned, or any part thereof, shall be declared or held to be invalid or in excess of my testamentary power, then and in that event I hereby give, devise and bequeath such portion or portions thereof as may be declared or held to be invalid or in excess of my testamentary power in fee, to my then living heirs-at-law, excluding my daughter Marguerite Layton, also known as Marguerite Nolan, now residing in Indianapolis, Indiana, equally, share and share alike." Another paragraph of the will of importance here provides: "Fifth: I have intentionally omitted to provide for and specifically direct and will that under no circumstances shall any part, share or interest in my estate go to, vest in or be taken by my daughter, Marguerite Layton * * * or any descendants of my said daughter, * * * and I hereby generally and specifically disinherit each and any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs-at-law, except as otherwise mentioned in this will, and if any of such persons or such heirs, or any devisees or legatees under this will, or their successors in interest, or any other person who if I died intestate would be entitled or shall lawfully become entitled to any part of my estate, shall either directly or indirectly, singly or in conjunction with other persons, seek to set aside this will, or attack, oppose or seek to set aside the probate of this will, or to impair, invalidate or set aside its provisions, * * * or shall consent to, acquiesce in or fail to contest such proceedings, * * * then and in any or all of the above mentioned cases and events I hereby give and bequeath to such person or persons the sum of One ($1.00) Dollar and no more, in lieu of any other share or interest in my estate. * * *"

The will was admitted to probate on February 1, 1926, the court finding, among other things, that the decedent was a resident of Los Angeles county, and the Security Trust & Savings Bank duly qualified as executor. On April 26, 1926, Alice B. Layton, the wife, and the First Church of Christ Scientist filed a motion under section 473 of the Code of Civil Procedure to amend the decree admitting the will to probate and the certificate of proof of will and facts found, and on the hearing on May 10, 1926, the court, with the consent of the executor, granted such motion and amended the decree and certificate to have the same contain the finding that the deceased, at the time of his death, was a resident of the District of Columbia. While personal notice of the motion was served upon the heirs and legatees specifically named in the will, no notice thereof was given to Ernest H. Layton, Grace Layton Laughlin, or Maude Layton Clendenin, the brother and sisters of deceased, other than that given by posting three notices as provided in the order fixing time for the hearing of the motion.

On January 22, 1927, Marguerite Layton filed a contest and opposition to probate of the will. The executors and specifically named beneficiaries in the will were made respondents, and answered the petition. The above-named brother and sisters of the deceased were not named or served, nor did either of them appear in this proceeding. No trial of the contest was ever had; it being dismissed October 15, 1928, by stipulation of the parties.

The executor came into possession of personalty, the separate property of the deceased, of the value of ninety-eight odd thousand dollars, of which a portion valued at $16,322 was returned in the inventory and appraisement filed herein. Of the balance, some seventy-five to eighty odd thousand dollars in intangible property was turned over by the executor to Alice B. Layton, who was appointed administratrix with the will annexed in the District of Columbia and returned this amount in the proceedings there.

The order of the trial court settling the account of the executor and distributing the estate determined: (1) That the contestants (the brother and sisters) were interested in the estate to the extent of any excess above that which the Christian Science Church could take, and that distribution of the trust estate should be deferred until the determination of the question as to whether the Christian Science Church was entitled to more than one-third of the estate; and (2) that the contestants were not disinherited by reason of any failure to oppose the contest filed by Marguerite Layton. From these portions of the order the wife and Christian Science Church have appealed. The contestants appealed from all of the order except the portions last stated, but present here only the points that decedent was a resident of Los Angeles county, and that the order amending the decree admitting the will to probate by a determination that decedent was a resident of the District of Columbia, was void, and that, even though decedent was a resident of the District of Columbia, the executor was chargeable with the value of all or at least part of the property which was delivered to the administratrix with the will annexed.

[1-4] The question first presented is whether the contestants are interested in the estate. The wife and Christian Science Church contend that the contestants are without interest by virtue of the provisions of the fifth paragraph of the will previously quoted, whereby the testator disinherited "all persons whomsoever claiming to be or who may lawfully be determined to be my heirs at law, except as otherwise mentioned in this will." Obviously, the contestants fall within the general description of this clause and are disinherited, unless "otherwise mentioned" in the will, for, even conceding that they could not be included in the class of "heirs-at-law," they were persons "claiming to be * * * heirs at law." In the reply brief of the wife and the Christian Science Church, it is argued that the word "mentioned" as used in the fifth paragraph of the will means "named," and that, since contestants were not "named," they did not come within the exception. This contention wholly overlooks the fact that in Estate of Kurtz, 190 Cal. 146, page 149, 210 P. 959, 960, the court specifically held contrary to such a contention, saying: "No reason is perceived why the wife could not be 'mentioned' by any description that would include her. Certainly it would not be necessary to mention her by name and to include her, as she was included, in the description of a class, 'mentions' her as effectually as if she had been named therein." This leaves the question, are the contestants "mentioned" in the will by any description which would include them? The fourth paragraph of the will, heretofore quoted, provides that if any part of the bequest to the Christian Science Church shall be held invalid then such portion shall go "to my then living heirs at law, excluding my daughter, Marguerite Layton. * * *" Whether the contestants are "mentioned" in the will and have an interest in the estate depends upon whether or not they are included in the term "then living heirs." Section 1386, subd. 1, of the Civil Code, provides that, where the decedent leaves a surviving wife and only one child, such wife and child will succeed to the estate in the absence of a will. It is contended that, since the decedent here left a wife and only one child, they alone would constitute and be included in the class of "then living heirs," and that, since the child is expressly disinherited by the will, the wife is the only person who could take under the conditional and contingent bequest to the "then living heirs." Ordinarily, the word "heirs" means the persons who would be entitled to the estate of one who died intestate (Civ. Code, § 1334; Ginochio v. City and County of San Francisco, 194 Cal. 159, 228 P. 428; Estate of Wilson, 184 Cal. 63, 193 P. 581, 582); however, as stated in the case last cited: "The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible. Civ. Code, §§ 1317 and 1318." Had the testator intended that any illegal excess over the bequest to the church should go to his wife, the simplest and most natural course would have

been to so provide, and the fact that he did not do so supports the theory that he did not so intend. In the fifth paragraph of the will (the disinheriting provision), the testator refers to persons "who may be lawfully determined to be my heirs-at-law, except as otherwise mentioned in this will," further evidencing that he considered that there were persons other than his wife and the daughter, specifically disinherited, who came under the description of "heirs at law," as that term was used and understood by him, a conclusion further reinforced by the exception clause, which, instead of excepting only the wife, is general in its phraseology. The use of the adjective "living" in the fourth paragraph of the will as defining the word "heirs-at-law" and its omission when using the word "heirs-at-law" in the fifth paragraph tends at least to indicate that, to the mind of the testator, there was a difference between "heirs-at-law" generally and "then living heirs-at-law." It may well be that the testator by the latter phrase intended to designate those who, when the bequest to the church should be declared invalid, were "then living." It must also be borne in mind that the estate, under the will, is to remain in trust until the "demise or remarriage" of the wife, in which event the entire estate is to be transferred to the church, and that this provision is followed by the one providing that the invalid portion shall go to the "then living heirs." This would indicate the intent of the testator that the interest of the wife should terminate upon her death or remarriage, and is opposed to the theory that the testator intended that the invalid portion of the bequest to the church should go to the wife.

The contestants base their claims upon the theory that, since the daughter is expressly excluded by the terms of the will, she is to be treated as nonexistent, and that, in accordance with the intent of the testator, the rule of intestate succession applicable to the case is that set forth in subdivision 2, section 1386, of the Civil Code, which provides that, if a husband die without issue and without a father and mother living, his estate shall go half to the wife and half to his brothers and sisters. This principle seems to be sustained by the cases of Minot v. Harris, 132 Mass. 529, and White v. Springett, L. R. Ch. App. Cas., vol. 4, p. 300. Whichever theory is adopted, it seems to us that the testator did not intend that any invalid portion should go to his wife alone, and that, in using the words "then living heirs," he did so intending to designate thereby those persons, excluding his daughter, who should be alive at the time of the termination of the trust, and who might at that time come within the term "heirs." The contestants, being the brother and sisters, were therefore interested parties in the probate of the estate, and, being "mentioned" by the provisions of the fourth paragraph of the will, are not included in the disinheriting provisions of the fifth paragraph thereof.

[5] The next point raised is that the contestants have forfeited their rights by failing to defend the contest brought by Marguerite Layton, and is based upon the fact that, while the executor and beneficiaries specifically named in the will filed an answer to the contest, the brother and sisters did not. It must be noted that the contestants here were not named as respondents in the contest, and no citation was directed to or served upon either of them, nor have we been referred to any proof tending to show that they had knowledge of the contest in time to answer. The notice of contestants to the executor requesting service upon them of copies of petition for sale of property, petition for conveyance of property, and of accounts and petition for final distribution cannot be considered as establishing that they had notice or knowledge of a contest filed thereafter. Acquiescence in a will contest or a failure to oppose the same can exist only when the party so charged has knowledge of the contest and then impliedly consents or assents thereto or willfully omits to oppose the same. Presumably Marguerite Layton, who instituted the contest, knew of the existence of her father's brother and sisters who, having been "mentioned" in the will, were entitled to notice by citation of her contest (Code Civ. Proc. § 1328), and her failure to so notify them might of itself prove fatal to the contest, since, before the court could try the issues of fact in the contest, proof would first have to be made that all known interested parties had been cited to appear. Code Civ. Proc. § 1329. Their rights and remedies arising from the fact that they were not cited would have been waived by an answer or other general appearance. The will does not say that the beneficiaries must "answer" a contest, neither does it describe how a contest shall be opposed. Contestants may, so far as we are advised, have either had no knowledge or, if they had knowledge, relied on the failure of the contestant to cite all interested parties as a means of defeating the contest. In the absence of any showing of facts to the contrary, it cannot be said that contestants did not oppose the will contest nor can it be said that they had knowledge of the contest and either acquiesced in or failed to defend the same. The finding of the trial court was fully justified. Furthermore, the contest was dismissed, and we have no means of knowing that, had such dismissal not taken place, the contestants would not have successfully defeated this attack on the will.

[6] Contestants urge that the court was without power to amend the order admitting the will to probate and the certificate of proof of will and facts found by changing the find-

ing that deceased was a resident of the county of Los Angeles, Cal., to a finding that he was a resident of the District of Columbia. The will declares that the testator is a resident of the District of Columbia, and it does not seem to be contended that in fact the deceased was not a resident of the latter jurisdiction at the time of his death. The executor's petition for probate of the will set forth, and the testimony of its agent as the applicant declared, that the deceased was a resident of Los Angeles county, but this was apparently due to a mistake of fact, and the executor later filed a written consent to the amendments in question. The proof in support of the motion clearly showed that the deceased was a resident of the District of Columbia. The only question here is whether the court was authorized by section 473 of the Code of Civil Procedure to order the amendments. Some nice distinctions are drawn in the briefs as to whether the order here attacked was one changing the finding as to the place of decedent's residence by amending the original order and certificate or by vacating the same and substituting a new order and certificate. Section 473 is not so narrow in its provisions as to lay down a specific exclusive form of order whereby a party may be relieved by reason of his mistake, inadvertence, or excusable neglect. We see no reason why the method adopted by the trial court does not fall within the procedure contemplated by the section if the section is applicable to proceedings in probate such as we have here. The precise question does not appear to have been adjudicated in this state, but it has been held that section 473 authorizes the court to relieve a party from an order or other proceeding in probate by reason of his mistake, inadvertence, or excusable neglect. Levy v. Superior Court, 139 Cal. 590, 73 P. 417; Cahill v. Superior Court, 145 Cal. 42, 78 P. 467; De Pedrorena v. Superior Court, 80 Cal. 144, 22 P. 71; Estate of Hickey, 129 Cal. 14, 61 P. 475; Estate of Seaman, 51 Cal. App. 409, 196 P. 928. The case last cited recognizes that an order admitting a will to probate may be assailed by proceedings under section 473, and the entire trend of the decisions warrants our conclusion that the trial court had the power to make the order changing the finding as to the place of residence. The case of Holabird v. Superior Court, 101 Cal. App. 49, 281 P. 108, 109, cited by contestants, was not one in which a proceeding was had under section 473, but was an application for a writ of mandate to compel the Superior Court to hear and determine a motion to set aside the order admitting the will to probate upon the ground that the court had no jurisdiction of the estate, for the reason that the deceased was not a resident of the county, and that the testimony, upon which the order was based, that she was a resident of the county, was untrue. The opinion lays down the rule that "an order granting letters of administration is an adjudication of the fact of residence of the deceased in the county over which the court has jurisdiction, and it is binding upon the whole world, unless vacated or set aside on direct attack," and that the determination as to residence "cannot be attacked collaterally." The decision in effect declares that, if the court erred in deciding the question of residence without sufficient evidence, the remedy was by appeal only. While there the motion was based upon a claim of fraud and sought a redetermination of a disputed issue of fact, here no fraud is claimed, and relief is sought by a motion under section 473. An order or judgment obtained by fraud is not an order or judgment had through mistake, inadvertence or excusable neglect. While the case of Holabird v. Superior Court, supra, holds that the order could not be attacked "collaterally" it also holds that the order "is binding upon the whole world unless vacated or set aside on direct attack." The proceeding under section 473 is a direct attack. People v. Norris, 144 Cal. 422, 77 P. 998. See, also, Sharp v. Eagle Lake Lbr. Co., 60 Cal. App. 386, 391, 212 P. 933. The cases cited wherein judicial error, which could have been reached by motion for a new trial or appeal, was sought to be corrected by motion to change findings or alter a judgment so as to overcome the error are not in point. In the case at bar, the order in question was not assailable either by motion for a new trial or by an appeal, and it seems that section 473 must have been intended to reach a situation such as we find here so that the determination of the trial court will not only be in accordance with the law, but will also be based upon the facts as they actually exist. The trial court was acting with legal authority in granting the motion and correcting the order and certificate of facts found so that they truly declared the place of residence of the deceased.

[7] Contestants raise the further point that the court had no power to make the order just referred to because they had no notice of the motion. Under and pursuant to the order of the trial court, the notice was personally served upon and a copy of the order for the hearing mailed to all persons named in the will and three copies of the notice of hearing were posted in and about the courthouse. No notice or copy of the order was served upon contestants, who here contend that the same notice should have been given as is required by law of the hearing of a petition for probate of the will. Section 1304, Code of Civil Procedure, provides that the notice of hearing a petition for probate shall be served upon the heirs and the devisees and legatees "named in the will." As the contestants were neither the heirs of the deceased nor "named in the will" (Murray v. Superior Court, 207 Cal. 381, 278 P. 1033),

they were not persons who were required by law to be notified of the hearing of a petition for probate, and, under their own contention, the same rule would apply to notice of the motion.

[8-12] Contestants next present the point that, conceding that the decedent was a resident of the District of Columbia, the executor is chargeable with the value of all of the personal property of the deceased because it took possession of the same, and that the executor had no authority to permit the removal of any of such property from the state without the order of the court. We may dispose of the latter portion of the point by stating that, if the act of the executor in turning the property in question over to the personal representative in the District of Columbia was in accordance with law, an order of court was not necessary for such a transfer (Estate of Fulmer, 203 Cal. 693, 265 P. 920, 58 A. L. R. 430), and there remains only the question as to whether the act of the executor was according to law. Contestants concede that it is the general rule that intangible property, which is the character of the property here involved, has its situs for all purposes, including administration, in the domicile of the decedent (see, also, Civ. Code, § 946), but question its applicability to cases involving bequests to charity violative of section 1313 of the Civil Code, and rely largely upon the case of Estate of Lathrop, 165 Cal. 243, 131 P. 752. That case was one in which the decedent died in the state of New York and the domiciliary executors came to California and were granted letters testamentary here. The property in California consisted of cash and shares in a local bank. The will left all of an estate valued at between two hundred and two hundred and fifty thousand dollars, except twenty-eight thousand five hundred dollars, to charity. The court held that the cash and bank stock in California was subject to the provisions as to charitable bequests of section 1313 of the Civil Code, and that appellant, one of the heirs, was entitled to her proportionate part of the estate situated in this state. The question as to whether the cash and stock was property situated in this state was not raised. The case cites and follows that of Estate of Dwyer, 159 Cal. 680, on page 683, 115 P. 242, 243, of which appears a statement with reference to the disposition of the purchase price of land in this state, due under a contract made by the deceased, which was collected by the California administrator after the close of the domiciliary administration of her estate in the state of Louisiana. The court declares that this purchase price "being personal property, the distribution of which was governed by the law of the domicile of the testator, and which would have been transmitted to the administrator in Louisiana to be distributed there had that administration not been closed, the court here in the ancillary administration properly distributed it to the heirs at law of the testatrix in accordance with the law of Louisiana."

However, as to certain real property in this state sold by the administrator here, the court held that, since the testator had bequeathed more than one-third of her property to charity, even though the will was made and probated in Louisiana, the heirs could, in the California proceeding in probate, receive a share of the proceeds of such latter sale which would make their total share equal to two-thirds of the testator's total estate. Had the money which the court held properly distributable under the Louisiana law been paid and sent to the Louisiana personal representative before the probate proceedings there were closed, the Dwyer Case would very closely resemble the case at bar, for the land purchase contract which was paid after the decedent's death was intangible property at the time of her death just as was the property sent to the personal representative in the District of Columbia in the case at bar. See, also, Estate of Gracey, 200 Cal. 482, 253 P. 921. The mere fact that the executor had the notes, mortgages, and bonds in its possession, and turned them over to the executor with the will annexed appointed in the District of Columbia, would not be a determining factor in the question before us. If the executor was not entitled to the possession thereof as such executor, its act of taking possession to which it was not entitled could not operate to convert the property into a part of the California estate of the deceased, for the situs of the property is determined by law as of the time of decedent's death and not by the act of the executor. A valid will made in another jurisdiction is valid in this state so far as it relates to personal property, "subject, however, to the provisions of section thirteen hundred and thirteen." Civ. Code, § 1285. Section 1313, limiting charitable bequests, had no application to bequests in foreign wills until the words just quoted were added to section 1285 by the amendment of 1905 (St. 1905, p. 606, § 3). See Estate of Lathrop, 165 Cal. 243, 248, 131 P. 752. The effect of this amendment was to declare it to be the law that, while generally, a will valid under the laws of a foreign jurisdiction within which it was executed is valid in this state so far as it relates to personal property, a provision in such a will, in contravention of section 1313, shall, as to such a charitable bequest or devise, be as invalid as if the will were executed in this state. The amendment, coupled with section 1313, declares no rule as to the situs of a decedent's property, but provides only that charitable bequests in the will of a nonresident probated in this state shall be invalid to the same extent as in the case of a domestic will. The matter of the disposition of the estates of deceased persons, the right of inheritance and testamentary disposition, is clearly within the legislative powers of the state (Estate of Graham, 187 Cal. 222, 201 P. 456, 18 A. L. R. 631), but "this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state." Estate of Clark, 148 Cal. 108, 112, 82 P. 760, 761, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306. This state being without power to legislate and thus control the distribution of property located in a foreign domiciliary jurisdiction, the amendment to section 1285 cannot be construed to have that effect, even if the language of the amendment were capable of such an interpretation.

[13] Contestants urge that, in any event, the promissory notes secured by mortgages and executed by residents of this state, included among the personal property delivered by the executor to the wife of the deceased, who became the administrator with the will annexed in the District of Columbia, constituted property having its situs in this state.

In support of the contention, the case of Murphy v. Crouse, 135 Cal. 14, 19, 66 P. 971, 973, 87 Am. St. Rep. 90, is cited as holding that the situs of a chose in action is, for the purpose of founding administration, where the debtor resides. In this case, however, the court also says: "In other words, our laws provide for the administration of the estates of all nonresidents who have died leaving property here, real or personal, but as to personalty the distribution is to be made at, or at least according to the law of, the domicile," a recognition that the domiciliary law governs. In the case cited, the plaintiff purchased from the executor, appointed in the state of Minnesota where the testator resided, certain shares of the capital stock in the defendant First National Bank of San Francisco. Defendant and appellant, Crouse, was appointed administrator with the will annexed by the Superior Court of San Diego county in this state. The action was one to compel the defendant corporation to cause the shares of stock to be transferred to the plaintiff. The case is decided upon the premise that the situs of the property, the shares of stock, was in this state, even though the deceased resided and the certificates were in the state of Minnesota. The decision is reconciled when we consider the language in Chambers v. Mumford, 187 Cal. 228, 233, 201 P. 588, 591, 42 A. L. R. 342: "A concession has been made under the decisions of this court in the right to modify the application of the maxim, mobilia sequuntur personam, in the matter of certificates of stock in a domestic corporation. It has been held for purposes of the inheritance tax law the situs of stock in a corporation is in the state of the incorporation. Citing Murphy v. Crouse, and other cases. A reason for making a distinction between certificates of stock, and ordinary choses in action is in the fact that the former represent an interest in and derive their value from the tangible assets of the corporation. Beyond this the California decisions have shown no disposition to limit or modify the common-law rule that the situs of mere choses in action follows the domicile of the owner." The opinion quotes from Estate of Hodges, 170 Cal. 492, 150 P. 344, L. R. A. 1916A, 837, that "the authorities are uniform in holding that though personal property may be actually located in another state than that of the residence of the decedent at the time of his death, its situs for the purpose of imposing an inheritance tax upon it is in the state which was the domicile of the decedent, and where the primary administration of his estate is being had." In Estate of Hodges, supra, it is further said: "As a general rule, the domicile of the decedent draws to it in contemplation of law all the personal property of the decedent no matter where its actual situs may be at the time of his death, and the distribution of it is governed and controlled by the laws of succession existing at the place of the domicile of the decedent." We hold, therefore, that the trial court did not err in refusing to charge the executor with the property turned over by it to the widow of the deceased who became the administrator with the will annexed in the District of Columbia.

The orders settling the final and supplementary account and for distribution of the estate are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

119 Cal.App. 293

GUM et al. v. ALLEN et al.

Civ. 6970.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1931.

Rehearing Denied Jan. 15, 1932.

1. Limitation of actions ⚷31.

Action for damages from infection caused by surgeon leaving gauze pack in operation cavity, not commenced within year from date of operation, *held* barred (Code Civ. Proc. § 340, subd. 3).

2. Limitation of actions ⚷13.

Surgeon, not attempting to falsify mistaken diagnosis that did not appear intentionally erroneous, *held* not estopped from pleading statute of limitations when sued for malpractice (Code Civ. Proc. § 340, subd. 3, and § 1962).

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Warren W. Gum and another against J. R. Allen and the Roosevelt Hospital. From a judgment for defendants, plaintiffs appeal.

Affirmed.

William J. Hanlon, of Los Angeles, for appellants.

W. I. Gilbert, of Los Angeles, for respondent Allen.

Kidd, Schell & Delamer, of Los Angeles, for respondent Roosevelt Hospital.

CRAIG, J.

Objections by the defendants to the introduction of evidence by the plaintiffs in an action for damages were sustained upon the ground that the same was barred by section 340 of the Code of Civil Procedure. Thereupon motions for a nonsuit were granted, and the plaintiffs appealed from the judgment entered in accordance with said rulings.

[1] More than one year previously to the filing of the action, appellant Rheta Lorraine Gum entered the hospital of the respondent corporation, and was operated upon by the respondent Allen, a licensed and practicing physician and surgeon. She thereafter contracted an infection from which she continued to suffer great pain, as the result of a gauze pack which had been inadvertently left within the cavity when closed on the day of the original operation. It was alleged that Dr. Allen continued to visit and treat the respondent at various dates up to and including a date within about four months next preceding the filing of the action, and that the plaintiffs were not informed nor aware of the existence of such foreign substance until about one month preceding the commencement of the action.

The appellants rely entirely upon the authority of decisions from the state of Ohio and cases therein cited. However, decisions of our own appellate courts have determined in clear-cut language both that an action such as that before us is one ex delicto and that in an instance wholly similar to the one here under consideration the original injury is the sole cause of action. The law thus established in this jurisdiction on these two propositions is, we think, decisive of this appeal. Notwithstanding the failure to furnish adequate surgical treatment for an injured limb constituted a breach of a contract, the gravamen of the action brought to recover damages for negligent and unskillful treatment by the surgeon of plaintiff's leg was of such character that the action itself sounded in tort. Harding v. Liberty Hospital Corporation, 177 Cal. 520, 171 P. 98. See, also, Kershaw v. Tilbury (Cal. App.) 2 P.(2d) 389. And it has been held that such cases fall within the bar of section 340, subdivision 3, Code of Civil Procedure. Jones v. Kelly, 208 Cal. 251, 280 P. 942; Huntly v. Zurich Gen. A. & L. Ins. Co., 100 Cal. App. 201, 280 P. 163; Johnson v. Nolan, 105 Cal. App. 293, 288 P. 78.

Wetzel v. Pius, 78 Cal. App. 104, 248 P. 288, 289, is here in point. It was there the contention that, "though an operation was improper, if during treatment a condition developed that a physician should with ordinary professional care and skill have discovered and remedied, neglect to do so is actionable, and, if such neglect continued * * * during all the time plaintiff was under * * * treatment, an action may be brought at any time within one year from the time of the patient's discharge for neglect of such duty." As there stated, with the approval of our Supreme Court, the action is one in tort, and not for a breach of contract. "This, of course, does not mean that if some new and different act of negligence should occur during the course of an employment, it could not be made the basis of a separate and independent action. The rule above stated is based upon the theory that, where an act of negligence, as in this case the improper setting of the femur bone, causes damage, the cause of action is complete, and cannot be split up. The original injury remains the sole cause of action, and subsequent acts which merely aggravate the damage already done, or later developments which frequently add new elements of damage, merely attach themselves to the original cause of action, and do not of themselves become independent causes of action, nor do they revive the cause of action for the original injury, if the same has become barred." The contention here that the operation "constituted as and was one act up to and including the date of the removal of the gauze pack or at least until the termination by the defendant of his employment," is inconsistent with the quoted settled law in such cases. And it is not wholly consistent with the appellant's positive allegation that she was "under the influence of an anæsthetic and remained unconscious until the operation was completed," that the operation was performed on the date alleged, and that the gauze was not discovered until a second operation was performed. Since the action was not commenced within one year from the date of the operation, it became barred by section 340, subdivision 3, of the Code of Civil Procedure, requiring that an action for the injury to one by the wrongful act or neglect of another be instituted within that period of time.

[2] It is urged that the respondents were estopped to plead the statute of limitations by section 1962 of the Code of Civil Procedure. Said section provides that a party who by his own act or declaration intentionally leads another to believe a particular thing to be true may not be permitted to falsify it, after the other party has acted thereon. Appellants al-

lege and argue in their briefs that the respondent surgeon at all of the times mentioned diagnosed the resultant infirmity as of an origin other and different from that finally discovered upon the second operation. It was not alleged nor does it appear that such diagnosis was intentionally erroneous, nor that the surgeon at any time thereafter attempted or was permitted to falsify it. The existence of the presumption established by said section does not appear.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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119 Cal.App. 262

PEOPLE v. DYE.

Cr. 2127.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1931.

Rehearing Denied Dec. 30, 1931.

Rehearing Denied by Supreme Court Jan. 14, 1932.

1. Homicide 🔑234(7).

In homicide prosecution, circumstantial evidence *held* sufficient to connect defendant with commission of crime.

2. Criminal law 🔑736(2).

Admissibility of confession is preliminary question for court.

3. Criminal law 🔑736(2).

Whether confession was freely and voluntarily made, and therefore entitled to consideration, is ultimately question for jury.

4. Criminal law 🔑531(1).

Burden is upon prosecution to prove voluntary character of confession offered in evidence.

5. Criminal law 🔑522(1).

Where accused within few days after threats and inducements makes confession, such confession is not admissible in evidence unless it clearly appears that threats and inducements had ceased to operate at time confession was made.

6. Criminal law 🔑522(1).

Any illegal process whereby, through external means of pressure, the free will of accused has been overcome, will render confession obtained involuntary.

7. Criminal law 🔑531(3).

In homicide prosecution, evidence disclosing circumstances under which confession was obtained *held* to render confession involuntary, and therefore inadmissible.

8. Criminal law 🔑1159(1).

Error, to warrant reversal of conviction, must have deprived defendant of right to fair trial so that conviction has resulted in miscarriage of justice.

9. Criminal law 🔑1169(12).

In homicide prosecution, error in admission of involuntary confession *held* to have deprived defendant of right to fair trial, and resulted in miscarriage of justice, in view of circumstantial nature of evidence.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Lloyd W. Dye was convicted of murder in the second degree, and from the judgment rendered and from an order denying his motion for a new trial, he appeals.

Judgment and order reversed.

Hearing denied by Supreme Court; WASTE and SHENK, JJ., dissenting.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

CONREY, P. J.

By indictment of the grand jury, appellant Lloyd W. Dye and one Gordon E. Gauss were accused of the crime of murder, alleged to have been committed by them in the county of Los Angeles on the 18th day of May, 1930, in that they did at said time and place willfully, etc., kill and murder one Albert Wade Horton. By verdict of the trial jury Gauss was acquitted and Dye was convicted of murder of the second degree. Defendant Dye appeals from the judgment and from an order denying his motion for a new trial.

The first three grounds for reversal, upon which appellant depends, are stated by his counsel as follows:

"One: That an alleged confession of the defendant Dye was erroneously admitted by the court; as the voir dire examination established that it was procured under duress and oppression, and by threats and promises of immunity, made by the arresting officers while defendant was held concealed in solitary confinement, and denied counsel, or the right to communicate with friend or family, and subjected to a most outrageous third degree treatment at the hands of the arresting officers.

"Two: That the evidence admitted by the court over the objection of the defendant Lloyd Dye, was incompetent, and its admission was prejudicial to the rights of the defendant.

"Three: That the evidence is insufficient to support the verdict."

[1] In connection with the points thus presented, appellant suggests that, leaving out of consideration the purported confession, the evidence was wholly circumstantial, and he insists that the whole of the circumstances were of such nature that they did not in any way tend to show any connection on the part of appellant with the death of said Albert Wade Horton. Preliminary to a consideration of the alleged errors, it will be useful to examine and see whether this last assertion of counsel is supported by the record.

On the night of May 18, 1930, said Albert Horton was found dead on the front porch of his house in Mint Canyon. It is established by the evidence that his death was caused by a bullet wound; that the bullet entered through the back and passed through the vital organs, including the heart. There is uncontradicted evidence that it would have been impossible for the wound to be self-inflicted. The autopsy surgeon testified that the wound was made by a bullet of medium size, anywhere from a "32" to a "38." Thus, it was a proven fact that the man had been killed by some one, and it only remained to identify the killer and to establish the circumstances under which the killing was done.

The deceased Horton was sixty-nine years old and lived on the Mint Canyon place with his brother George, who was ninety years old. Apparently, George was the only other person staying in the house at the time of the killing. George died about a month after the 18th day of May, 1930, and the record contains, of course, no testimony given by him. It was the theory of the prosecution at the trial that appellant and Gauss, for purposes of robbery, came to the Horton house in the automobile of appellant; that they turned the horses out of the corral, in order to attract the attention of the Hortons; that when Albert Horton came to the door, a struggle took place between him and appellant, in the course of which Horton shot appellant in the abdomen with a pistol which Horton had in his hand; and that then appellant fired with his own pistol the shot which killed Horton.

Careful examination was made of certain tire tracks in the vicinity of the Horton house, from which witnesses acquainted with the subject, and who had made special study of identification of tire marks and tires, testified that an automobile which came to the ranch at the time of the murder was running on three Goodyear tires and one Firestone, of a stated size, "29 4/50." The Firestone was on the right rear wheel. Evidence was produced that in February, 1930, at Long Beach, appellant, under the name of Don Parks, obtained from a dealer in Long Beach a 1927 Pontiac blue roadster with a khaki top; that the car was repossessed "by the finance company" and brought back on May 20th; that the car was later sold, with the same tires, to a purchaser named Blake. The witness Love, a special investigator of tire identification, examined the Blake car and found that the tire size was 29 x 4/50. The tire on the right rear wheel was a Firestone. This witness gave it as his opinion that the tire prints at the Horton ranch, as photographed, were of the same type of tire which he found on the Blake car. The agent of the company which repossessed the car found it in an alley at Long Beach, and the car did not then have a top on it. About a week later a manager for the dealer who had sold the car to appellant, saw appellant and asked him where the top was. Appellant told him that he had removed the top and that it was torn a little on the top. Witnesses who examined the premises at the ranch immediately after the murder, testified that in following the tracks of the automobile which had been there, they found that it had gone under a tree on which limbs had been broken from the lower branch; that some of the parts of the broken twigs were right on top of the tire tracks. However, there was evidence concerning the height of the limbs or branches of the tree, and that their nearest point was 5.55 feet from the surface of the ground. Also, there was evidence concerning the height of appellant's car that the distance to the highest point of the top would be 65⅛ inches.

It appears from the evidence that on the 19th day of May, 1930, appellant went to a physician in Long Beach to obtain treatment for a gunshot wound in the abdomen. At that time appellant claimed that he had been shot by the husband of a woman whom he had been visiting. But the witness Crane, a young woman friend of appellant, testified to two statements made by appellant to her on that subject. She said that on May 19th appellant told her he had been shot by the husband of some woman; but also, she said that on the 25th day of May appellant told her he had been up to Saugus and got shot by a rancher. (Saugus is near Mint Canyon, and would not be far from the Horton ranch.) The bullet was not removed from appellant's abdomen. The nurse testified that the wound was "about the size of a nickel."

The evidence shows that the Hortons had in their house, prior to the time of the murder, a revolver (a "Bulldog" 44), which had been given to them by their nephew. This revolver was not found in the house after the murder. In September, 1930, following a clue which had been given by defendant Gauss to officers, this revolver, together with another which had belonged to Gauss, was found buried near a telephone pole near the Horton ranch.

Immediately after the dead body of Horton had been found, officers were sent for, who came and inspected the premises. One of them, Deputy Sheriff Bright, identified Exhibit No. 5 as being a bullet which he saw on the porch floor about four inches from the foot of Horton. At the same time he found a shell and a pipe; the shell (Exhibit No. 45) was a 32-caliber Remington. The witness Crossman, a ballistic expert, gave testimony concerning the bullet, Exhibit 5, and particularly concerning the kind of gun from which it had been fired. He said that it is an actual 31 caliber; that it comes from a 32 automatic cartridge. While he was unable to state positively the kind of gun it was fired from, he said that "the bullet coincides closely with the test bullets and data in my files covering a German automatic pistol known as the Dreyse; it also comes very closely to a German automatic pistol known as a Stock, but more close to the Dreyse." The witness Flynn testified that in November, 1928, he let one Bart Jenkins have a 32 automatic pistol marked, "Made in Germany," the side panels of which were wood and which he had painted green. He identified Exhibit No. 5 as about the size of bullet used in that pistol. The witness Jenkins testified that in February or March, 1930, he sold to appellant Lloyd Dye a pistol, "a foreign made gun," which he had obtained from Flynn; that it had on it a German or Austrian name; that it was 32 caliber with panels which had been painted green. In a conversation with the officers after appellant's arrest, but prior to the date of the alleged confession which is the subject of complaint on this appeal, appellant admitted to the officers that he had had a 32-caliber gun which had the words, "Made in Germany," on it, but he said that "some time during April" he had thrown it into the ocean.

In the brief of counsel for appellant, they have given us an extended statement of their version of the evidence, without quotation of the testimony of the witnesses and without giving the pages of the record where such testimony would be found, except the testimony relating to the alleged confession and relating to the manner in which same was obtained. By thus omitting to set forth the testimony in proper form or with proper record references either in the brief or in a supplement thereto, counsel have not only ignored the rule governing the preparation of briefs, but have prevented the court from following their statements through the record. But with the assistance of the brief of the Attorney General, where the testimony of the witnesses is stated with appropriate references to the record, we think we have been able accurately to make the foregoing statement of the evidence. From the facts thus obtained and which in much greater detail are contained in the record of 2,371 pages, we are led to the conclusion that there is abundant evidence tending to connect appellant with the commission of the crime, and, in fact, evidence legally sufficient to have sustained a conviction if such conviction had been secured without the confession which counsel insists was improperly admitted.

We come now to a consideration of appellant's contention that the confession obtained from him was erroneously admitted in evidence by the court. On the evening of September 5, 1930, appellant was arrested by Officers Gray and Penprase, who were deputy sheriffs. The arrest was made by the officers without a warrant. The confession was obtained from him on September 12th. During the intervening week appellant was kept secretly in jail, without being taken promptly before a magistrate as the law requires, and without being allowed communication with counsel or friends. We may say at once that, if the testimony of appellant describing the treatment to which he was subjected during that interval stood uncontradicted as the only evidence on the subject, it would have been a gross error to admit in evidence a confession so obtained. But his testimony is contradicted by that of the officers, who testified that they did not use threats, promises, or mistreatment of any kind in obtaining the confession. But it is further necessary to give attention to the facts admitted by the officers, as well as those asserted by them, in order to properly determine whether or not as a matter of law the court was entitled to receive the confession in evidence. The testimony of Officer Penprase shows that the arrest was made at Long Beach at about 5 o'clock in the evening of September 5th; that after visiting appellant's room, and after allowing him time for dinner at his boarding house, they took him to a police substation on Fairfax avenue in Los Angeles; that from 8:30 in the evening until 2 in the morning, during all of that time, either Penprase or Gray was questioning the defendant; that after 2 o'clock they took the defendant to a police station at Beverly Hills, where he was allowed to go to bed; that on September 9th, in the jail at Beverly Hills, the same officers were with the defendant for the six hours from noon until 6 o'clock, during which time they were questioning him continually; that the officers had figured out in their own minds what had happened at the Horton ranch, and used that as a foundation upon which to base their questions; that these officers did not see defendant again until September 12th, when they took him from the Beverly Hills jail and brought him to the county jail in Los Angeles; that the statement or confession signed by defendant and offered in evidence at the trial was obtained at the county jail on

September 12th. In the testimony of Officer Gray he admitted that on leaving defendant in the police station at Beverly Hills, he left instructions that they were not to let anybody see the defendant or permit him to send out any messages. Mr. Gray admitted a conversation with Mr. McKenna prior to September 12th, in which Mr. McKenna (defendant's attorney in this action) asked where the defendant was, to which Gray replied that he was being held in an outlying jail. The conversation, as admitted by Gray, shows that the attorney was trying to find the defendant, and that the sheriff was seeking to prevent the attorney from finding the defendant. Finally McKenna suggested that he would get a writ of habeas corpus, to which Gray replied that then he would be compelled to produce the defendant.

The conversation of September 5th, between the officers and appellant, was taken down by the shorthand reporter Hueston, and is in evidence. It shows a persistent questioning of the defendant about various matters, many of which related to the tragedy at Mint Canyon, including a direct charge, which defendant denied, that he had shot Albert Horton in Mint Canyon on the night of May 18th. During the night the defendant became weary and sleepy, but the questioning went right on. Officer Gray admitted that twice he told defendant "to sit up in his chair"; that the defendant "may have been nodding; he was not asleep." In view of the inquisition that was going on, and the condition of the prisoner, these orders were in effect a kind of coercion. The circumstances of the questioning, and the method thereof, were well calculated to force a confession of guilt, but the process was not at that time successful. It was only after six hours more of questioning on September 9th, followed by three days more of secret imprisonment, that the confession was finally obtained on the 12th. Considering the wearing-out process of inquisition, the secrecy of the imprisonment, the isolation of the defendant, and the unlawful failure to take the defendant before a magistrate (Pen. Code, §§ 821, 824, 849, and 145), the transaction has all the earmarks of a deliberate attempt to force a confession by every means short of promises, direct threats, or actual violence. The question presented is this: Can a confession so obtain be accepted as a confession freely and voluntarily given?

[2-7] The law on the subject of confessions has been very definitely settled; the difficulties lie in its application to particular cases. The admissibility of a confession, when offered in evidence, is a preliminary question for the court. People v. Ferdinand, 194 Cal. 555, 567, 229 P. 341. Ultimately, if the evidence is admitted, it is for the jury to determine whether the confession was freely and voluntarily made, and therefore entitled to consideration. People v. Bateman, 80 Cal. App. 151, 156, 251 P. 335. But first there must be evidence from which it is possible to determine that the confession was thus made. The burden is upon the prosecution to prove the voluntary character of a confession. "It is a fundamental rule of criminal law that a confession may not be used against a defendant, unless the prosecution can show its free and voluntary character, that it was made without previous inducement, and that neither duress nor intimidation caused defendant to furnish such evidence against himself. People v. Miller, 135 Cal. 69, 67 P. 12. It is also true that if threats and inducements are made to a prisoner, and within a few days thereafter he makes a confession, such acknowledgment of the commission of the crime may not be introduced in evidence, unless it clearly appears that the threats and inducements had ceased to operate upon his mind to bring about his statement of his own guilt. People v. Johnson, 41 Cal. 455." People v. Loper, 159 Cal. 6, at page 14, 112 P. 720, 723, Ann. Cas. 1912B, 1193. See, also, People v. Russell, 77 Cal. App. 113, 118, 246 P. 110; People v. Quan Gim Gow, 23 Cal. App. 507, 138 P. 918. To "threats and inducements" we think it appropriate to add, any illegal process whereby through external means of pressure the free will of the defendant has been overcome.

Counsel for respondent have quoted from some decisions and from 16 C. J. 729, and from Wigmore on Evidence, from which they state that the principle upon which a confession is treated as sometimes inadmissible is that under certain conditions it becomes untrustworthy as testimony. From this premise we are asked to approve the proposition (Resp. Brief, p. 94), that the question whether improper influences have so *impaired the probable truth* of the confession as to make it unreliable should be first determined by the trial judge. In other words, we are asked to establish an unique rule that the competency of evidence offered for submission to a jury shall be tested by the judge's opinion about its credibility. This we think that the court should decline to do.

We may reject, for present purposes, the testimony of the defendant concerning the treatment to which he claims to have been subjected while in jail. The case for the prosecution cannot be stronger than the admitted facts, to which we have referred. On those facts alone we are of the opinion that the court erred in overruling appellant's objections to the purported confession when offered in evidence against him.

[8, 9] Mere error is not a sufficient reason for reversing a judgment. An appellant must also satisfy the court, on appeal, that by such error he was deprived of the right to a fair trial, and therefore that his conviction has become a miscarriage of justice. We have said

that in this case the evidence, exclusive of the confession, would have been sufficient to sustain the verdict. But this is far from saying that a jury to which that evidence (without the confession) had been submitted would have been satisfied beyond a reasonable doubt, that the defendant was guilty of the murder. In the determination of this appeal, can we be justified in saying that the circumstantial evidence upon which the state must rely, when taken together with the evidence received on behalf of the defendant, so strongly established the guilt of the defendant that the jury, in the performance of its duty, could not reasonably have failed to find him guilty? Is the case so clear that, in spite of the erroneous admission of evidence, there was no miscarriage of justice?

"The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' (Opinion written by Mr. Justice Sloss in People v. O'Bryan, 165 Cal. 55, 130 P. 1042.)" People v. Wilson, 23 Cal. App. 513, 524, 138 P. 971, 975.

In the case at bar it is the claim of appellant, not only that the court erred, but that the error has resulted in a conviction which probably would not have resulted in the absence of such error. We have outlined the circumstances shown in evidence, which point to the defendant as the guilty man. That they unerringly so indicate, is not so plain that we dare to say it, although if such a case could go upon a mere preponderance of the evidence we might by that standard reach a different conclusion. On the other hand, the defendant by his own testimony denied that he shot the deceased, and denied that he (the defendant) was at or near the Horton ranch at the time of the murder or at any time. He testified that just before 6 o'clock on the evening of May 18, 1930, he went in his own car from Long Beach, down the coast to Balboa, and at 9 o'clock arrived at his father's house at Costa Mesa, and stayed there until 10 o'clock the next day. The defendant's father, his mother, and his brother all testified that defendant was at their home at Costa Mesa the night of the murder. Counsel for the people, in their brief, refer to the testimony of these three witnesses, but do not suggest any inconsistencies or other defects therein. The testimony of the parents is that he arrived at home at 9 in the evening. The testimony of the brother is that defendant was there, in bed, at 4 the next morning. According to the testimony of Mrs. Larimer and Miss Larimer, defendant was in their house at Long Beach until after 4 o'clock on the afternoon of the 18th. The distance from Costa Mesa to Mint Canyon by the most direct route was shown to be not less than eighty miles. The distance from Long Beach to Mint Canyon is (we will assume) not less than sixty miles. From the foregoing it will be seen that there was evidence on which a jury might have rested, leaving something more than a slight shadow of doubt that the defendant was at the Horton ranch at the time of the murder. Also there were some defects in the state's net of circumstantial evidence. Counsel for the state say (Resp. Brief, p. 110) that the evidence shows that "somebody who committed the crime wore shoes approximately the size of defendant Dye's shoes," but they do not tell us where to find such testimony in the record. We have found only the testimony of Officer Penprase (Rep. Trans., pp. 945 to 949) that on the morning of the 19th he found "tracks west of the house in the alfalfa field"; and some other foot tracks near by the ranch, some leading to and others from the ranch. But we have not found any testimony showing that any of these foot tracks were measured or that they were of the size or shape of any tracks that could be made by defendant's shoes.

We deem it useless to pursue the inquiry any further. The case is one where the zeal of prosecution has gone beyond the boundaries of justice, and where liberty has been lost without the rightful sanction of law. It is for such cases that appeals exist.

The judgment and the order denying appellant's motion for a new trial are reversed.

We concur: HOUSER, J.; YORK, J.

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119 Cal.App. 102

DENNING et al. v. GREEN.

Civ. 4381.

District Court of Appeal, Third District, California.

Dec. 9, 1931.

1. Money received ⚿18(3).

In action to recover rents collected, deed to plaintiffs and decree in former suit, quieting title, *held* sufficient to prove ownership.

There was no attempt to show, nor was there any intimation in evidence, that plaintiff's grantor was not owner of property at time of conveyance.

2. Property ⚿9.

In action for rents collected, there being no intimation that plaintiffs' grantor was not owner at time of conveyance, presumption was grantor was owner.

3. Money received ⚷18(3).

Plaintiffs, in action for rents collected, *held* not required to trace title back of common source against defendant defeated in quiet title action.

4. Quieting title ⚷10(2).

Where defendant claims through tax deed based on sale for taxes levied while plaintiff's grantor was owner, such grantor is "common source of title."

[Ed. Note.—For other definitions of "Common Source of Title," see Words and Phrases.]

5. Judgment ⚷735.

Matters not in issue in previous action are not res judicata.

6. Judgment ⚷740.

Finding as to rents in previous action in which title was quieted, neither within issues nor necessary to judgment, *held* not bar to action to recover rents collected by defendant.

> Complaint in action to quiet title was simple and ordinary form to quiet title, and, although trial court found that defendant collected and retained rental in certain sum, there was no mention of rental in conclusions of law or in judgment, and matter of rental was not an issue in the case.

7. Money received ⚷16.

Plaintiffs, in action for rents collected, *held* real parties in interest, although, after rents accrued, they conveyed property to stranger.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by David H. Fyfe, a minor, by Marie D. Denning, formerly Marie Darling Fyfe, his guardian ad litem, and another, against M. Green. From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

Robert L. Levy, of San Francisco, for appellant.

J. L. Smith, of San Francisco, C. W. Anderson, of Santa Rosa, and W. H. Early, of Petaluma, for respondents.

Mr. Justice pro tem. TUTTLE, delivered the opinion of the court.

This is an action brought to recover rents collected by appellant from property which belonged to respondents. It was tried by the court, and judgment for $920 was rendered against appellant. The appeal is from this judgment.

Defendant and appellant had possession of the real property from which said rentals accrued, he having acquired title from one Lichtenberg, who claimed title from the state of California by virtue of a sale for delinquent taxes. This tax deed was declared void by the trial court, and said decision was affirmed on appeal. This action for the collection of rentals, however, was pending before the final determination of the action involving the tax deed, and was not presented to the court for its determination until the decision in the first case, involving title to the lands from which the rent was derived, had become final. In the first action, which was a simple suit to quiet title, the trial court found, among other things, that defendant and appellant had collected and retained $920 in rentals while he had possession of the real property. The trial court also found in that action that defendant and appellant had refused to accept the tender of plaintiffs, made in open court, to reimburse him for all taxes, penalties, costs, and interest paid out and expended in the matter of his said tax title, as required by section 3898, Political Code.

As a conclusion of law, the court held that the tax sale to Lichtenberg was invalid and void. The judgment in said former action was in the usual form, quieting the title of plaintiffs and respondents in the real property, against the title or claim of title of defendant and appellant, M. Green.

[1-4] It is contended that the evidence is insufficient to support the findings, in that respondent failed to prove ownership. There is no merit in this contention. A deed to respondents was admitted in evidence and also the decree in the former suit quieting their title. There was no attempt to show, nor was there any intimation in the evidence, that plaintiffs' grantor was not the owner of the property at the time of the conveyance. Under such circumstances, the presumption is that the grantor was the owner. This question is fully discussed and decided by Justice Finch pro tem. in the case of Pearson v. Hellman Commercial Trust & Sav. Bank, 199 Cal. 305, 249 P. 10. It further appears that the parties derived their titles through this common grantor. This would also render the objection untenable. This court so held in the case of Jeffers v. Hulen, 52 Cal. App. 590, 199 P. 350. Where defendant claims through a tax deed based on a sale for taxes levied while plaintiffs' grantor was the owner, such grantor is the common source of title. 51 C. J. p. 175.

[5, 6] It is next contended that respondents are estopped and barred from maintaining the action, by the judgment rendered in the former action, which quieted respondents'

title to said property. In that action the complaint and other pleadings do not mention rental. The complaint is the simple and ordinary form to quiet title. In the findings, however, the trial court finds that appellant collected and retained rental in the sum of $920. There is no mention of rental in the conclusions of law or in the judgment. The evidence in the former case is not before us. It thus appears, and we must conclude that the matter of rental was not an issue in the case. Matters not in issue in the previous action are not res judicata. 15 Cal. Jur. p. 134. The finding made upon the matter of rental was clearly outside the issues, and cannot constitute a bar to the present action. Furthermore, the finding was not necessary to the judgment and hence was not conclusive upon respondents. Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 974, 66 P. 982.

[7] It is also contended that respondents were not the real parties in interest, and hence could not maintain the action. Appellants point out that the record shows a deed from respondents to one Early, dated April 13, 1927. The record shows, however, that the rental in question accrued between August, 1922, and March, 1925. At this time the undisputed evidence shows that respondents were the owners of the property. Their right to the rental during this period is beyond question.

There is no merit in the appeal, and it is therefore ordered that the judgment be affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 195

In re BROWN'S ESTATE.

BROWN v. LOOMIS.

Civ. 4522.

District Court of Appeal, Third District, California.

Dec. 12, 1931.

Rehearing Denied Jan. 11, 1932. Hearing Denied by Supreme Court Feb. 8, 1932.

1. Wills ⚷440.

Testator's intent must be determined, if possible, from language of will.

2. Wills ⚷440.

Purpose of construction of will is to arrive, if possible, at testator's intention, as expressed in will.

3. Wills ⚷441.

Where language of will is uncertain, testator's intention may be ascertained by construing language in light of surrounding circumstances (Civ. Code, § 1318).

4. Wills ⚷561(2).

Will *held* to show intention to devise to tenant house in which she resided, with sufficient land to include it, which was described.

5. Executors and administrators ⚷314(12).

Where court's finding respecting testator's intention was unsupported, reviewing court will modify decree of partial distribution to conform to language of will.

Appeal from Superior Court, Shasta County; James W. Bartlett, Judge.

In the matter of the estate of Thomas Jefferson Brown, also known as Thomas J. Brown, also known as Jeff T. Brown, also known as Jeff Brown, deceased. From an order decreeing partial distribution, William Brown, executor, appeals, opposed by Ella Weik Loomis.

Modified and affirmed.

Arthur M. Dean and L. C. Smith, both of Redding, for appellant.

Baker & Ross, of Redding, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the Court.

This is an appeal from a decree of partial distribution. The review involves only the construction of the terms of a will to ascertain the intention of the testator in the devise of real property.

Mr. Thomas J. Brown, the testator, was an elderly unmarried gentleman who owned a tract of land in block 44 of the city of Redding upon which he had constructed five cottages for the purpose of renting. For many years he resided in one of these cottages. It was a two-room cabin fronting on Sacramento street, but set back from this street a considerable distance. The approach and main entrance to this house was from Sacramento street. It had no street number. Some time subsequent to the construction of the cottage in which he resided, the testator built on lot 5, block 44, of this tract of land a three-room cottage which was numbered 506 and fronted on South street near the property line. South street was on the opposite side of the block from Sacramento street. This cottage, including the side porches and a woodshed at the rear, is about 24 by 40 feet in dimensions. The rear of this house was situated only about 10 feet from the rear of the building occupied by the testator. A porch connected the two structures. Subsequently this porch was inclosed and roofed, in an improvised fashion, to provide for a bathroom to accommodate both dwellings. Outside doors communicated with this bathroom from both houses. For several years the South street cottage was occupied by the respondent, Ella Weik Loomis. She was then unmarried, and was called Ella Weik. She was not related to the testator, but was a friend, and usually paid no rent for the use of the cottage.

In October, 1929, the testator became ill, and was taken to a hospital in Redding. At his request, Mr. Dean, the appellant's attorney, prepared his will, which was duly executed in the presence of two subscribing witnesses on October 9th. The will contained this provision: "I give, devise and bequeath to my friend Ella Weik, of the City of Redding, Shasta County, California, the dwelling at No. 506 South street, in the City of Redding, County of Shasta, State of California, together with the lot around said dwelling, being 25 feet fronting on the said South street, and extending back and northerly a distance of 40 feet."

Upon proceedings duly had, this will was admitted to probate. On petition for partial distribution of the dwelling house last above referred to, contrary to the appellant's opposition thereto, the court found: "That it was the intention of the testator by said devise to give the said Ella Weik the said dwelling at No. 506 South street, in the City of Redding, County of Shasta, State of California, together with the lot around said dwelling, and that it was not the intention of said testator to limit said devise by the dimensions given of twenty-five feet frontage on the said South street and extending back and northerly a distance of forty feet."

The court thereupon specifically described and distributed to the respondent portions of lots 5 and 6, block 44, fronting 31 feet on South street and extending back toward Sacramento street a distance of 60 feet, together with the dwelling house in which she resided and also the one where the testator lived prior to his illness. From this decree, the executor of the will has appealed.

It is contended the finding of the court above quoted is unsupported by the evidence, and that the decree of partial distribution is in violation of the unambiguous terms of the will.

[1-4] A reasonable construction of the language of the will seems to support the appellant's contentions. When a testator specifically devises a piece of land which he describes as "twenty-five feet frontage on the said South street and extending back and northerly a distance of forty feet," it seems unreasonable to assume, under the circumstances of this case, that he intended to devise a piece of land which is 31 feet fronting on South street and 60 feet in depth. The language of the will does not bear this construction. It is apparent the court assumed the testator intended to give the respondent, not only the house in which she resided, but also the one in which he lived, together with sufficient land to include both structures, that both houses constituted but one dwelling since they were united by an intervening bathroom, and that this purpose required the conveyance of a piece of land 31 by 60 feet in size. But this is in conflict with the unambiguous language of the will. The intent of the testator must be determined, if possible, from the language of the will. In re Estate of Young, 123 Cal. 337, 344, 55 P. 1011; Fay v. District Court of Appeal, 200 Cal. 522, 536, 254 P. 896. The authorities are uniform in declaring that: "'The purpose of construction as applied to wills is unquestionably to arrive, if possible, at the intention of the testator; but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will.' It is not the business of the court to say, in examining the terms of a will, what the testator intended, but what is the meaning to be given to the language which he used." In re Estate of Blake, 157 Cal. 448, 459, 108 P. 287, 291.

Where the language of a will is uncertain, the intention of the testator may be ascertained by construing the language of the will in the light of surrounding circumstances. Civ. Code, § 1318. The surrounding circumstances which prevailed in the present case seem to leave no doubt that the testator intended to devise to the respondent the house in which she resided, together with sufficient land to include it, which was described as 25 feet fronting on South street, by 40 feet in depth.

[5] Mr. Dean, the attorney for appellant, testified that, when the testator directed him to prepare the will, he gave "his instructions to me, he said he wanted to give that portion of the little house she lived in to Ella Weik, at 506 South street." He further testified: "I asked him how he was going to describe that portion, and he said, 'You will have to go down there and measure it,' which I did. * * * I told him [after making the measurements] that I went down to that little house, 506 South street, he told me about, measured off 25 feet frontage at 506 South street, and then ran back 40 feet, and cut the little house she lived in about a foot back of where it adjoins onto his house, and asked him if that was what he wanted. * * * And he said yes, that was all right." The attorney then returned to his office and drew the will accordingly. Returning to the hospital, the will, including the paragraph under construction, was read to the testator in the presence of four other persons. He was then of sound mind and rational. Regarding this circumstance, Mr. Dean said:

"I then read the will to him, explained to him again what I had done, and asked him if it was satisfactory to him, and he said it was. * * *

"Q. All these measurements contained in this will were put there on your own initiative? A. No. I submitted them to him before I ever wrote the will, and he ratified them." Corroborating this statement, Mr. Hanford, who was one of the subscribing witnesses to the will, testified he was present and heard the conversation between Mr. Dean and the testator regarding the devise to Ella Weik. He said: "Mr. Dean then told him that after their conversation earlier in the day, that he had gone to the little house Ella Weik lived in at 506 South street, in Redding, and measured off 25 feet frontage on South street, and then run back and northerly 40 feet which gave her a tract of ground 25 by 40 feet around the house she lived in, and that the back line cut the shed or lean-to that connected the little house Ella Weik lived in off from the cabin Jeff Brown lived in at a point about one foot back of the little house she lived in, and again Mr. Dean asked Mr. Brown if that was what he wanted to give to Ella Weik, and he said it was. He then signed the will."

There are no circumstances in this case which reasonably indicate the testator intended to give the respondent the cabin in which he had resided, together with the land upon which it is located, in addition to the cottage in which she lived and the land upon which it is located. The finding of the court with respect to the intention of the testator is without support of the evidence.

It therefore becomes necessary to modify the decree of partial distribution to conform to the language of the will specifying the dimensions of the lot. The court is accordingly directed to modify the decree so as to distribute to the respondent only that portion of lot 5, block 44, of the city of Redding, upon which the dwelling house numbered 506 South street is located, beginning at the point therein designated and extending westerly along the south line of said lot 5, a distance of 25 feet; thence northerly and parallel to the line between lots 5 and 6 of said block 44, a distance of 40 feet; thence easterly and parallel with said south line of said block 44 a distance of 25 feet; thence southerly and parallel with said line between lots 5 and 6 of block 44, a distance of 40 feet to the place of beginning, together with the dwelling house which is situated thereon.

Thus modified, the order and decree of partial distribution is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

ENDICOTT v. ROSENTHAL et al.*

Civ. 4451.

District Court of Appeal, Third District, California.

Dec. 22, 1931.

Rehearing Denied Jan. 21, 1932. Hearing Granted by Supreme Court Feb. 18, 1932.

1. Monopolies ⚷12(2).

Incorporated cleaners' and dyers' association *held* unauthorized to establish minimum price, even if price was reasonable and was reasonably necessary to produce fair profit (Civ. Code, § 1673).

2. Monopolies ⚷23.

Legal portions of business adviser's contracts with cleaners' and dyers' association and with individual members *held* inseparable from illegal portions contemplating elimination of competition and increase of prices, precluding recovery against individual member (Civ. Code, § 1673).

Evidence showed that as result of suggestions by a business counselor and adviser, so called, association of cleaners and dyers was formed and incorporated, two of main purposes of which were to eliminate competition and increase prices; that adviser entered into contract with each member whereby he was employed to improve methods, equipment, and working conditions, and also entered into contract with association, whereby he was employed for similar purposes; and that delivery to such adviser of members' contracts was withheld until increase of prices was made through association.

3. Monopolies ⚷12(2).

Cleaning and dyeing industry *held* "business" within statute forbidding contracts in restraint thereof (Civ. Code, § 1673).

[Ed. Note.—For other definitions of "Business," see Words and Phrases.]

4. Contracts ⚷138(6).

Court properly refused to entertain action where plaintiff's case showed illegality of contract, even though not pleaded or urged as defense (Civ. Code, § 1673).

5. Evidence ⚷429.

That written contract, though lawful on face, was illegal, or part of illegal transaction, may be shown by parol.

Appeal from Superior Court, Los Angeles County; James W. Bartlett, Judge.

Action by Thomas P. Endicott against Harry Rosenthal and others, copartners doing business as the Bear Cleaners & Dyers. Judgment for defendants, and plaintiff appeals.

Affirmed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 16 P.2d 673.

William Schreider, of Los Angeles, for appellant.

Fred H. Luth and W. H. Gregory, both of Los Angeles, for respondents.

Mr. Justice pro tem. JAMISON delivered the opinion of the court.

This is an action brought by plaintiff to recover from defendants commission upon the gross wholesale and retail business done by defendants since April 6, 1925, under a written contract. Defendants Harry Rosenthal and Robert Cowan, by their amended answer, admitted that they are copartners doing business under the name of Bear Cleaners & Dyers, but deny that they were indebted to plaintiff under said contract.

At the close of plaintiff's case defendants moved for a nonsuit upon the grounds that the contract sued upon is illegal, failure of consideration, and because the contract sued upon has been superseded by the agreement with the Plant Owners' Association. The trial court granted the motion for nonsuit upon the ground that the contract was illegal, and thereupon rendered judgment for defendants, from which judgment plaintiff has appealed.

The contract provides, in substance, that respondents being engaged in the business of cleaning and dyeing wearing apparel, etc., and being desirous of securing the services of appellant as business counselor and adviser, have employed him in that capacity. That appellant shall maintain an office in Los Angeles, Cal., at his own expense, from which advice and counsel will be given respondent, appellant agreeing to use his best efforts to improve the methods of cleaning and dyeing, to improve the equipment and facilities for handling, cleaning, and dyeing, to improve the working conditions, and to standardize the methods generally of the industry. The respondents, irrespective of the extent that they may avail themselves of the advice and counsel of appellant, agreed to pay for said services so to be rendered by appellant, after the 6th day of April, 1925, the sum of 1 per cent. of the amount of their retail gross business, and 3 per cent. of the amount of their wholesale gross business during the life of the contract, remittance of said sums to be made to appellant on Wednesday of each week. The contract to continue in force for a term of five years from the date thereof, and not to be voidable for any cause whatsoever. The contract was dated March 11, 1925.

It appears from the testimony of appellant that, previous to coming to California, he had been engaged in the cleaning and dyeing business for 25 years, and at one time had been at the head of the National Association; that he came to Los Angeles in 1925, and during the latter part of January and February and the early part of March of that year he visited the various plants and consulted with the cleaners and dyers, and gave them suggestions as to contemplated improvements, and in what manner he could save them money. The result of this was that the cleaners and dyers resolved to form an association and incorporate it, and on March 2, 1925, the said association was formed and incorporated under the name of "Plant Owners Association of Cleaners and Dyers." The by-laws of said corporation provided, among other things, as follows: "That each member shall furnish the director general, within fifteen days after signing the agreement, with the names and addresses of all customers with which each member does a wholesale business. Each member shall refrain from soliciting wholesale business directly or indirectly. That if a member comes in contact with a wholesale customer, he shall decline accepting business from such customer pending approval thereof in writing by the director general. If through neglect or design, business should be taken from this customer, and it is later learned that such customer is, or has been a customer of any other member, then the member so dealing with said customer shall turn over to the member designated by the director general, as the member rightfully entitled to the business, the full amount of all charges collected from such customer, without allowance of any amount or kind for work or services rendered; that no member shall provide services of any kind in the cleaning and dyeing industry for less than the minimum reasonable charges fixed by the association, or its board of directors, provided that before a member shall change or vary his price from the established minimum, he shall give fifteen days notice of such intention to the director general."

The by-laws also provided that any member violating any of the provisions should be fined $100 and pay to the association, as liquidated damages, $500, and for the second offense should pay to the association, as liquidated damages, the sum of $3,000, and that each member was to deposit with the director general his note for $5,000, with the agreement that the sum due on the note should be applied to the payment of said fine and damages. The by-laws also provided that no member should accept business from new commission men or contractors. The association consisted of 135 members, and each of them, including appellant, signed said by-laws; the appellant was also constituted the director general. Each of the members executed to appellant a note for $5,000, and a contract similar to that executed to him by respondents; appellant indorsed said notes to the association, but it was agreed that none of the contracts should be delivered to appellant until an increase of price had been provided. On April 1, 1925, a meeting of the members of the association was held and a resolution was adopted ordering the board of directors to increase the retail price of a man's suit to $1.50, and at a meeting of said board the next day the increase was made, and thereafter, on April 6, 1925, all of said contracts were delivered to appellant. On April 10, 1925, appellant entered into a contract with said corporation, which is therein alleged to be an association of individuals, firms, and corporations engaged in the business of cleaning and dyeing wearing apparel, etc. By said contract said association employed appellant to give business advice on all problems affecting the cleaning and dyeing industry, and to equip and maintain an office in Los Angeles, the incidental expenses thereof to be paid from the income derived by appellant from the agreement for services with the individual members of the association. Appellant testified that all persons, firms, and corporations engaged in the business of cleaning and dyeing wearing apparel, etc., in Los Angeles and Orange counties, except one firm in Los Angeles county, became members of the association and signed the bylaws. Appellant also testified that he expended $50,000 under his contract with the Plant Owners' Association of Cleaners and Dyers, of which the sum of $13,000 only has been received by him, leaving the sum of $37,000 still owing him by the association for money expended by him for its benefit; that he was told by the board of directors to sue the individual members upon their contracts to make up this default, and that the purpose of this suit is not to collect damages or salary for his services, but only for the purpose of recovering the money he has paid for the benefit of the association. That the commissions provided for in the individual contracts of the members were considered as dues owing to the association, and were to be used for its benefit. That within six or seven weeks after the price of $1.50 for cleaning and dyeing wearing apparel, etc., was established, a large number of the members cut said price, and thereupon numerous suits were instituted to enforce the provisions of the by-laws, by the imposition of fines and damages.

It is evident that the two main purposes for which this association was formed were to increase prices and eliminate competition. It included in its membership practically all of the cleaners and dyers in the counties of Los Angeles and Orange, and bound its members to be governed in their dealings with the public by price to be fixed by the association, and also bound them to cease competition with each other under heavy penalties.

The trial court held that the contract sued upon in this action violated the provisions of section 1673 of the Civil Code, and was therefore void. Said section provides that "every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." The exceptions provided by the next two sections have no application here.

[1] Appellant contends that the association had the right to establish a minimum price, so long as that price is not unreasonable and is reasonably necessary to produce a fair profit upon the commodity sold or the services rendered, and in support of its contention cites Herriman v. Menzies, 115 Cal. 16, 44 P. 660, 46 P. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81, but as was said in Meyers v. Merillion, 118 Cal. 352, 356, 50 P. 662, 663, "In the Menzies Case it was held that the contract was not illegal, for it was not shown that it was designed to or did effect a control of business to an extent enabling the contracting firms to exclude competition or control the prices of the commodity."

In Pacific Factor v. Adler, 90 Cal. 110, 27 P. 36, 38, 25 Am. St. Rep. 102, the Supreme Court quoted with approval the following language used in the case of Salt Company v. Guthrie, 35 Ohio St. 672: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." The general principle governing matters of this kind is thus stated in 19 R. C. L. 47: "A combination between independent dealers to prevent competition between themselves is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, * * * and * * * it is illegal however reasonable the prices fixed by the parties thereto."

In the case of United States v. Trenton Potteries Co., 273 U. S. 392, 47 S. Ct. 377, 379, 71 L. Ed. 700, 50 A. L. R. 989, 995, Justice Stone, delivering the opinion of the court, said: "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed."

[2] The next contention of appellant is that the contract of respondent sued upon in this action is separate and distinct from the contract of the association, and that any illegality of the latter will not render the former unenforceable. The evidence shows that appellant, together with the cleaners and dyers of the counties of Los Angeles and Orange, confederated together to form an association of cleaners and dyers that would include all of those engaged in that business in those two counties; that in furtherance of that design they did form an association that had for its principal objects raising the price of their output and stifling competition; that the main purpose that appellant and respondents had in view, when respondents entered into the contract with appellant, was the accomplishment of said objects. This is evidenced by the fact that prior to entering into said contract, the said association had been formed; practically all of those engaged in the business of cleaners and dyers in the counties of Los Angeles and Orange had joined the association and had signed the by-laws, and had agreed to cease competition among themselves, and by the further fact that it was agreed that the individual contracts of the members should be withheld and not delivered to appellant until after the prices had been raised. In support of this contention appellant cites several opinions of the Supreme Court, in none of which the facts are similar to those of the case under consideration. In Pacific Wharf, etc., Co. v. Dredging Co., 184 Cal. 21, 192 P. 847, 849, cited by appellant, the court said: "Whether a contract is entire or separable depends upon its language and subject-matter, and this question is one of construction to be determined by the court according to the intention of the parties." And in Poultry Produce Co. v. Barlow, 189 Cal. 278, 208 P. 93, the court held that a promise to do two things, one legal and the other illegal, if the two are so mingled and bound together that they cannot be separated, the whole promise is void. The contract with the association and those with the individual members called for the same services to be performed by appellant. Among other things, those services included price raising and eliminating competition. While portions of said contracts may be said to be legal, they are so interwoven with the illegal parts that they cannot be separated.

[3-5] Appellant claims that section 1673 of the Civil Code does not apply to the industry of cleaning and dyeing, and cites State v. McClellan, 155 La. 37, 98 So. 748, 31 A. L. R. 527, and cases from other jurisdictions in support of this claim. These were under statutes that prohibited combinations in restraint of trade and commerce, and the courts held in those cases that the terms "trade" and "commerce" did not include laundrymen. The said section 1673 is much broader in its terms, for it not only specifics trades, but includes business of any kind. It could not logically be maintained that persons engaged in the industry of cleaners and dyers of wearing apparel were not engaged in some kind of business. Even if respondents did not set up in their answer the defense of illegality of the contract, but the case made by appellant showed its illegality, it became the duty of the court sua sponte to refuse to entertain the action. Dean v. McMerney, 91 Cal. App. 206, 266 P. 975. Parol evidence is always competent to show that a written contract, though lawful on its face, was illegal, or part of an illegal transaction, and the illegality, if serious, need not be pleaded or urged to enable the court to act upon it. 3 Williston on Contracts, 3060; Morey v. Paladini, 187 Cal. 727, 739, 203 P. 760.

Appellant calls attention to Anaheim C. F. Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959, 961, which was a co-operative marketing association, formed for the purpose of enabling its members to jointly conduct the operation of harvesting and marketing citrus fruits grown upon land owned by such member. The by-laws which were signed by the stockholders provided that the association should have the sole and exclusive right to pick, grade, pack, and market and sell the citrus fruit raised by the members. The court said: "There is nothing in the articles of incorporation of the plaintiff or its by-laws, or in the evidence of its methods, which tends to show that any purpose of the association was to do acts in restraint of trade or produce an unlawful monopoly." In that case there was no evidence that a price had been fixed at which the fruit was to be marketed, nor any evidence that the purpose or effect of the association was to kill competition. The court held that the authority to form an association for the purposes indicated in that decision is expressly given by the Cartwright Act (St. 1909, p. 593).

We are of the opinion that the evidence produced at the trial of this case clearly shows that contracts entered into by appellant with the association, and with the individual members thereof, were in furtherance of the design to prevent competition in the business of cleaning and dyeing wearing apparel, etc., in the counties of Los Angeles and Orange, and are therefore void, as being in restraint of trade, and tending towards creating a monopoly.

The judgment is affirmed.

We concur: PRESTON, P. J.; THOMPSON, J.

EAST BAY MUNICIPAL UTILITY DIST. v. CITY OF LODI et al.*

Civ. 4313.

District Court of Appeal, Third District, California.

Dec. 17, 1931.

Rehearing Granted Jan. 12, 1932.

1. Eminent domain 🔑47(1).

"Used," as employed in statute exempting from eminent domain property while appropriated and "used" for public purposes, does not mean actual physical use, but reasonably probable use within reasonable time (Code Civ. Proc. § 1240, subd. 4).

[Ed. Note.—For other definitions of "Use; Used," see Words and Phrases.]

2. Eminent domain 🔑262(4).

In condemnation proceeding, trial court's finding on sufficient evidence that projected use of property for public purposes is contingent, uncertain, or unreasonably indefinite as to time, is conclusive (Code Civ. Proc. § 1240, subd. 4).

3. Eminent domain 🔑196.

Evidence *held* to support finding of trial court that use of property in controversy for public purposes was contingent, uncertain, and unreasonably indefinite as to time (Code Civ. Proc. § 1240, subd. 4).

4. Eminent domain 🔑196.

In determining whether property is "used" for public purposes within statute, conduct of defendants in standing by without objection while plaintiff spent large sums and other inequitable conduct may be considered (Code Civ. Proc. § 1240, subd. 4).

5. Eminent domain 🔑196.

To determine whether property is "used" for public purposes within statute, evidence as to defendant city's financial condition, bonded indebtedness, and ability to use property involved is admissible (Code Civ. Proc. § 1240, subd. 4).

6. Eminent domain 🔑196.

Protests against building of dam by others than defendants have no tendency to prove that property is "used" for public purposes within statute exempting it from condemnation (Code Civ. Proc. § 1240, subd. 4).

7. Eminent domain 🔑205.

Evidence supported damages allowed for taking of riparian rights for public use by water district.

8. Eminent domain 🔑203(1).

Estimated investment necessary to make land productive, amount of sales, and capitalization of net profits furnish no legal basis for fixing damages in eminent domain proceeding.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Condemnation proceeding by the East Bay Municipal Utility District against the City of Lodi and another. From a judgment condemning the riparian rights of defendants, defendants appeal.

Affirmed.

Robt. M. Searls, of San Francisco, Glenn West, of Lodi, and Edw. R. Solinsky, Frank J. Solinsky, Corbet & Selby, and Humphrey, Searls, Doyle & MacMillan, all of San Francisco, for appellants.

Harold Raines, T. P. Wittschen and L. W. Irving, all of Oakland, John Hancock, of Stockton, Jos. R. Huberty, of Woodland, and Chas. P. Snyder, of San Andreas, for respondent.

PLUMMER, J.

The plaintiff had judgment in an eminent domain proceeding condemning the riparian rights of the defendants in and to the waters of the Mokelumne river in so far as said rights pertain to the lands and premises described in the plaintiff's complaint. From this judgment the defendants appeal.

The lands and premises involved comprise about 207 acres situate along the Mokelumne river in Amador and Calaveras counties, are unsuitable for agricultural purposes, are mostly rocky and barren, and are susceptible of being used for grazing purposes only to a limited extent. The lands and premises belonging to the defendants are divided by certain lands and premises belonging to the United States, reserved from entry except for power purposes, and also a certain tract of land belonging to a private owner.

The court found that the lands and premises of the defendants could be used for power purposes by building a dam thereon which would raise the waters of the river, giving a head of not exceeding 43 feet without inundating the lands belonging to the general government, but if the intervening tracts between the lands owned by the defendants were submerged, the waters of the river might be so raised as to give a head of 57 feet.

While not so found, the testimony shows that a head of water to the extent herein mentioned would operate a power plant of some capacity, the extent of which does not satisfactorily appear.

The Mokelumne river has its source in the Sierra Nevada Mountains, approximately 100 miles easterly of the city of Lodi, and flows in a general westerly course to its confluence with the San Joaquin river at a point between

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*For subsequent opinion see 8 P.2d 532.

15 and 20 miles from the city of Lodi. During certain seasons of the year it carries a large body of flood waters, occasionally approximating a flow of 60,000 cubic feet per second. Thereafter it rapidly decreases during certain summer months until the flow does not exceed 100 cubic feet per second. Until the year 1923 no action had been taken by the municipality to impound either the natural flow or the flood waters of the Mokelumne river.

For the purpose of utilizing the waters of the Mokelumne river so far as possible to supply the domestic demands of the cities of Oakland, Berkeley, Alameda, Emeryville, Piedmont, Albany, Richmond, and El Cerrito, an election was held on May 22, 1923, for the purpose of organizing the East Bay Utility District, with exterior boundaries including the cities above mentioned. This election resulted in the organization of the plaintiff as a utility district. Investigations were had as to the availability of the waters of the Mokelumne river for the purposes mentioned, and also to ascertain for what power uses said waters might be applied, and thereafter, on November 4, 1924, an election was had authorizing a bond issue in the sum of $39,000,000 for the construction of what was thereafter called the Mokelumne river project. Some litigation followed relative to the validity of the bonds offered for sale by the district, which resulted favorably, and on September 25, 1925, contracts were entered into for the construction of the major units of the project, and actual work was begun. Thereafter, eminent domain proceedings were had, whereby the district secured the use of approximately 8,000 acres of land for use as a reservoir site. These proceedings were had in 1927. For the purposes of impounding the waters of the river and rendering them available for use, the district began the building of a certain dam called the Pardee Dam, and continued work thereon, and at the time of the execution and delivery of a deed by the Colorado Power Company to the city of Lodi, hereinafter mentioned, had expended upon the Pardee Dam, conduits, etc., upwards of $34,000,000, a sum slightly in excess of $15,000,000 thereof having been expended upon the construction of the dam. In addition to this the utility district has expended on tunnels, aqueducts, and acquiring distribution systems an aggregate sum in excess of $64,000,000. Prior to the institution of this suit, no action had been taken with reference to the riparian rights of any owners of land on the Mokelumne river below the site of the Pardee Dam, apparently, the contention of the district being that the impounding of the flood waters of the Mokelumne river during the flood season of each year would enable the district to release from its reservoir a quantity of water sufficient in volume that the riparian rights of lower land owners would not be impaired.

Beginning with September, 1926, and ending with July, 1927, one Lloyd Thayer acquired title to the various parcels of land involved in this action, and thereafter organized the Colorado Power Company and conveyed the premises to the company so organized.

During the period of time elapsing between tht commencement of construction work by the utility district and some time in the year 1928, Thayer had some negotiations with the utility district relative to the district advancing a sum in the neighborhood of $100,000 to build a dam for impounding waters upon the lands to which he had acquired title. These negotiations did not result in the district advancing any money, and some time later the Colorado Power Company sent a letter to the utility district in which it was stated that the power company proposed to develop power as a riparian owner, and notified the utility district not to proceed with any construction work that would interfere with the natural flow of the Mokelumne river above the Colorado Power Company's project. This was three years after work had been begun upon the Mokelumne river project by the utility district, and after the district had expended thereon a sum in excess of $15,500,000.

On the 9th day of January, 1929, so far as the record shows, without any previous negotiations, the Colorado Power Company delivered to the city of Lodi a deed of conveyance signed by Lloyd W. Thayer, as president, and Albert P. Slichter, as secretary, whereby the power company transferred to the city of Lodi, all and singular, the premises described in the plaintiff's complaint. This deed contains, among other things, the following terms and conditions: "Whereas the grantor and the grantee consider the said premises are adaptable and necessary for the construction thereon and operation of a hydroelectric power plant for the generation of electric energy and the transmission of such energy therefrom to serve the inhabitants of the City of Lodi; and whereas the grantee now owns and operates a municipal electric distribution system adapted to the distribution of electric energy to be generated on the premises hereinafter described by and through the construction and operation of the said power plant, together with the construction and operation of transmission lines connecting the said present distribution system of the City of Lodi with the said hydroelectric power plant: Now, therefore, in consideration of the premises and of the sum of $10 to it in hand paid, the receipt of which is hereby acknowledged, and upon other good and valuable considerations to it thereunto moving, the grantor hereby grants and conveys to the grantee all of that certain property above referred to situate in the counties of Amador and Calaveras, state of California, and more particularly described as follows, to-wit: (Here follows a particular description of the lands and premises, aggregating some 200 acres.) To have and to hold the said premises, and appurtenances unto the grantee, its successors and assigns forever, for public use in the generation and production of electric energy for the use of the inhabitants of the City of Lodi, subject, however, to the following conditions subsequent, the happening of any one of which shall operate to terminate and defeat the title of the grantee in said premises and revest the same in the grantor hereunder." Six conditions are then set forth in the deed, a failure to comply with any one of which would revest title in the grantor. The first condition specified that the grantee should accept the deed, with the conditions, within 10 days after the tender of the same. The second condition, that the grantee should, within one year after the receipt of the deed, cause a final investigation of the engineering features necessary to be made prior to the construction of any power plant, and report the same to the grantor. The third condition specified that the grantee should, within two years from and after the date of the deed, call an election for the purpose of having it determined by the electors of the city of Lodi, whether a bond issue would be authorized to pay the expenses of constructing such hydroelectric plant and transmission lines. The fourth condition specified that the grantee should, within three years from and after the date of the deed, enter into a binding contract with a responsible contractor for the construction of the projected works, including the power plant and transmission line, and notifying the grantor of the awarding of such contract. The fifth provision specified that the grantee should, within four years from and after the date of the acceptance of the deed, have completed a power plant having a rated capacity of 3,000 kilowatts together with a transmission line connecting said power plant with the distribution system owned by the grantee. The sixth condition specified that the grantee should not fail, for a period of three months, to operate the plant, and should cause to be paid to the grantor, in semiannual instalments, a royalty of two mills per kilowatt hour for each kilowatt hour of electric energy generated at said plant, in semiannual payments for 25 years, payments to be made within 30 days after the expiration of each semiannual period; that the payments should never be less than $5,000 semiannual, nor more than $10,000 semiannual, irrespective of the quality of energy delivered, or to the extent to which the plant might be operated. A failure to comply with any of the conditions set forth in the deed would cause the title to revest in the grantor.

At the same meeting of the council, when the deed just referred to was tendered by the representatives of the Colorado Power Company to the city of Lodi, the council adopted resolution No. 567, which contained, among other things, the following: After reciting that in the judgment of the representatives of the company and of the council, the project referred to was economically adapted as a site for the development of a municipally owned electric power plant, the resolution reads: "Whereas, the conditions attached to the tender of the said deed are that the City of Lodi accept the deed, conveying the property of the Colorado Power Company, as hereinafter described, and such title to the said property as the Colorado Power Company now has, subject to certain conditions subsequently expressed in said deed, and that the settlement or dismissal of any litigation now pending, or which may follow the acquisition of title to the said property by the City of Lodi, affecting the riparian rights to the flow of the Mokelumne River through the said property, which rights are part and parcel of the said property, shall be satisfactory in terms to the Colorado Power Company and approved by it; and Whereas, the city council of the City of Lodi believes that the conditions attached to said offer of conveyance are reasonable, do not involve any present heavy commitment to expenditure by the City of Lodi, and should be accepted; Now Therefore, be it, and it is hereby Resolved, that said conditions attached to said tender be, and they are hereby accepted, and that the clerk of this board is hereby authorized and directed to notify said Colorado Power Company, in writing, of such acceptance and to transmit to said company a copy of this resolution; and be it Further Resolved, that the said property so conveyed to the City of Lodi in said deed is hereby appropriated and dedicated to public use, to-wit: as a site for the construction of a reservoir, power-house, bus-yard, operators' quarters and other appurtenant structures to be designed, constructed and used in the generation of electric energy for the use of the City of Lodi and its inhabitants." The resolution then further authorized the city engineer to make examinations and explorations of the site of the proposed plant, and to report his findings to the council. The city attorney was likewise directed to prepare and submit to the council a report setting forth the legal procedure necessary for the presentation to the electors of the city of Lodi of a plan for financing construction and operation of said works. The city attorney was authorized also to negotiate with the proper state and federal authorities in obtaining permits and licenses necessary and expedient. The city attorney was also authorized to take such steps to prosecute or defend any litigation which might be necessary for the protection of the rights of the city of Lodi in and to the riparian flow of the waters of the Mokelumne river; also to protect the contingent interests of the power company. It was further provided that none of the litigation should be settled without the consent of the power company. It was further provided that the rights of the city of Lodi acquired under the deed should not be transferred without the consent of the power company, other than to a water district organization, to include the city of Lodi. It was further provided that in the event of any adverse proceedings being taken and had, and the title to the premises or the riparian rights transferred to or vested in any adverse party, that the amount of damages awarded therefor should be first applied to the repayment of any expenses and costs incurred by the city of Lodi, and the surplus, if any, divided between the city and the power company in the following proportions: 75 per cent. to the power company and 25 per cent. to the city of Lodi.

The record shows that the instruments just referred to were presented to the city council of the city of Lodi on the evening of the 9th of January, 1929, by representatives of the power company, and the proceedings then had included the delivery of the deed in the passage of the resolution referred to and the authorization of the institution of injunction proceedings against the utility district. The mayor of the city of Lodi testified that no consideration was paid by the city of Lodi, no bond election had been called up to the time of the trial of this action, and practically no further proceedings had been taken and had, other than of a very limited exploration made of the premises by the city engineer, or an engineer employed for that purpose.

It appears also from the record that the council was advised that their position in the pending litigation, which litigation involved the water level in the wells from which Lodi derived its water supply, would be strengthened by going into the Colorado deal. No investigation was made as to the purchase price of the premises involved, paid by Thayer, which the record shows aggregated the sum of $9,475. The representatives of the power company in explaining the project to the council did not state how much the project would cost, nor was the purchase price of the premises mentioned. Mr. Thayer never informed the council as to the amount of money he had paid for the lands included in the deed, nor was anything said as to what the Colorado Power Company had paid therefor. The record shows that no application was ever made to the Federal Power Commission to use the lands owned by the federal government. It was further shown that it was the intent of the council to meet the expense of the project by a bond issue. The record further shows that an election was held to organize a water district which included the city of Lodi, and the project was voted down. The record further shows that the city of Lodi did not have in its treasury sufficient funds to finance the project; that a bond issue would be necessary; and that the bonds of the city of Lodi already outstanding were so great in amount as to render improbable that a bond issue could be voted sufficient to defray the expense of the building of the dam, the hydroelectric plant and the transmission line, without violating the constitutional provision limiting the indebtedness of the city to a certain percentage of the assessed valuation of the property within its corporate limits.

[1-3] With this summary in view, only one vital question is tendered for consideration, to wit: Were the circumstances and transactions connected with the property involved such as to render the same immune as against eminent domain proceedings under the last sentence of subdivision 4 of section 1240, Code of Civil Procedure, which reads: "but property appropriated to the use of any county, city and county, incorporated city or town or municipal water district, may not be taken by any other county, city and county, incorporated city or town, or municipal water district, while such property is so appropriated and used for the public purposes for which it has been so appropriated." This language implies that the property to be rendered immune must not only be appropriated, but also used for a public purpose. As construed by the authorities which we shall hereinafter cite, the word "used" does not mean actual physical use at the date of the institution of the condemnation suit, but means property reasonably necessary for use, and which the circumstances reasonably show will be actually used within a reasonable length of time. If the use is contingent, uncertain or problematical, or not reasonably definite as to time, eminent domain proceedings are not barred. If the circumstances disclosed upon the trial of the cause are such as to justify the trial court in concluding that the projected use is contingent, uncertain, problematical, or not reasonably definite as to time, then and in that case an appellate court has no power to interfere, unless error otherwise appears in the trial, necessitating a reversal.

In the consideration of the questions presented and determined by the trial court it must be remembered that the water supply of the city of Lodi is not involved, and that the city of Lodi was already being supplied with electric power for use over its distributing system. In arriving at a conclusion the court had for its consideration the fact that a proposed water district to be organized for the purpose of protecting the water supply of the district which included the city of Lodi, had already been voted down; that the contingencies set forth in the deed of conveyance executed and delivered by the power company, rendered the title of the city of Lodi all the while more or less contingent and subject to loss; that the city of Lodi had no money in its treasury to finance the project; that a resort to taxation to raise the necessary funds to defray the expenses of the undertaking would impose a very heavy burden; that in order to float a bond issue covering the cost of the undertaking would require a two-thirds vote of the electors of the city of Lodi; that no such election had been called, although nearly two years had elapsed between the receipt of the deed and the trial of this cause; that the resolution adopted by the city of Lodi recited, among other things, that the city was not committing itself to any heavy expenditures; that the deed was accepted and the resolution for appropriation adopted, without any previous exploration of the project, without any ascertainment of its proposed cost, and any definite knowledge or information had in relation thereto, or as to whether the city of Lodi, even though willing, could legally incur the necessary expenditure. Likewise, the resolutions indicated that no immediate use was contemplated, and that the council at the time of passing the resolution, was not definitely committing the city of Lodi to any expenditure of money, or to any obligations whatever to the public with regard to the projected works, but had in mind that it would aid the city in its contest to conserve its underground supply of water and at least enable the city to share in whatever recovery might be had in the way of damages in the event that the use of the waters of Mokelumne river for power purposes by the city or the power company should be subjected to the uses of the utility district by eminent domain proceedings. The findings of the trial court were and are to the effect that the lands involved in this action are bare and unimproved, and were not, on the 9th day of January, 1929, or at any other time, dedicated to any public use, and were not, and are not in process of being put to any public use, and that the city of Lodi has not been proceeding, with reasonable or any diligence to put said lands or any part thereof, or of any water rights appurtenant thereto, to any beneficial use. The court further found that the waters of the Mokelumne river could be utilized by the plaintiff to the extent and for the purposes proposed by the plaintiff without destroying the adaptability or feasibility of the lands of the defendants for power purposes. The court further found that if the lands and premises of the defendants were depreciated in value to any extent, such depreciation did not exceed the sum of $10,000, which sum was allowed as compensation for damages on account of the subjection of the riparian rights appurtenant to the lands involved being subjected to the uses of the plaintiff in this action. The trial court also found that the amount of the bonded indebtedness which would be required to construct the power project and transmission line, in addition to the amount of the present outstanding bonded indebtedness of the city of Lodi, would exceed 15 per cent. of the total assessed valuation of the property within the limits of the city.

In support of their appeal the appellants cite a number of cases to the effect that property appropriated to public use by one municipality cannot be taken by condemnation proceedings for the uses and purposes of another municipality. This, of course, is in accordance with the statutory law of this state. The cases cited, however, are distinguishable from the circumstances here presented.

In the case of Mono Power Company v. City of Los Angeles (C. C. A.) 284 F. 784, cited as controlling here, the facts show that the Southern Sierras Power Company, to which the property had been conveyed, was engaged in the transmission of power to a number of different cities; that while the Southern Sierras Power Company had only recently acquired the property in dispute preceding the institution of eminent domain proceedings by the city of Los Angeles, it was proceeding to utilize the property, and there were not any contingencies relative to either the immediate or prospective uses of the property by the power company. The means, the ability, the immediate and actual use, were all present to support the rights of the power company, and to render the property being used immune as against any condemnation proceedings. In other words, there was both appropriation and use, complying strictly with the requirements of subdivision 4 of section 1240, Code of Civil Procedure.

In State ex rel. Union Trust & Savings Bank et al. v. Superior Court of Spokane County et al., 84 Wash. 20, 145 P. 999, 149 P. 324, as appears from the opinion, the findings of the trial court and the record show that the property acquired was held for future use, and the court said, quoting from the syllabus: "A corporation constructing a hydroelectric power plant for a public purpose cannot condemn a power site owned by another public utilities corporation which intends to construct thereon a similar power plant, since property owned by a corporation and devoted to a public use cannot be condemned by another corporation for use in the same manner and for the same purpose." Here, again, are no circumstances showing the future use to be problematical.

The case of Marsh Mining Co. v. Inland Empire Mining & Milling Co., 30 Idaho, 1, 165 P. 1128, is simply to the effect that eminent domain proceedings will not enable one claimant to condemn property where the condemnor is merely seeking to subject the property to similar uses to which it is already being applied.

In State ex rel. South Fork Log Driving Co. v. Superior Court, etc., 94 Wash. 691, 163 P. 15, the Supreme Court of Washington held that property not presently actually devoted to a public use, but purchased and held by a public service corporation in reasonable anticipation of future needs, is deemed devoted to a public use. Here, again, enters a question of fact to be determined by the trial court as to whether the property has been acquired, and is being held in reasonable anticipation of future use, upon which determination of fact, if supported by the testimony, the finding of the trial court cannot be disturbed.

The case of Nicomen Boom Company v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412, involved the question of abandonment of property after having been acquired, which differentiates everything said in the opinion in that case from the circumstances here presented.

In 20 C. J. 601, the law is thus stated: "Land owned by a corporation whose business constitutes a public use, not in actual use nor essential to the exercise of its franchise, stands on the same footing as that of a private individual, and may be condemned by another corporation under the general laws. Nevertheless, there must be a liberal consideration of the future, as well as the existing needs of the company whose land is sought to be appropriated, before it can be deprived of any portion thereof; but the mere possibility that the land sought to be taken may at some future time become necessary to the exercise of the franchise of the company owning it, does not exempt it from condemnation." Again, the facts and circumstances surrounding the case must be considered in determining the application of this statement of the law as to the possibilities and contingencies relating to the use, and whether the owner possesses the ability to devote the same to a public use, and whether the conditions are such as to make the public use contingent and problematical.

We do not find anything in the case of Los Angeles v. Los Angeles Pacific Co., 31 Cal. App. 100, 159 P. 992, applicable here.

In Vermont Hydro-electric Corporation v. Dunn, 95 Vt. 144, 112 A. 223, 225, 12 A. L. R. 1495, a case cited by appellants and also by respondent, we find a very full statement of the law and citation of authorities which we think amply sustains the judgment of the trial court in this action. It is there shown that there must be a reasonable probability of use of the property, within a reasonable time; that the exemption does not apply if the use is indefinite and uncertain; and that it must be used without any unreasonable delay. The opinion in this case is so full and complete that we quote therefrom extensively as follows: "It is the settled law of this state that property already legally approriated to a public use cannot be taken for another public use without legislative authority expressly given or necessarily implied. Rutland-Canadian R. Co. v. Central Vermont R. Co., 72 Vt. 128, 133, 47 A. 399; Rutland R., Light & P. Co. v. Clarendon Power Co., 86 Vt. 45, 50, 44 L. R. A. (N. S.) 1204, 83 A. 332. To bring property within the immunity from condemnation under general legislative authority it is not necessary that it be acquired by eminent domain. If its owner has devoted it to a public use which he is under a legal obligation to maintain, it comes within the protection of the rule. 2 Nichols on Em. Dom. § 364; 2 Lewis on Em. Dom. (3d Ed.) § 443; Rutland R., Light & P. Co. v. Clarendon Power Co., supra; Barre R. Co. v. Montpelier & W. River Co., 61 Vt. 1, 4 L. R. A. 785, 15 Am. St. Rep. 877, 17 A. 923; In re Saratoga Ave., 226 N. Y. 128, 123 N. E. 197. And it is not necessary that the property be actually in use for the public purpose to exempt it from the proceeding. In other words, it may be appropriated or devoted to a public use within the law of eminent domain without being actually put to such use. Rutland R., Light & P. Co. v. Clarendon Power Co., supra; In re Newport Ave., 218 N. Y. 274, 112 N. E. 911; New Haven Water Co. v. Wallingford, 72 Conn. 293, 44 A. 235. But a mere voluntary assumption of public service which may be abandoned at any time does not carry with it the privilege of exemption. The test whether land is held for a public use such as will exempt it from condemnation is said not to be what the owner does or may choose to do, but what under the law he must do, and whether a public trust is impressed upon it. A corporation does not so hold its property impressed with a trust for the public use, unless its charter or the general law puts that character upon it so that it cannot be shaken off. In re New York L. & W. Co., 99 N. Y. 12, 1 N. E. 27. While land kept by a corporation bound by law to serve the public in reasonable anticipation of future needs cannot be seized for a different public use under general authority, land held for purposes other than those pertaining to its franchise may be taken as freely as from a private individual. 2 Nichols on Em. Dom. § 364, and cases there cited. The element of necessity plays an important part in the determination of the question. While liberal consideration should be given to the future as well as the existing needs of the corporation, the exemption will not extend to property held for future use upon the mere possibility that it may at some future time become necessary to the exercise of its corporate franchise. Reasonable expectation of future needs is required to protect the property from condemnation. Scranton Gas & Water Co. v. Delaware, L. & W. R. Co., 225 Pa. 152, 73 A. 1097; Goldfield Consol. Mill. & Transp. Co. v. Old Sandstorm Annex Gold Min. Co., 38 Nev. 426, 150 P. 313; Cincinnati, S. & C. R. Co. v. Belle Centre, 48 Ohio St. 273, 27 N. E. 464; 20 C. J. 601. The court must deal with conditions that exist at the time condemnation is asked. Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co., 161 Mo. 288, 51 L. R. A. 936, 84 Am. St. Rep. 717, 61 S. W. 684. Nor is the exemption indefinite in point of time, but the property must be subjected to the use for which it is held within a reasonable time. Denver Power & Irrig. Co. v. Denver & R. G. R. Co. [Denver Power & Irrig. Co. v. Colorado & S. R. Co.], 30 Colo. 204, 60 L. R. A. 383, 69 P. 568; East Hartford Fire Dist. v. Glastonbury Power Co., 92 Conn. 217, 102 A. 592. The general rule to be gathered from the authorities is that property is devoted to or held for a public use, so as to be exempt from condemnation for a different public use under general authority, when used in immediate and necessary connection with a public trust, or when acquired by a public service corporation for a necessary purpose pertaining to its franchise and held in reasonable anticipation of its future needs, with a bona fide intention of using it for such purpose within a reasonable time. For additional cases see State ex rel. Union Trust & Sav. Bank v. Superior Court, 84 Wash. 20, 145 P. 999, 149 P. 324; State ex rel. South Fork Log Driving Co. v. Superior Court, 94 Wash. 691, 163 P. 15; St. Louis, A. & T. H. R. Co. v. Belleville City R. Co., 158 Ill. 390, 41 N. E. 916; In re Rochester H. & L. R. Co., 110 N. Y. 119, 17 N. E. 678. It follows that to sustain the plaintiff's claim that the property in question is held devoted to a public use, it should appear that it is reasonably necessary to a proper discharge of the plaintiff's legal obligation to the public, and that in good faith it intends to use the property for such purpose without unreasonable delay. These are largely questions of fact to be inferred from the circumstances under which the property is held."

Again, as shown by the case of State v. Chehalis Boom Co., 82 Wash. 509, 144 P. 719, 721, mere ownership of property by a public service corporation does not render it immune from condemnation. We quote therefrom the following: "The mere fact of ownership of this property by respondent, even though it is a public service corporation, is no impediment to the acquisition of such property through eminent domain proceedings by relator. It is not the mere ownership of property by a public service corporation that protects it from acquisition by another public service corporation seeking to acquire it for a public use by right of eminent domain; but the question of such a right of acquisition must find its answer in the present or prospective use of such property," etc. In that case it appears that the court there was authorized to weigh the comparative advantages flowing to the public by the ownership of the condemnor and condemnee. This, of course, does not enter into the consideration of the case before us. The opinion from which we have quoted cites a number of cases to support the rule just stated.

To the same effect is the case of Borough of Florham Park v. Borough of Madison, 77 N. J. Law, 260, 72 A. 4, where it is said: "Immunity from condemnation accorded to lands held by any municipality for the purposes of a water supply * * * is not created by the mere execution and delivery of a deed of lands to a municipality for such uses, and the acceptance of the same by the common council of such municipality." The same ruling was had in the same case upon a subsequent hearing. 78 N. J. Law, 446, 78 A. 753. To the same effect is the case of East Hartford Fire Dist. v. Glastonbury Power Co., 92 Conn. 217, 102 A. 592, where the Supreme Court of Connecticut held that the mere ownership of property did not exempt it from condemnation proceedings. See, also, Indiana Power Co. v. St. Joseph, etc., Power Co., 159 Ind. 42, 63 N. E. 304, 64 N. E. 468.

[4] The respondent urges the fact that the appellants stood by for a number of years, to wit, from some time in 1923, until shortly before the institution of these proceedings, made no objection to the work being done by the utilities company, and negotiated to the extent which we have mentioned on the part of Thayer and the power company, and also that the city of Lodi had made inquiries as to obtaining electric power from the power plant of the utility district, and that they are equitably estopped, citing in support thereof a number of cases, two of which we will mention: Collier v. Merced Irrig. District, 2 P.(2d) 790, decided by the Supreme Court, August 31, 1931; and the case of Gravelly Ford Canal Co. v. Pope & Talbot Land Co., 192 Cal. 4, 218 P. 405. However, these cases and others cited by the respondent in support of estoppel, we think, are not wholly applicable, the holding in these cases being that an injunction will not be allowed to a property owner who has stood by until after great sums of money have been expended in the construction of the power or irrigation project, and that damages only will be allowed. What is said in those cases, however, is pertinent to be considered by the trial court in determining the questions of fact to which we have heretofore referred, as to whether the appellants were or were not complying with the requisites of section 1240, Code of Civil Procedure, as to the purposes and uses of the property, and as to the purposes of the conveyance of the property by the Colorado Power Company to the city of Lodi.

We do not find anything in the case of City of San Diego v. Cuyamaca Water Co., 209 Cal. 105, 287 P. 475, affecting any rule of law hereinbefore stated.

[5, 6] Objection is made by appellants relative to the ruling of the trial court as to the admission and rejection of testimony, it being insisted that the testimony relative to the financial condition of the city of Lodi, its bonded indebtedness, and whether it could or could not legally float an additional bonded indebtedness to construct the projected works, was erroneously admitted. With this

contention we cannot agree, as such testimony bore directly upon whether the city of Lodi either would or could make any immediate use for power purposes of the property involved in this action, or whether such use was only remote and problematical. Likewise, the ruling of the court excluding protests against the building of the Pardee Dam by others than the appellants herein was unquestionably correct. Some of the findings of the trial court appear to us to be immaterial as contended by the appellants, but whether correct or incorrect, they do not affect the vital questions involved herein.

[7, 8] Appellants also contend that the trial court erred in fixing the damages allowed. However, our attention has not been called to any testimony which really supports such contention. On the part of the respondent testimony was introduced to the effect that there were no substantial damages, and that the market value of the property involved would not be decreased by the construction of the work of the utility district in carrying out its plans of operation. These witnesses testified that the value of the land under the natural flow of the river was considerably less than the damages allowed by the court. The testimony of these witnesses varied from $5,175 to $7,595. On the part of the appellants witnesses were introduced who testified that the value of the property, including its riparian rights, was approximately $300,000. At the conclusion of the cross-examination of the witnesses referred to, motions were made to strike out the testimony of these witnesses. These motions were timely interposed but we have not been pointed to anything in the record indicating the ruling of the court on these motions. However, the findings of the court and the judgment show that the estimates of these witnesses were disregarded. That the court was correct in so doing appears from an examination of the basis upon which the estimates were made. A reference to the testimony of one or two of the witnesses for the appellants will show that no proper basis was laid for estimating the damages. Question to the witness Herman: "Your $290,000.00 you arrived at in this way: You calculated how much it would cost to build a dam; how much it would cost to put in a power plant; how much it would cost to operate it; then you capitalized the value of the land and gave it a certain percentage? A. I capitalized the values that were there." This witness further testified that he arrived at his value by assuming that the plant would cost $363,300, and that the sale output of energy would be at the rate of 4½ mills per kilowatt, and then capitalized this net profit at 8 per cent., and the sum which invested at 8 per cent. would yield the amount of net profit was the sum which he fixed as the market value. The witness Grunsky placed the value at $360,000, approximately $1,800 per acre, and answered the question as follows:

"Q. Your method of arriving at that valuation is to capitalize the returns that would be secured from the revenue of the power generated at this plant after you took out the expenses of building the plant? A. That is one method that was considered.

"Q. What other method did you use? A. Perhaps I should answer that question this way: That I considered a number of different conditions of sale in the manner that you have indicated.

"Q. Mr. Grunsky, I would like a direct answer to this if you will. You said that was one method. If there is any other method that you use, will you please state it? A. Well, that is the method.

"Q. That is the only method? A. That's right."

The other expert witnesses all based their calculations upon capitalizing the investment, figuring the returns, possible sales, etc. That the testimony of witnesses who based their estimate of values upon estimated profits, capitalizing the investment, etc., furnishes no legal basis for fixing damages, is a settled law of this state, in support of which we need only cite the cases of City of Stockton v. Vote, 76 Cal. App. 369, 244 P. 609, and East Bay Municipal Utility District v. Kieffer, 99 Cal. App. 240, 278 P. 476, 279 P. 178, and the authorities there cited.

The respondent makes the point that under the cases of Chester v. Carmichael, 187 Cal. 287, 201 P. 925, and Mahoney v. San Francisco, etc., 201 Cal. 248, 257 P. 49, and authorities there cited, the deed of the Colorado Power Company to the city of Lodi is void, but from what we have said, it does not appear necessary to determine this question; nor is it necessary to express any opinion as to the validity or invalidity of section 11 of the Water Commission Act (as amended by St. 1923, p. 124) wherein the Legislature purports to abrogate riparian rights on account of nonuser.

Other questions have been tendered and considered, but not being such as to affect the decision herein, are not mentioned in detail. We may add, however, that we find nothing in the case which would warrant the application of the apportionment provisions contained in subdivision 4 of section 1240, Code of Civil Procedure.

The judgment of the trial court is affirmed. Costs awarded appellants.

We concur: **PRESTON, P. J.; THOMPSON, J.**

119 Cal.App. 230

MADDOX v. HOGIN.

Civ. 4588.

District Court of Appeal, Third District, California.

Dec. 15, 1931.

Appeal and error ⚷787.

Where no undertaking was filed for appeal costs, and no proceedings for bill of exceptions were pending in trial court, wherein order terminating proceedings to obtain transcript was filed, appeal *held* dismissed (Code Civ. Proc. § 953).

> Clerk's certificate disclosed that judgment was rendered January 27, that on April 10 plaintiff filed notice of appeal under Code Civ. Proc. § 953, and requested shorthand reporter to prepare transcript of testimony, and that there was on file in trial court an order terminating proceedings to obtain transcript on appeal, which was entered November 9.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Irma Fay Maddox against G. M. Hogin, individually and as Sheriff of Stanislaus County. From the judgment, plaintiff appeals. Motion to dismiss the appeal.

Appeal dismissed.

Hawkins & Hawkins, of Modesto, for appellant.

T. B. Scott, of Modesto, and Edward R. Eliassen and C. Leonard Rosenberg, both of Oakland, for respondent.

PER CURIAM.

It satisfactorily appearing from the certificate of the clerk of the Superior Court of Stanislaus county wherein the above-entitled action was tried that judgment was rendered on the 27th day of January, 1931; that on the 10th day of April, 1931, the plaintiff filed notice of appeal to this court, under the provisions of section 953, Code of Civil Procedure; that on April 10, 1931, a request was made of the shorthand reporter to prepare a transcript of the testimony taken in said cause; that no undertaking has been filed in the court for costs on appeal; that no proceedings for a bill of exceptions are pending in the trial court; that there is on file in said court an order terminating proceedings to obtain a transcript on appeal, which was entered on the 9th day of November, 1931:

From which it follows that the appeal in this cause should be dismissed. And it is so ordered.

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119 Cal.App. 192

FOELLMER v. MIDWAY LIME & CEMENT CO. et al.

Civ. 4459.

District Court of Appeal, Third District, California.

Dec. 12, 1931.

Mortgages ⚷378.

Foreclosure of trust deed constituting second lien wiped out subsequent mechanic's liens; hence mechanic's lienors could not complain because first mortgagee made advancement under optional condition of mortgage.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Chris J. Foellmer against the Midway Lime & Cement Company, Fred Shipley, E. R. Locke, and Steller Bros. & Skoog, a copartnership, and others. From an adverse judgment, Fred Shipley, E. R. Locke, and Steller Bros. & Skoog appeal.

Affirmed.

D. Chase Rich, of Los Angeles, and John J. Dillon, of Culver City, for appellants.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for respondent.

Mr. Presiding Judge PRESTON delivered the opinion of the court.

Action to quiet title to real property in the city of Los Angeles. After trial, a decree and judgment was entered quieting plaintiff's title to the property in question. From this judgment, the defendants Fred Shipley, E. R. Locke, and Steller Bros. & Skoog, a copartnership, have appealed.

The facts are briefly these: On December 1, 1926, the property in question was owned by Miss Leora Ward, and was unimproved vacant property. On that day Cavaglieri Mortgage Company agreed to loan her not exceeding $3,500 to be used in the erection of a dwelling upon said property. A mortgage for $3,500 was executed and recorded before any work was commenced on the building. This agreement between Miss Ward and the Cavaglieri Mortgage Company provided that $1,000 of said sum was to be advanced when the building was ready for plastering, $600 when all plastering was completed, $800 when said building was completed, and the balance of $1,100 to be advanced thirty-six days after notice of completion was filed. The agreement further provided that the mortgage company was under no obligation to make any advances, except the first, unless the building was erected; and further provided that, in case of abandonment, the mortgage company could, but they were under no obligation

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to do so, use the balance of the funds on hand for the purpose of completing the building.

After the execution of this agreement and first mortgage, and on December 6, 1926, Miss Ward executed and delivered to Chris J. Foellmer, the plaintiff and respondent herein, a deed of trust on said real property to secure the payment of a promissory note for $1,081. This deed of trust was duly recorded on December 10, 1926. After the deed of trust was executed and recorded, the appellants, who are lien claimants, began the furnishing of materials for the erection of said building. Default was made in the payment of said note secured by said deed of trust, and, by reason of said default, the trustee under the deed of trust, caused said property to be sold, and respondent became the purchaser, and on December 31, 1927, received a deed.

No claim is made by any of the appellants that any materials were furnished for said building prior to the date of recordation of said deed of trust. In fact, appellants stated that the lien of Steller Bros. & Skoog attached to the property March 1, 1927, and that Shipley and Locke's lien attached April 7, 1927.

Prior to the completion of said building, but after $2,500 had been advanced under the first mortgage, work on the building was abandoned. The Cavaglieri Mortgage Company thereupon exercised their option under the loan agreement, and completed the building, using for that purpose the $1,000 then unexpended in their hands.

The only point raised by this appeal is that, the last $1,000 advanced by the Cavaglieri Mortgage Company being optional and not being required under their loan agreement, the liens of appellants, as their attorney expresses it, "cut in ahead" of the $1,000 portion of the first mortgage.

There is no merit in this contention. As above stated, it is nowhere contended that the mechanics' liens in favor of appellant were prior to the deed of trust under which respondent acquired title. Appellants seem to be of the opinion that, inasmuch as the first mortgagee advanced $1,000 on the first mortgage loan, when it was not legally obligated to do so, the lien claimants are, in effect, to be subrogated to the rights of the first mortgage to the extent of $1,000. They overlook the fact that the action brought by respondent in this case is an action to quiet title as against their claims of lien, and does not affect the Cavaglieri mortgage in any respect. Under the facts, there was no question but that the deed of trust was a lien prior to the lien of the mechanics, and that the sale thereunder wiped out all claims that appellants may have had against said property. The court, under these facts, properly determined that appellants had no lien against the real property.

Before appellants could be heard to complain about voluntary payment having been made by the first mortgagee, it was necessary for them to either have paid the deed of trust or purchased the property at the trustees' sale had under the deed of trust; having done neither, they are in no position to question the first mortgage, and have absolutely no standing in this case.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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119 Cal.App. 161

TARANTO et al. v. DICK.

Civ. 4454.

District Court of Appeal, Third District, California.

Dec. 11, 1931.

1. Appeal and error ⚿1024(4).

Determination of motion to set aside default, decided on conflicting affidavits, is conclusive in absence of clear abuse of discretion (Code Civ. Proc. § 473).

2. Judgment ⚿143(17).

Court may properly set aside default under evidence judgment was entered in opposition to oral agreement extending time relied on in good faith.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Suit to rescind contract to purchase real property brought by Mabel B. Taranto and another against Alex Dick. Judgment for plaintiffs by default, and from an order denying a motion to set it aside, defendant appeals.

Affirmed.

I. Henry Harris, of Los Angeles, for appellant.

Andreani, Haines, Bisher & Carrey, of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order denying the motion to set aside and vacate a judgment which was entered on default for failure to answer within the time allowed by law.

The plaintiff instituted a suit for rescission of a contract to purchase real property for a breach of covenants therein contained, and to

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

recover $1,000 which was advanced on account of the purchase price thereof. The complaint was filed in October, 1928. The defendant commenced negotiations with the object of securing a compromise of the issues in dispute. It is conceded that the attorneys for the respective parties conferred regarding the proposed settlement on December 26, 1928. Satisfactory terms were not agreed upon. The default of the defendant for failure to answer the complaint was entered December 31, 1928. January 7, 1929, a default judgment was duly entered. The defendant subsequently served and filed, pursuant to section 473 of the Code of Civil Procedure, a motion to set aside the default and to vacate the judgment for excusable neglect, which was heard by the court on January 14, 1929. This application was determined upon affidavits of the respective parties which were conflicting with respect to the notice of the entry of default.

The affidavit of Mr. Harris, attorney for the appellant, avers that Mr. Haines, one of the plaintiffs' attorneys, told him over the telephone: "No default would be entered until ample time was afforded him within which to consult counsel and interpose an answer, and further stated to the affiant that he need not interpose any answer until ten days after negotiations were broken off, or until notice was given." In the counter affidavit of Mr. Haines, he avers that on December 26, 1928, he verbally notified Mr. Harris "that negotiations in respect to a settlement were at an end." He also denies that he ever discussed the subject of entering default, or that he promised Harris additional time after the termination of negotiations, or at all, within which to file an answer. Mr. Prudhon, an attorney who was associated with counsel for the respondent, was also charged with making oral promises to extend the time for defendant to answer, in the event of a failure to reach a settlement of the case, until after formal notice to do so had been first served. Mr. Prudhon also filed a counter affidavit in the proceeding to set aside the default judgment, in which he specifically denied each and all of the material averments. Upon these conflicting affidavits, the court denied the application to set aside the default or vacate the judgment. From this order, the defendant has appealed.

[1, 2] On appeal from an order refusing to set aside a default judgment where the motion was determined upon affidavits of respective parties which were contradictory regarding the essential issues involved, this court may not hold there was an abuse of discretion on the part of the trial court. Upon satisfactory evidence that a default judgment was entered in opposition to an oral agreement extending the time within which to answer, when the stipulation is relied upon in good faith, a court may properly set aside the default and vacate the judgment. 14 Cal. Jur. 1032, § 93. But the determination of such a motion, which is presented pursuant to section 473 of the Code of Civil Procedure, when it is decided upon conflicting evidence, will be conclusive upon the appellate court, unless it should clearly appear the trial court has abused its discretion. Brown v. De Waard & Sons, 99 Cal. App. 222, 278 P. 257; 14 Cal. Jur. 1072, § 115. It was exclusively the province of the trial judge to determine the credibility of affiants and the weight of the evidence which was adduced. In Smith v. Pickwick Stages System (Cal. App.) 297 P. 940, 941, it is said: "These two affidavits are in direct conflict in every important particular. The trial court accepted the affidavit made on behalf of plaintiff as true. This action of the trial court in determining whom to believe is conclusive on appeal to this court."

Under the circumstances of the present case, the denial of the appellant's motion to set aside the default and vacate the judgment rested in the sound discretion of the trial court. This discretion may not be interfered with. Coleman v. Rankin, 37 Cal. 247.

The order is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 126

BOLLES v. HILTON & PALEY, Inc., et al.

Civ. 6892.

District Court of Appeal, Second District,
Division 1, California.
Dec. 10, 1931.

Municipal corporations ⚿808(1).

Abutting owner *held* not liable for pedestrian's injuries sustained in fall resulting from defective condition of sidewalk; no statutory liability being shown.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Lillie H. Bolles against Hilton & Paley, Inc., and others. From the judgment, plaintiff appeals.

Affirmed.

I. W. Bane, of Los Angeles, for appellant.

Samuel J. Crawford, of Santa Monica, for respondents.

CONREY, P. J.

The defendants conducted a store in a building fronting on Third street in Santa Monica. Plaintiff, while walking along the public sidewalk in front of said store, slipped upon some wet paper and rubbish and fell, thereby causing the injuries of which she complains. The wet condition of the sidewalk was caused by water dripping from a faucet affixed to the store building. The faucet was located six inches from the dividing line between the store of defendants and adjoining premises. The water, however, came from a pipe line from the adjoining premises and not from defendants' store. There is no evidence that defendants had anything to do with the adjoining premises, or that they were owners of the building. At the trial, on the conclusion of the plaintiff's evidence, the defendants moved for a nonsuit on the ground that there was no evidence of negligence on the part of the defendants. The court thereupon, and upon the same ground, granted the motion for nonsuit, and judgment was entered accordingly. Plaintiff appeals from the judgment.

"At common law, no duty was cast upon the owner of the abutting property to maintain the street in good repair. If such duty exists in this state, it must be by virtue of some statutory enactment. Since culpable negligence cannot exist except from failure to perform a duty imposed by law or by contract, if the duty to repair the sidewalk in this instance was not cast upon defendants they were not responsible for its condition. * * *" The quotation is from Martinovich v. Wooley, 128 Cal. 141, 60 P. 760. In that case, as in this, the injury was occasioned to a passing pedestrian because of defective condition of the sidewalk in front of defendant's property.

This case does not come within any of the apparent exceptions to the rule. Some illustrations of those exceptions may be given: In Monsch v. Pellissier, 187 Cal. 790, 204 P. 224, where the Martinovich Case received some attention, the defendant constructed and maintained in the sidewalk a light-well above an area or vault. Since this light-well was maintained for the sole and exclusive benefit of the defendant, it was held that it was her duty to keep the light-well in safe repair and that she was liable for injuries caused by defects therein. A similar case in principle is Granucci v. Claasen, 204 Cal. 509, 269 P. 437, 59 A. L. R. 435.

In Long v. John Breuner Co., 36 Cal. App. 630, 172 P. 1132, it appeared that a concrete incline having an excessive slope upward from the street, led from the sidewalk to the entrance to the store. The plaintiff did some shopping in the store and, on leaving the premises, slipped on the incline close to the entrance. It was held that, as the defendant was engaged in conducting a merchandise store which it invited the public to patronize, the duty rested upon defendant to keep the entrances and passageways to and from the premises in a safe condition and to use ordinary care to avoid accidents or injury to those properly and lawfully entering upon or leaving its premises through such entrances or passageways in connection with the transaction of business on such premises.

In the case at bar we have no such exception to the conditions which require the application of the general rule as above stated. "In this country, in the absence of a statute or ordinance requiring them to do so, abutting owners are under no obligation to keep the street or sidewalk in front of their premises in repair or in a safe condition for public travel." 13 R. C. L. p. 86, also at page 321. In the case at bar the plaintiff neither pleaded nor proved the existence of any conditions which would create a statutory liability. It follows that the court did not err in granting the motion for nonsuit.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

119 Cal.App. 222

CASSON v. ATCHISON, T. & S. F. RY. CO.

Civ. 6982.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1931.

Rehearing Denied Jan. 12, 1932. Hearing Denied by Supreme Court Feb. 11, 1932.

1. **Appeal and error ⟹930(1).**

Upon appeal from judgment for injured railroad employee, evidence was to be viewed in light most strongly tending to establish want of ordinary care chargeable to railroad.

2. **Master and servant ⟹276(2).**

In railroad employee's action for damages sustained in rescuing fellow employee from imminent peril on signal pole, plaintiff had burden to prove, by preponderance of evidence, injuries resulted from negligent droping of fellow employee upon him by other employees' failure to hold rope.

> Record disclosed that a lineman of defendant railroad was injured while working at top of a pole; that plaintiff, also a lineman, ascended pole, caused rope to be thrown over cross-arm, placed it about fellow employee's body, and proceeded to descend with latter on his shoulders while several employees in turn held portion of weight and aided in lowering him by such rope which they dealt out from ground.

3. Master and servant ⚷278(1).

In action by interstate railroad's injured employee for injuries sustained in rescuing lineman from imminent peril, evidence *held* not to show defendant's negligence, thus barring recovery.

4. Negligence ⚷2.

Negligence is breach of duty.

Where there is no duty or no breach thereof, there can be no negligence.

5. Negligence ⚷12.

One acting according to best judgment in sudden emergency, though omitting to act in most judicious manner, is not chargeable with negligence.

6. Appeal and error ⚷110.

No appeal lies from order denying new trial.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Frank B. Casson against the Atchison, Topeka & Santa Fé Railway Company. From a judgment in favor of plaintiff and an order denying a new trial, defendant appeals.

Appeal from the order dismissed. Judgment reversed.

Robert Brennan, M. W. Reed, E. T. Lucey, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant.

Bertrand J. Wellman and Charles J. Kelly, both of Los Angeles, for respondent.

CRAIG, J.

The defendant appealed from a judgment entered upon the verdict of a jury awarding to the plaintiff, its employee, damages alleged to have been sustained in rescuing a fellow employee from imminent peril.

The appellant was engaged in transporting passengers and freight in interstate commerce between points in the state of California and eastern terminals, and maintained a system of signals which were operated by wires suspended upon poles along its right of way. One Walter F. Springs, a lineman of the defendant company, was injured while working at the top of a pole. Casson, also a lineman, ascended the pole, caused a rope to be thrown over a cross-arm, placed it about Springs' body, and proceeded to descend with the latter on his shoulder, while several employees in turn held a portion of the weight and aided in lowering him by said rope, which they dealt out from the ground. During said descent, respondent slipped at times, due to insecurity of spurs which he attached to the pole at each step, temporarily relieving him of the weight of his burden, which again was precipitated upon him as release of the rope permitted. In his complaint, respondent alleged: "That the said employees holding the said rope in the lowering of the body of the said injured man did so in such a careless, negligent and unlawful manner that the entire weight of the injured man was thrown in a sudden and unexpected manner upon the plaintiff, whereby and because whereof plaintiff's spurs were caused to come out of the said signal pole and he was caused to slip down the said signal pole a short distance, and that the said employees again further carelessly, negligently and unlawfully failed and neglected to hold the said rope taut and to support the body of the said injured man, whereby the same was caused to again fall upon the plaintiff with great force and violence, whereby he was injured."

[1-3] The respondent's evidence is entitled to be viewed upon appeal in the light which most strongly tends to establish a want of such ordinary care as was chargeable to the appellant under the circumstances of the particular case. But it was the duty of the plaintiff upon the trial to prove by a preponderance of evidence that his injuries resulted from careless and negligent dropping or throwing of Springs upon him with force and violence. by a failure to hold the rope. He testified: "The boys left the rope pretty slack, and I was carrying pretty near all the weight, and I hollered to them to keep the rope tight, that I could not carry the whole load; and I got under a heavy load and one of my spurs cut out and let me,—oh, I probably stepped down six or eight inches, when the whole weight of Mr. Springs got on my shoulders, * * * and in going down every little while I was receiving the load, so it would be light and then I would receive it again; they were trying to pay the rope out and give me a chance to get out from under him." Another employee who had been discharged prior to the trial testified: "I was on the rope * * * I know there were two or three others. * * * I helped pay out the rope. * * * There was a jerk on the rope; I felt it. * * * I could see the pole, but I could not see what was going on very well, because I was in back. * * * As I remember they fell together to the ground. * * * Mr. Springs fell on top. It got away from us. * * *

"Q. Do you know what caused that rope to get out of your hands? A. No." This witness further said: "I don't know if I let go of the rope entirely or not, but I know we lost control." The respondent admitted: "I was excited, * * * certainly I was excited." The appellant stresses the fact that all other employees swore that the discharged lineman who testified as above recited was not one of the men holding the rope, and that the rope did not slip; that his testimony was

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

influenced by personal bias. However, affording the conflicting evidence its most favorable view in support of the verdict and judgment, the jury must be presumed to have accepted the testimony of such witness at its full value. It results that the plaintiff failed to establish the vital fact of negligence under the uniform rule to be applied in such cases. No witness attempted to say that the employees holding the rope carelessly, negligently, or in an unlawful manner caused the weight of Springs to fall, or failed to hold the rope taut. The most that can be said of the testimony of any witness is that, in the haste and excitement of the emergency, appellant's employees in acting suddenly to avoid further peril or injury to Springs, for some unaccountable cause permitted the rope to pass over the cross-arm of the pole more rapidly than was requisite to his safety. That the respondent and his co-workers suddenly became responsible for the life of Springs, that they became excited, and that they acted promptly to the best of their judgment, is not disputed in the record nor in argument. That they rescued him without further harm, and in a manner most convenient and effective under the circumstances, is not denied. Many other features, such as the heat of the day, Casson's physical exhaustion, the failure of his spurs to adhere to the pole, etc., though stressed, were not in issue as a proximate cause of the injury to the respondent.

[4-6] "Negligence is a breach of duty. Where there is no duty or no breach, there is no negligence. An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act or omission is not actionable; and such an act or omission is either the remote cause or no cause whatever of the injury." Moody v. Gulf Refining Co., 142 Tenn. 280, 218 S. W. 817, 819, 8 A. L. R. 1243. The rule, judicially stated, is that one who in a sudden emergency acts according to his best judgment, and who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence. 20 R. C. L. p. 29. "The obligation of an employer in such matters is simply to use reasonable care, that degree of care, as was said by Judge Lurton in a decision of the United States Circuit Court of Appeals, 'which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work.' Westinghouse, etc., Co. v. Heimlich, 62 C. C. A. 92, 127 F. 92, 94. * * *" Sterne v. Mariposa Comm. & M. Co., 153 Cal. 516, 97 P. 66, 69. To recall the testimony of the respondent's most positive witness as to the proximate cause of the injury to himself, Springs fell on him, the rope "got away from us," as he stated, but he made no pretense even to hazard an opinion as to the cause of the rope getting out of their hands. No witness ventured to assert that any act attributable to the appellant was careless or negligent, nor to cite any act that could have been done which was not done. From all of which it follows that the foregoing authorities, and many others which might be cited, preclude a recovery of damages upon the facts presented. An appeal was taken from the order denying a new trial. There is no appeal from such orders.

The appeal from said order is dismissed. The judgment is reversed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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119 Cal.App. 231

KANANANAKOA v. BADALAMENTE et al.

Civ. 8050.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1931.

Rehearing Denied Jan. 15, 1932.

1. Automobiles ⚷192(11).

Owner permitting one known by him to be reckless and incompetent to drive automobile is liable for driver's negligence.

2. Automobiles ⚷245(28).

Whether inference that driver of automobile at time of accident was acting as owner's agent was dispelled by evidence *held* for jury.

3. Automobiles ⚷242(6).

Inference of driver's agency for owner of automobile involved in collision may be drawn from proof of ownership alone.

4. Appeal and error ⚷1002.

Jury verdict on conflicting evidence will not be disturbed on appeal for insufficiency of evidence.

5. Appeal and error ⚷1050(1).

Any error in admitting in evidence automobile driver's written statement, made after accident, that owner had given written permission to drive, *held* not prejudicial to owner as hearsay, in view of owner's testimony.

6. Witnesses ⚷379(4).

Written statement made by witness immediately after automobile accident *held*

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properly admitted for impeachment (Code Civ. Proc. §§ 2049, 2051).

The witness was guest in automobile owned by one defendant and operated by other defendant when automobile ran down pedestrian. When witness was called to stand by plaintiff, it was apparent that he had changed his story to benefit defendant owner. Claiming surprise in this respect, plaintiff's counsel was permitted to read in evidence portions of statement impeaching witness' testimony on the stand, such impeaching evidence tending to show that owner's codefendant was driving car with owner's permission and at his instance.

7. Appeal and error ⚿1067.

Refusing instruction that statements by plaintiff's witness after accident conflicting with statements on stand were to be considered solely for impeachment *held* error prejudicial to defendant.

8. Trial ⚿253(1).

Giving formula instructions, none of which covered all elements of rule in issue, *held* error.

9. Automobiles ⚿246(60).

Requested instruction advising jury that there was no presumption of negligence against automobile owner from fact of accident alone should have been given; res ipsa loquitur doctrine not being involved.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Action by Keoloha Kananaakoa against Steven Badalamente and Earl O'Donnell. From a judgment for plaintiff, defendant last named appeals.

Reversed.

Gibson, Dunn & Crutcher, of Los Angeles (Norman S. Sterry and Philip C. Sterry, both of Los Angeles, of counsel), for appellant.

Rosenthal & Rosenthal and Samuel A. Rosenthal, all of Los Angeles (E. B. Drake, of Los Angeles, of counsel), for respondent.

NOURSE, P. J.

Plaintiff sued for damages arising out of an automobile accident. The cause was tried with a jury, and plaintiff had a verdict for $10,000. The defendant O'Donnell has appealed upon a bill of exceptions.

Briefly stated, the facts are that the defendant Badalamente was an employee of a parking station where appellant kept his cars, and was an intimate friend of appellant; that he had frequently driven one of appellant's cars with appellant's permission, had been arrested on at least two occasions for reckless driving, and thereafter had received from appellant written permission to drive the car. On the night previous to the accident the appellant attended the wedding of Michael Rizzotti, a friend of Badalamente. On the night of the accident, the newly married couple attended a dinner at the home of the defendant Badalamente, and the latter was driving them to their home in a car owned by Dr. O'Donnell when he ran into and injured plaintiff, a pedestrian, at a street intersection. Immediately following the accident, Rizzotti made a statement in which he said appellant said to him: "Use my auto as my guests. Tell Steve (Badalamente) my chauffeur, where you wish to go." On the trial, plaintiff planted his case on the unquestioned negligence of defendant Badalamente in the operation of the car, and, as to appellant O'Donnell, plaintiff rested on the proof that this appellant gave Badalamente permission to drive the car with the knowledge that his codefendant was a reckless and careless driver, and upon the inference that Badalamente was in the service of the owner.

[1] As to the first theory, the evidence is undisputed that Badalamente had been arrested for reckless driving, that appellant had frequently been called out of bed to release him from jail, and that, with this knowledge, he gave Badalamente a card reading: "Steve Badalamente has permission to drive this Mercer. E. O'Donnell."

Counsel say they have found no authorities directly holding that it is or is not negligence for the owner of an automobile to permit a careless and reckless driver to take his car out upon the public highways. This principle of law seems to be now very well settled. In Easton v. United Trade School Con. Co., 173 Cal. 199, 201, 159 P. 597, L. R. A. 1917A, 394, the Supreme Court held that a school of instruction in the operation of vehicles is liable for an injury resulting from the inexperience of a student driver while operating a vehicle with the permission of the school. In Owens v. Carmichael's U-Drive Autos, Inc., 2 P.(2d) 580, we held that the owner of an automobile is liable when he negligently intrusts his automobile to an incompetent person who commits a tort while operating it. In that case we said: "Such negligence is most frequently predicated upon the fact that an owner knowingly intrusts his car to an incompetent person, * * *" and cited as authority for the proposition Rocca v. Steinmetz, 61 Cal. App. 102, 214 P. 257, where numerous other cases to the same point may be found. As said in the Rocca Case (page 109 of 61 Cal. App., 214 P. 257, 260): "If he were to intrust his car to a person whom he knew to be insane or intoxicated or utterly incompetent to run a car, it would certainly shock the common understanding to hold that he was not chargeable with negligence. There can be no difference in principle but only in degree, where he knows the driver to be careless and reckless in the operation of the machine. In any such case, consideration for the safety of others requires him to withhold his consent and thereby refrain from participating in any accident that is liable to happen from the careless and reckless driving of such a dangerous instrumentality."

[2-4] On the issue of agency, respondent rested upon the inference growing out of the ownership of the car. 19 Cal. Jur., p. 702; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73. This, however, was supplemented by evidence of admissions made by appellant to respondent immediately following the accident. On the trial, appellant offered testimony tending to rebut the inference. It was thus a question for the jury to determine whether the inference was dispelled. Poncino v. Reid-Murdoch & Co. (Cal. Sup.) 298 P. 818. The latter case is a complete answer to appellant's point that the trial court should have granted his motion for a nonsuit and his motion for a directed verdict on this issue of agency. But it is argued that the inference of negligence was completely overcome by evidence offered by the appellant. The jury was not required to believe the testimony of these witnesses. It might have drawn the inference of agency from the proof of ownership alone. But there was other evidence supporting the inference. Under such circumstances, we could not disturb the verdict on this ground. Mah See v. N. Amer. Acc. Ins. Co., 190 Cal. 421, 426, 213 P. 42, 26 A. L. R. 123; Bushnell v. Yoshika Tashiro et al. (Cal. App.) 2 P.(2d) 550.

[5] Criticism is made of the ruling of the trial court in admitting in evidence a written statement made by Badalamente immediately following the accident. The objectionable portion of the statement is: "Dr. O'Donnell has given me written permission to drive this auto at any time." This written permission was in evidence signed by the appellant. True it is that appellant denied that he gave Badalamente written permission to use the car, but he admitted that he gave oral permission, "also gave him a little note to take with him * * * reading: 'Steve Badalamente has permission to drive this Mercer. E. O'Donnell.'" If the statement was hearsay as to appellant, the objectionable matter in it was proved by competent evidence and appellant was not prejudiced by the admission.

[6] The written statement of the witness Rizzotti was properly admitted. This witness was one of the guests in the machine at the time of the accident. He was called by the plaintiff, and it was at once apparent that he had changed his story to benefit the appellant. Claiming surprise in this respect, counsel for plaintiff was permitted to read in evidence portions of the statement impeaching the testimony given on the stand. The objectionable portion of this statement was: "Dr. O'Donnell said to me, 'use my auto as my guests. Tell Steve, my chauffeur, where you wish to go.'" The materiality of the statement is plain. The appellant attended the wedding of the witness on the night preceding the accident. If he offered the use of his car to the newly wedded couple as his guests, with his codefendant as chauffeur, this was evidence tending to show that his codefendant was using the car with his permission and at his instance. The statement was admissible under the provisions of sections 2049 and 2052, Code of Civil Procedure. The purpose of these sections is said in People v. Sliscovich, 193 Cal. 553, 554, 226 P. 611, 615, to be "to permit a party who has in good faith, produced a witness upon the stand in the belief that the witness will give certain testimony in support of the party calling him to show that prior to being called to the witness stand the witness made statements which, if admitted in evidence, would have been favorable to the party calling the witness." Here the testimony given by the witness on the stand was prejudicial to the plaintiff, and, in view of the circumstances, we cannot say that plaintiff was not surprised by such testimony. It is not, therefore, a case of a witness failing to testify favorably to the party calling him. It is a case where the witness gives testimony unfavorable to the party calling him and which such party seeks to show to be untrue through the production of a prior statement of the witness contrary to such testimony.

[7] However, the serious question raised on this appeal is the refusal of the trial judge to give the instruction proposed by appellant advising the jury that these statements were not to be considered as evidence of the facts contained therein, but as tending to show that the witnesses had at other times made declarations contrary to their testimony on the witness stand. The subject-matter of the proposed instruction was not given in any other instruction, and the refusal to give it was error. Adkins v. Brett, 184 Cal. 252, 259, 193 P. 251. The prejudice of the error is patent. When the statements were made by Badalamente and his guest immediately following the accident, they were designed to protect Badalamente in his right to use appellant's car on that occasion. Neither statement was made in the presence of the appellant, and neither was evidence as to him. The question of the relation between appellant and Badalamente was a close one, upon which the evidence was sharply contradictory, and it is altogether probable that this

question was determined upon facts contained in these statements.

[8] The criticism of the refusal to give other proposed instructions does not require lengthy discussion. Those relating to the "borrower" rule were not properly worded. They were in effect formula instructions, no one of which covered all the elements of that rule which were at issue. See, generally, Rock v. Orlando, 100 Cal. App. 498, 280 P. 377; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697; Hall v. Puente Oil Co., 47 Cal. App. 611, 191 P. 39; Easton v. United Trade School Con. Co., 173 Cal. 199, 159 P. 597, L. R. A. 1917A, 394.

[9] Proposed instruction No. 8 advised the jury that there was no presumption of negligence against defendant from the fact of the collision alone. The doctrine of "res ipsa loquitur" was not involved; hence we can see no reason why this instruction should not have been given.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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119 Cal.App. 296

WILSHIRE BOULEVARD CONGREGATIONAL CHURCH OF LOS ANGELES v. DYER.

Civ. 4445.

District Court of Appeal, Third District, California.

Dec. 17, 1931.

Rehearing Denied Jan. 16, 1932. Hearing Denied by Supreme Court Feb. 15, 1932.

Appeal and error ⚿907(3).

Where appeal is on judgment roll alone, presumption is that evidence supported trial court's finding.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

Action by the Wilshire Boulevard Congregational Church of Los Angeles against Frank Dyer. From a judgment for plaintiff, defendant appeals.

Affirmed.

Botsford, Hurtt & Schumacher and Frank G. Tyrrell, all of Los Angeles, for appellant.

Geo. S. Beebe and Schweitzer & Hutton, all of Los Angeles, for respondent.

PLUMMER, J.

The plaintiff had judgment in an action to cancel a contract of employment of the defendant as pastor of the above-named church, from which judgment the defendant appeals.

The record shows that pursuant to a vote of the members of said church the plaintiff and defendant, on the 28th day of July, 1925, entered into an agreement, whereby the plaintiff retained the services of the defendant as pastor of the Wilshire Boulevard Congregational Church, for the period of ten years next succeeding, at a salary of $7,500 per year. The complaint sets forth a number of grounds for the cancellation of the agreement just mentioned, and also that the board of trustees of the plaintiff, prior to the beginning of this action, passed a resolution purporting to cancel said agreement and to dispense with the services of the defendant as pastor of said church. The prayer of the complaint is to the effect that, if said resolution be held ineffective, the agreement be canceled for the reasons set forth therein. A supplemental and amended complaint was also filed in the action setting forth additional grounds for the cancellation of the agreement.

The action is brought to us upon the judgment roll alone, and, if any of the findings of the trial court are sufficient to sustain the judgment, our inquiry is at an end. This is true, even though some of the findings may be subject to the objections urged by the appellant that the facts found are solely and exclusively within the jurisdiction of ecclesiastical authorities. We do not need to cite authorities to support the statement that, where an appeal is from the judgment roll alone, it will be presumed that the testimony sufficiently supports the findings of the trial court.

This cause was before the appellate court in and for the second appellate district where practically all the questions necessary for our consideration in the determination of this case were passed upon, and, after being decided, hearing in the Supreme Court was denied. See opinion in the case of Dyer v. Superior Court, 94 Cal. App. 260, 271 P. 113.

Without extending the length of this opinion by copious quotations therefrom, we refer to pages 268 and 269 of the above-mentioned case, as reported in 94 Cal. App., 271 P. 113, 117, for a full and complete statement of the law relative to the power of courts in actions such as this, and of the full faith and credit to be given to the action of the ecclesiastical tribunal having power to pass upon the status of the pastor of a Congregational church, and to withdraw fellowship from any one purporting to act in such capacity, and to take away his character, designation, and ecclesiastical standing as a pastor in a Congregational denomination, and likewise, the effect thereof.

In the case to which we have just referred, it was held that the trial court had jurisdiction to make and file the findings to which we hereinafter refer as sufficient to support the judgment. The allegations of the pleadings found by the trial court to be true, and constituting therefore one of the findings, are as follows: "That on May, 1928, upon charges duly and regularly preferred charging Frank Dyer with conduct unbecoming a Congregational minister, a special meeting of the Los Angeles Association of Congregational Churches and ministers was duly and regularly called to be convened at the Mt. Hollywood Congregational Church in the City of Los Angeles, California, June 7, 1928, at the hour of 10 o'clock a. m., for consideration of said charges, and notice of the time and place of said meeting, together with a copy of said charges was duly and regularly served upon, and received by the said Frank Dyer, not less than seven days prior to June 7, 1928; that at said meeting duly and regularly called and held the association, after full and complete hearing of said charges, by a vote of 107 to 1, withdrew the fellowship of said Association from said Frank Dyer, and then and there took from said Dyer his standing as a Congregational minister, and terminated his ministerial character. That there is no appeal from the action of said Association, and said action is final and is still in full force and effect." Finding IX of the trial court is as follows: "That since the commencement of this action said defendant Frank Dyer, has organized and is now conducting in the edifice of the Wilshire Boulevard Congregational Church, a super-denominational church not in fellowship with the Los Angeles Association of Congregational Churches, or any other Congregational Society, known as the American Church, to the exclusion of the said Wilshire Boulevard Congregational Church and its members, and ever since the organization of said American Church, said defendant has been acting as its minister, and has ceased to act as the pastor or minister of the Wilshire Boulevard Congregational Church, or to perform any of the functions of pastor of said last named church."

In support of these findings, it must be presumed that they are amply supported by the evidence showing the action of the ecclesiastical council, and also the finality of such action which dispossesses the defendant of his character and standing as a pastor of the Congregational church. That the trial court had a legal right to make these findings and base its judgment thereon is conclusively established in this case by the authorities cited in the opinion in the case of Dyer v. Superior Court, supra, and the reasoning of the court in the language there used.

It having been heretofore held and established as the law in this case that the trial court had jurisdiction to make the findings which we have quoted, which findings are amply sufficient to support the judgment, and as they do not involve any ecclesiastical determinations, it necessarily follows that the judgment of the trial court must be affirmed; and it is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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119 Cal.App. 312

In re COELHO'S ESTATE.

AZEVEDO et al. v. MARSHALL.

Civ. 8114.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1931.

1. Husband and wife ⚷264.

Clear proof is required to overcome presumption that wife's bank account, started near time of sale of home of herself and husband, was community property (Civ. Code, §§ 162–164).

2. Appeal and error ⚷842(7).

Presumption that wife's bank account was community property was evidence which, when controverted, raised issue of fact, determination of which was conclusive on appellate court (Civ. Code, §§ 162–164).

3. Husband and wife ⚷264.

Evidence *held* insufficient to rebut presumption that wife's bank account was community property (Civ. Code, §§ 162–164).

4. Husband and wife ⚷276(8).

Probate court's finding that husband was an heir of wife's estate, which included separately owned realty, did not determine that her bank account was separate property (Civ. Code, § 164).

Even though probate court in determining heirship of deceased wife's estate inadvertently used the term "heir" as applying to the husband, in reference to the wife's personal property, such inadvertence could have no force, in view of the positive finding that the personalty was community property.

5. New trial ⚷108(1).

Denial of new trial on ground of newly discovered evidence *held* proper where such evidence, in view of conceded circumstances, would be of little value.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Maria Rose Coelho, also known as Marie Rose, deceased. From a decree of settlement of final account and distribution and from an order denying a retrial of the issues, W. J. Azevedo and others, heirs, opposed by Alfred Marshall, administrator, appeal.

Affirmed.

Dennett & Zion, of Modesto, for appellants.

P. R. Lund and Geo. E. Kelly, both of San Francisco, for respondent.

NOURSE, P. J.

Two appeals are taken on the same typewritten transcripts: The first, from a decree of settlement of final account and of distribution; the second, from an order denying a retrial of the issues.

Manuel Rose Coelho and Maria Rose Coelho were husband and wife. In 1911 they sold a ranch in Alameda county owned by them and purchased the home property involved in the decree as tenants in common. At about the same time Maria opened a bank account in her name with a deposit of $100. Other deposits were apparently made in this account, but, as to them, the record is silent until the year 1916 when she withdrew $2,000 which she loaned on a promissory note, secured by a mortgage, to Caleira and others. Interest on this note was deposited to the same account until the year 1926, when the note was paid to her administrator and the proceeds deposited to the same account. In the year 1921 Maria died intestate leaving, beside her surviving spouse, the relatives who join in this appeal. Following the death of Maria, Manuel married Christina Coelho and died in the year 1923 leaving a will wherein he named his surviving wife as residuary legatee.

Upon the settlement of the final account it was found that the sum in the bank deposit, including the proceeds of the promissory note, amounted to $6,366.32. In the decree this entire sum was found to be the community property of Manuel and Maria Coelho, and, as such, was distributed to the estate of Manuel. The real property was found to be separate property of the two—each owning an undivided one-half interest therein as tenants in common. The heirs of Maria were awarded their respective shares of the realty and, from this portion of the decree, no appeal has been taken.

[1-3] Though several points are argued on the main appeal, the real point at issue is the sufficiency of the evidence to support the finding that the cash in bank was community property. Respondent rested upon the well-settled presumption that all property other than that mentioned in sections 162 and 163 of the Civil Code was community property within the terms of section 164 of the Civil Code, as it read during the period in question. Fennell v. Drinkhouse, 131 Cal. 447, 451, 63 P. 734, 82 Am. St. Rep. 361; Stafford v. Martinoni, 192 Cal. 724, 734, 221 P. 919, and cases there cited. To rebut the presumption the appellants offered the testimony of a witness that, in the year 1911, after the parties had sold their Alameda ranch, he had heard them say that, after they had purchased the new home property "they divied up the money between husband and wife." Other circumstances are referred to in the appellants' briefs as being suspicious, and tainted with fraud, but these "suspicions" appear in the mind of counsel only. There is no evidence in the record which gives them any probative value.

The presumption of the community interest in the property can be overcome only by clear and satisfactory proof to the contrary. Estate of Rolls, 193 Cal. 594, 597, 226 P. 608; Estate of Jolly, 196 Cal. 547, 553, 238 P. 353; Fountain v. Maxim, 210 Cal. 48, 51, 290 P. 576. Such presumption is evidence which, when controverted, raises an issue of fact the determination of which by the trier of the facts is conclusive upon the appellate courts as in other cases. Simonton v. Los Angeles Trust & Savings Bank, 205 Cal. 252, 258, 270 P. 672. Here the evidence tending to rebut the presumption was so weak and improbable that a finding adverse to the presumption would have been without substantial support.

[4] Appellants' second point seems to be that, because, in the proceedings under section 164, Code of Civil Procedure, to determine heirship to the estate of Maria, the probate court found the heirs to be the husband and the appellants herein, the court must therefore "negatively" have found that the property was the separate property of Maria, because, otherwise, the husband could not have been an heir. The point is not well taken. It is conceded that certain real property was involved which was found to be separate property and to which the husband was admittedly an heir. If this term should have been used inadvertently in reference to the personal property, such inadvertence could have no force in view of the positive finding that the personalty was community property. Under the express provisions of section 1401, Civil Code, as they read at the time of Maria's death, all community property (the cash in bank) went directly to her husband, Manuel. As to this portion of her estate the proceedings to declare heirship were not applicable. As Maria held an undivided one-half of the realty as her separate property these proceedings were necessary. In reference to that interest alone the husband was an heir entitled to one-half of his wife's undivided one-half interest as heir, which, of course, was one-quarter of the whole.

[5] We find no error in the order denying the motion for a retrial, which motion was based upon the ground of newly discovered evidence. This "evidence" was in the statement of a party that he overheard a conversation between Manuel and Maria in which Manuel said they had divided the proceeds of the ranch sale back in 1911 and that each had taken $6,000 as his respective share. This testimony if given could have had little, if any, probative value in view of the circumstances which were conceded. If Maria had received that sum it is too plain for argument that she did not deposit it in the bank and that it could not have been the property involved in these proceedings.

The decree and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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119 Cal.App. 277

DEIBLER v. WRIGHT et al.

Civ. 7959.

District Court of Appeal, First District, Division 2, California.

Dec. 17, 1931.

As Modified on Denial of Rehearing Jan. 16, 1932. Hearing Denied by Supreme Court Feb. 15, 1932.

1. Trial 🔑133(6).

Counsel's remark that child injured in automobile accident was harassed in taking of deposition *held* prejudicial error, not cured by admonition to jury.

> Objection was made to remark on ground that it was not supported by any evidence, which fact was admitted; and although court admonished jury to disregard the remarks, the error, because of such deliberate and uncalled for misconduct, was not cured by admonition.

2. Appeal and error 🔑1060(1).

Misconduct of counsel, in action to recover for injuries to child in automobile collision, in attempting to bring out fact that father had served in World War *held* prejudicial error.

> Conduct was attempted to be justified on ground that some inference might be drawn from cross-examination of one of witnesses that child's father was afflicted with tuberculosis. It was apparent, however, that inquiry was solely for purpose of enlisting sympathy of jurors toward child and father because of his World War services, and misconduct was emphasized, following court's sustaining of objection to question, by remark of counsel, "Apparently they don't want that information."

3. Damages 🔑33.

Damages may be recovered for aggravation of existing ailment on account of injury.

4. Damages 🔑142.

Damages sought which were not necessary consequences of act complained of must be specially pleaded.

5. Damages 🔑216(4).

Instruction respecting recovery of damages for aggravation of existing ailment *held* erroneous as leaving to jury question of aggravation to be determined merely on conjecture and surmise.

> Instruction was to effect that if jury believed prior to happening of accident that injured person was suffering from some pre-existing physical ailment or impairment, such fact, if it was a fact, would not preclude recovery of damages for injuries proximately caused by accident in question, and that in event verdict was in favor of plaintiff they might take into consideration in fixing amount of award of damages any aggravation to any pre-existing physical ailment or impairment from which plaintiff may have been suffering proximately caused by injury sustained in accident.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Dorothy Deibler, a minor, by and through her guardian ad litem, Roy A. Deibler, against A. F. Wright and another. Judgment for plaintiff, and defendant named appeals.

Reversed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellant.

Ford & Johnson and Fletcher A. Cutler, all of San Francisco, for respondents.

NOURSE, P. J.

Plaintiff sued through her guardian for damages resulting from an automobile collision. The cause was tried with a jury which returned a verdict in the sum of $7,500. The defendant Wright has appealed upon typewritten transcripts.

The collision occurred on February 23, 1930, on the highway running from Oakland through the Livermore valley. Plaintiff was a child of fourteen years of age. She was riding in a Chrysler car which was driven by her father, and guardian herein, in a westerly direction along a straight stretch of the highway about two and one-half miles west of Livermore. At the same time, defendant was traveling easterly along the same highway directly behind a large truck. The Chrysler car was traveling at a speed of about thirty miles per hour. The truck was traveling at a speed of about twenty-five to thirty miles per hour, and the defendant had followed the truck at the same speed for about two miles. The highway was paved for a width of eighteen feet, with a graveled shoulder on each side approximately ten feet wide. The surface of the paved portion was rippled or "washboardy," and a slight rain had made it wet and slippery. As the defendant approached the slow moving truck, she passed it going to the left side of the pavement, and, as she turned in on her own side of the highway in front of the truck, her car skidded so that the rear wheels went completely off the pavement and onto the shoulder on the right-hand side of the highway, and her car then skidded to the left so that it was forced directly across the highway and in the path of the car in which plaintiff was riding. Plaintiff's witnesses testified that when the defendant first left her lane of traffic behind the truck her car was at a distance of one hundred feet from the car in which plaintiff was riding. Aside from lowering his speed from thirty to twenty miles per hour, the plaintiff's father did nothing to prevent the collision, though the skidding of defendant's car was plainly seen by all occupants of the Chrysler. The evidence is without serious conflict, except as to the matter of the speed of the respective cars and the distance between the two at the time the defendant turned out to pass the truck. Disinterested witnesses on the part of the defendant testified that the plaintiff's car was from two hundred to three hundred feet away when the defendant made this turn. Plaintiff's father and others riding with him testified that this distance was not more than one hundred feet. The truck was drawing a trailer and the full length of the truck and trailer was forty-five or fifty feet. The admitted speed of the truck was from twenty to thirty miles per hour, the speed of defendant's car while passing it was from forty to fifty miles per hour. It was, of course, a mathematical impossibility for defendant to turn out and pass this moving truck, reach the right side of the highway in front of the truck, and then pass to the left side again, within the distance described by the plaintiff's witnesses, a distance which was, of course, shortened by the approach of plaintiff's car. The evidence is uncontradicted, however, that she did pass the truck, went out to the right-hand shoulder of the highway, and then skidded at right angles to the left-hand side, so that the right front fender of defendant's car was struck by the left front fender of the Chrysler. If the question before us were solely whether the evidence of defendant's negligence sustained the verdict, we might be compelled to close our eyes to the physical conditions and accept the jury's judgment as final. Because of the errors occurring during the trial, which will hereafter be noted, and because the evidence taken at a new trial may be different from what we have here, it would serve no purpose to say whether in our judgment the evidence of defendant's negligence is sufficient to support the verdict. It is sufficient to point out, as we have done, that it was an extremely close question whether the collision was caused by any act of omission or commission on the part of the defendant, or whether it was the result of inevitable accident, and that, for this reason, the errors complained of become the more prejudicial.

The appellant insists that the verdict is excessive, that it was the result of passion and prejudice on the part of the jury caused by misconduct on the part of the respondent's counsel, and the errors in the instruction given to the jury which permitted the jury to take into consideration in awarding damages a pre-existing ailment of the respondent. We are satisfied that for both of these reasons the judgment must be reversed.

The misconduct of counsel for the respondent occurred in his examination of plaintiff's father in rebuttal. Specific objection is made to the following portion of the transcript:

"Mr. Johnson: Q. I will ask you this, Mr. Deibler, during the course of the World War, did you serve as an officer in the United States army?

"Mr. Harris: I object to that as incompetent, irrelevant and immaterial, and assign the asking of it as misconduct and prejudicial error.

"The Court: I don't think it is that, but I am rather inclined to think it is irrelevant.

"Mr. Johnson: I will take a ruling. I am going to try to develop the fact with no idea of trenching upon the court's position.

"The Court: The objection will be sustained.

"Mr. Johnson: Q. Were you, Mr. Deibler, examined during the course of the World War by physicians of the United States army as a suspected tubercular case?

"Mr. Harris: The same objection, your Honor.

"The Court: The same ruling.

"Mr. Johnson: Q. Were you, Mr. Deibler, sent to any hospital maintained by the United States government for the purpose of further examination in that regard?

"Mr. Harris: The same objection, and the same assignment.

"The Court: The same ruling.

"Mr. Johnson: All right.

"Q. Subsequent to the World War, Mr.

Deibler, state whether or not you have continuously been an officer in the United States reserve corps.

"Mr. Harris: The same objection and the same assignment.

"The Court: That will also be sustained.

"Mr. Johnson: Q. Mr. Deibler, have you yearly since the World War been examined physically, particularly for tuberculosis by physicians of the United States government?

"Mr. Harris: The same objection and the same assignment.

"The Court: The objection will be sustained. If these things are true, the people who made these examinations are the proper ones to come here and testify.

"Mr. Johnson: It is certainly proper to show he has been examined.

"The Court: He can't testify as to the result of the examination.

"Mr. Johnson: I didn't ask him any question of that kind.

"The Court: I understand that, but I assume the other would be immaterial unless that phase were developed. If you are going to offer that proof I will permit the question to be answered.

"Mr. Johnson: Q. I will ask you further, Mr. Deibler, have you served continuously since the World War and have you maintained your standing as an officer in the United States reserve corps and have attended their encampments?

"Mr. Harris: The same objection, and the same assignment, particularly in view of Mr. Johnson's clever evasion of answering the question your Honor propounded.

"The Court: Objection sustained.

"Mr. Johnson: That is all.

"Mr. Harris: No questions.

"Mr. Johnson: That is all. Apparently they don't want that information.

"Mr. Harris: I assign that remark of Mr. Johnson's as misconduct and respectfully ask the court to admonish the jury to disregard it.

"Mr. Johnson: I want the assignment. Let us have it.

"The Court: I didn't hear it.

"Mr. Johnson: He said apparently they didn't want to hear about.

"The Court: That may go out."

Another objection goes to a portion of counsel's argument to the jury when he said:

"Mr. Johnson: A couple of weeks ago the little girl was harassed for the greater part of an afternoon in the taking of a deposition and was in bed for two weeks afterwards."

[1] Objection was made to this remark on the ground that it was not supported by any evidence. The fact that it was not supported was admitted, and, although the court admonished the jury to disregard the remarks, the appellant urges that the admonition was insufficient to overcome the injury done. As to this assignment, we are satisfied with our reading of the record that the misconduct was deliberate and uncalled for, and that the error was not cured by the admonition. Mangino v. Bonslett (Cal. App.) 292 P. 1006.

[2] As to the first assignment, respondent attempts to justify the conduct on the plea that some inference might have been drawn from the cross-examination of one of her witnesses that her father was afflicted with tuberculosis. The only evidence remotely touching on that subject was that brought out in the examination of the family physician wherein the latter testified that from the history of the little girl's case he understood that she had been exposed to tuberculosis in her home; that her father had been afflicted with the disease; and that she had been returned to her home where she might be further exposed. But in view of the expert evidence that she had not been afflicted with the disease since her return to her home, the inquiry relating to the prior home conditions had no bearing upon the case. It is apparent that the inquiry was solely for the purpose of enlisting the sympathy of the jurors toward respondent and her father because of his "World War" services. It was unjustified from any standpoint, and the trial court properly sustained objections to the questions asked along that line and for that purpose. Counsel's misconduct, however, was emphasized by his remarks following the court's ruling, "Apparently they don't want that information." As the damages awarded were far in excess of what ordinarily might be expected for an injury such as the little girl suffered, we cannot say that this misconduct did not tend to the prejudice of appellant in that respect.

Appellant complains of the instruction given at the request of the plaintiff, and reading, "If you believe from the evidence that prior to the happening of the accident in question the plaintiff, Dorothy Deibler, a minor, was suffering from some pre-existing physical ailment or impairment, this fact, if it be a fact, would not preclude her recovery of damages for any injuries proximately caused by the accident in question, and in the event that your verdict is in favor of this plaintiff, you may take into consideration, in fixing the amount of your award of damages, any aggravation to any pre-existing physical ailment or impairment from which the plaintiff may have been suffering proximately caused by the injuries sustained in the accident, as well as the nature, character, and extent of the injuries directly caused by the collision in question."

[3-5] The objection to the instruction is that it injected into the case a false issue which was not supported by any direct evi-

dence, and that it left to the jury the question of "aggravation" to be determined merely upon conjecture and surmise. The instruction is poorly worded, and should not have been given in this form. Our courts have frequently approved the rule that where one is suffering from a disease or ailment at the time the injury complained of was inflicted, and this injury has aggravated the existing ailment, the injured party is entitled to recover for the damage done by the injury in thus hastening the development of, or increasing the activity of, the disease. White v. Red Mountain Fruit Co., 186 Cal. 335, 342, 199 P. 318, 321. Instructions covering this issue have been approved in Campbell v. Los Angeles Traction Co., 137 Cal. 565, 567, 70 P. 624; White v. Red Mountain Fruit Co., supra; and Perry v. Porter McLaughlin (Cal. Sup.) 297 P. 554. The instructions thus approved tie the issue to a disease or ailment existing at the time of the injury and aggravated by the injury, so that the present condition of the injured party appears to be a direct result of the injury. The principle involved in the application of this rule is that under section 3283, Civil Code, damages may be awarded only for the detriment resulting from the injury "or certain to result in the future." General damages are said to be the natural and necessary result of the act complained of, and such damages alone may be recovered under a general pleading such as we have here. If damages are sought which are not the necessary consequence of the act complained of, of course they must be specially pleaded. Campbell v. Los Angeles Traction Co., supra. Therefore, where as here the damage is pleaded generally, the plaintiff is limited in her recovery to the natural and direct consequences of the wrong, and under the evidence before us was entitled to recover for the hastening the development of, or increasing the activity of, any pre-existing ailment. The instruction approved in the White Case directed the jury to take into consideration whether the said injury hastened the development of the pre-existing disease "and that thereby said plaintiff's present condition, whatever you find that to be, has resulted from such injury." The expert evidence upon which the issue is based (and that is all that can be considered in a question of this character) was without material conflict that the little girl was exposed to tuberculosis or had a predisposition to tuberculosis about ten months prior to the accident, and that for seven months of that period had been kept in a home known as "A Preventorium"; that she returned to her home about three months prior to the accident apparently in perfect health, except that she was slightly underweight; that as a result of the accident she suffered three fractured ribs which healed in some four or six weeks and caused her no apparent discomfort thereafter; that she was under the care of a physician who examined her frequently during the eleven months intervening between the accident and the time of the trial; that he testified that at the time of the trial her temperature, respiration, and pulse were all normal, that she showed no signs of having tuberculosis, and no permanent disability as a result of the accident. The same witness testified, in answer to a direct question, that he was unable to say that the predisposition to tuberculosis had been materially affected by the accident, but that there was a possibility that this injury might tend toward a lower resistance; that is to say, that if she were exposed to the disease in the future she might possibly be less able to resist it because of the injury complained of. Another physician called by the plaintiff testified that he could find no evidence of tubercular trouble, but it was possible that the injury might in the future cause the plaintiff to be less resistant to these germs if they should become active. His testimony may be summed up in his concluding statement, reading, "I believe that the injury sustained may possibly be a detriment to her general health. She has been exposed to tuberculosis. Has a typical narrow chest with retracted apices which is characteristic of a tubercular individual. Violence sustained interferes with her general health, and in that way may cause a future attack of tuberculosis." A physician called as a witness by the appellant testified that from his examination he could find no evidence of the pre-existing disease; that the lungs were fairly clear, heart good, that she had very little complaint to make; that aside from being underweight she was a very healthy child. There is no substantial conflict in the evidence that at the time of the trial the child was not suffering from any pre-existing ailment, or that at the time of the trial there was no "aggravation to any pre-existing physical ailment or impairment * * * caused by the injuries." It is true that the witness Pearce, in answer to questions which purported to be hypothetical, gave testimony which tended to support plaintiff's theory, but in each question the facts stated were not in accord with the facts in evidence. Thus in answer to a question whether after an observation of eleven months showing "no improvement in the lung condition, would you say from the injury that has occurred, that there is a greater tendency toward a tubercular condition?" He answered "Yes." Similarly the same witness was asked if the injury was a factor in impeding the recovery of the little child, assuming that she had returned to her home prior to the accident normal in weight. It was undisputed that when she returned to her home her weight was below normal. We cannot escape the conclusion that the peculiar wording of the instruction permitted the jury to enter the field of speculation and to return its verdict on surmise and conjecture, in so far as the injury complained of aggravated any pre-existing ailment of the plaintiff. In view of the fact that the physical injuries suffered at the time of the accident were shown to have been three fractured ribs and a slight cut upon the index finger, and that the verdict of $7,500 was far in excess of what might be deemed reasonable for those injuries alone, it is not reasonable to say that the error of the instruction complained of did not enter into this verdict.

Other complaints are made as to the refusal of the trial court to give certain instructions. We have read the charges as a whole, and are satisfied that the issues were fairly covered, and that the matters of which the appellant now complains may be readily avoided on a new trial without further discussion in this opinion.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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119 Cal.App. 200

HART v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7935.

District Court of Appeal, First District, Division 1, California.

Dec. 14, 1931.

Rehearing Denied Jan. 13, 1932. Hearing Denied by Supreme Court Feb. 11, 1932.

1. Master and servant ⚷414.

Determination whether petitioner's injury was permanent at particular time was fact question in compensation proceeding.

2. Master and servant ⚷417(7).

Industrial Commission's conclusion on fact question, supported by evidence, is conclusive.

3. Master and servant ⚷405(6).

Evidence *held* to support conclusion that injury to employee claiming compensation was permanent, notwithstanding further treatment.

Reports of medical experts showed that two years and a half after accident claimant's condition was unchanged, and such time was ample to justify conclusion that injury was permanent, and situation was not changed by fact that further treatment was thereafter had in hope of improving claimant's condition.

4. Master and servant ⚷385(16).

Employee, though permanently injured, is entitled to medical and hospital treatment reasonably required to relieve him from effect of injury.

Proceeding under the Workmen's Compensation Act by Charles H. Hart, opposed by the State Compensation Insurance Fund. The Industrial Accident Commission made an award, and Charles H. Hart applies for certiorari to review the order.

Award affirmed.

H. C. Kelsey, of Oakland, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

TYLER, P. J.

Certiorari to review an award of the Industrial Accident Commission.

Petitioner suffered an industrial injury to his knee on October 24, 1928. At the time of said injury the State Compensation Insurance Fund was the insurance carrier, and it assumed the employer's liability, furnished medical treatment, and paid certain disability indemnity to the injured employee. On November 19, 1930, petitioner filed with respondent commission an application for adjustment of claim as to the nature, extent, and duration of the disability caused by the injury. Hearing was had and evidence received, and the commission issued its findings and award on January 8, 1931. The injured employee was found to have suffered temporary disability from October 24, 1928, to May 15, 1930, at which time it was further found that his injured condition had become permanent. He was given a permanent disability rating of 25 per cent., which entitled him to $20.83 a week for one hundred weeks, or the sum of $2,083. On January 27, 1931, the commission rendered an order correcting the findings and award for clerical error. By said order it was found that petitioner's temporary disability terminated on May 15, 1930, and that the insurance carrier had paid to petitioner $2,083 disability indemnity for one hundred weeks, which constituted an overpayment for temporary disability; that petitioner was entitled to further operative treatment, and would be entitled to further indemnity at said rate for temporary disability caused by said further treatment, less all sums already paid as disability indemnity.

Petitioner's contention is that his disability contrary to the findings of the commission, was total and temporary, and never did become permanent, but remained temporary at all times, and that, as a result, he is entitled to temporary compensation from October 24, 1928, to February 1, 1931, at which time he was operated upon, and indefinitely thereafter until his condition becomes cured or is found to be permanent. The number of weeks between October 24, 1928, and February 1, 1931, is 118⅗, so that, if petitioner's contention be correct, he is entitled to temporary disability benefits for this period as against one hundred weeks on account of permanent disability. It is not disputed that he will be entitled to temporary disability as a result of the operation of February 1st, but, unless his contention be sustained, he will not be entitled to be paid by the insurance carrier for the first 18⅗ weeks thereof; that is, until his temporary disability in point of weeks becomes greater than the amount paid him on account of permanent disability. In other words, if his condition has been at all times temporary, he is entitled to 18⅗ weeks' more compensation than has been awarded him, which amounts to some $383.86.

[1-4] We are of the opinion that petitioner's claim is without merit. The determination of the question as to whether petitioner's injury was permanent at a particular time was purely a question of fact to be ascertained by the evidence. There is evidence in the record to support the conclusion of the commission, and its determination is therefore final and conclusive upon the subject. Contractors' I. Exch. v. Indus. Acc. Comm., 72 Cal. App. 350, 237 P. 404. The reports of the medical experts show that two years and a half after the accident petitioner's condition was unchanged. This time was ample to justify them in concluding that the injury was permanent. Nor does the fact that further treatment was thereafter had, in the hope of improving petitioner's condition, alter or change the situation. An injured employee, although permanently injured, is entitled to such medical and hospital treatment as may be reasonably required to relieve him from the effects of his injury, and the granting of such relief will not in any way alter or otherwise affect the original award. United States Fidelity, etc., Co. v. Dept. of Indus. Relations, 207 Cal. 144, 277 P. 492.

As above indicated, the conclusion of the commission upon questions of this character is a determination of a question of fact, and is not subject to review by courts, unless palpably contrary to the undisputed evidence. Frankfort General Ins. Co. v. Pillsbury, 173 Cal. 56, 59, 159 P. 150. The question being purely one for determination by the commission, we have no power to alter or change its conclusion. The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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119 Cal.App. 352

VIERRA v. NEW YORK LIFE INS. CO.

Civ. 4194.

District Court of Appeal, Third District, California.

Dec. 22, 1931.

Rehearing Denied Jan. 21, 1932. Hearing Denied by Supreme Court Feb. 18, 1932.

1. Insurance ⚷634(1).

In action on life policy, complaint *held* to contain sufficient allegation of performance by insured of provisions for making insurance effective from time of application.

Plaintiff alleged the execution of the application and that deceased complied with and fulfilled requirements in provision thereof for the purpose of making said insurance effective from the date of the application. This was a sufficient allegation of performance; it not being incumbent on plaintiff to allege in detail wherein each requirement had been performed.

2. Pleading ⚷362(1).

In action on life policy, motion to strike allegation that insurance agent stated insurance would be effective immediately *held* properly denied.

This was not an attempt to vary the terms of a written instrument by parol, but was merely setting up a waiver or estoppel on part of insurer to enforce certain conditions in the application.

3. Insurance ⚷376(1).

Notwithstanding limitations in life policy on agent's authority to bind company by waiving conditions therein, such conditions may be waived by some agents.

Under some circumstances, such conditions in policy will be deemed to have been waived, notwithstanding the method provided for in the policy has not been pursued.

4. Insurance ⚷137(4).

As between insurer and insured, taking note will constitute payment of first premium where custom is for agent to be responsible for collection.

Although agents are forbidden by the insurer to take notes for first premiums, the taking of a note will constitute a payment, where the custom or common practice is for the agent to take the note in his own name and charge it to himself in his account with the company, being responsible for its collection.

5. Insurance ⚷141(1).

Insurer could not be heard to say deceased was not insured from time of application under facts.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

The facts showed that the applicant understood and was told by the agent that he was temporarily insured; that the agent was authorized to act; that deceased paid for the insurance; and that the insurance carrier thereby waived conditions whose nonperformance was being urged as defense to action.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Lena M. Vierra against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Neumiller & Ditz and R. L. Beardslee, all of Stockton, for appellant.

C. R. Perrier, of Gustine, for respondent.

TUTTLE, Justice pro tem.

This action was brought to recover upon a policy of life insurance, issued to the husband of plaintiff. It was tried before the court, and judgment for the amount of the policy, $5,000, was rendered for plaintiff. From the judgment entered upon the findings, defendant appeals.

On July 22, 1927, the agent of appellant called upon Frank M. Vierra for the purpose of soliciting a policy of life insurance. As a result, an application for ordinary life insurance, in the sum of $5,000, was signed by Vierra. The latter also executed and delivered to the agent his promissory note, in favor of the agent, for the first year's premium, in the sum of $187.50, with interest at the rate of ten per cent. On this date, Vierra was also examined by the physician of appellant, and he was again examined on July 31st. He "passed" this medical examination, and the application was forwarded by appellant to its office in New York on July 31st. On August 7th, Vierra was taken sick and he consulted his physician, and on the 8th he was operated upon. On August 9th a policy of insurance was duly issued by appellant in New York, in accordance with said application, and mailed to its Fresno agency. On August 11th, Vierra died, and on August 15th the policy was returned to the New York office of appellant. The foregoing is a brief résumé of the undisputed facts in the case.

[1] The demurrer to the amended complaint was properly overruled. Plaintiff alleged the execution of the application and that the deceased complied with and fulfilled the requirements in the provision thereof for the purpose of making said insurance effective from the date of the application. This was a sufficient allegation of performance. It was not incumbent upon plaintiff to allege in detail wherein he had performed each requirement.

[2] The motion to strike out portions of the complaint was properly denied. The portion sought to be eliminated alleged that the agent stated to applicant that the insurance would be effective immediately. This was not an attempt to vary the terms of a written instrument by parol. It is merely setting up a waiver or estoppel upon the part of appellant to enforce certain conditions in the application. "It has been held that the parol waiver of a condition in a policy is good notwithstanding a provision in such policy that nothing but a written agreement, signed by an officer of the company, shall have that effect; that such a requirement may be waived by parol as an act in pais." Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 P. 740, 741.

The complaint contains no allegations of fraud, but it is alleged that the agent, through neglect, inadvertence, or mistake, made certain entries in the application which were contrary to his assurance and statement to the insured that the insurance would be in full force and effect from the date of the application.

Appellant makes the contention that certain findings are not supported by the evidence. We have gone over these, and have selected the following as the only findings which merit consideration here:

"Twenty-first: That the said A. E. Preciado accepted the said note as full payment for the first year's premium on said insurance; and that the said Frank M. Vierra paid the first year's premium on the said life insurance in full."

"Twenty-sixth: That the said A. E. Preciado neglected and failed to give to the said Frank M. Vierra the receipt referred to and set forth in said application blank; and failed and neglected to advise the said Frank M. Vierra that the said application form provided that such a receipt should be received by the applicant; and failed and neglected to have the said Frank M. Vierra make the declaration of payment and receipt, as provided in said application; that the said A. E. Preciado did not, due to his inadvertence, neglect or mistake, deliver the said receipt to the said Frank M. Vierra; and that the said A. E. Preciado, due to his inadvertence, mistake or neglect, did not have the said Frank M. Vierra sign the said declaration."

"Thirty-second: That the said Frank M. Vierra, under the guidance and direction and advice of the said A. E. Preciado, did on his part, in all respects, comply with and fulfill, according to the advice and instructions, so received, the requirements of the provisions in the said application form set forth and required by the said New York Life Insurance Company, a corporation, for the purpose of making said insurance take effect upon the date of the signing of said application. * * *"

The authority of the agent to act as he did in the premises is unquestioned, being admitted in the answer, and embodied in the findings, as follows: "That the said application so made by the said Frank M. Vierra for life insurance to the said defendant was made at the solicitation of A. E. Preciado; and that the said A. E. Preciado was, at the time of soliciting said insurance from the said Frank M. Vierra, to-wit, on and about the said 23rd day of July, 1927, the duly appointed, qualified, authorized and acting agent of the said New York Life Insurance Company, a corporation, and defendant above named."

Appellant does not question the authority of the agent to waive the conditions of the application.

Some of the facts which are relied upon by respondent as furnishing a basis for waiver and estoppel are embodied in the following findings which are not attacked by appellant:

"Thirteenth: That the said Frank M. Vierra, at the time of making said application for life insurance to the said defendant, did ask the said A. E. Preciado whether the said insurance, for which the said Frank M. Vierra was applying, and before the said Frank M. Vierra signed the application, would commence at the time of the signing of the application and whether he, the said Frank M. Vierra, would if he signed the same, be insured from the date of the signing the application, to-wit, from the said 23rd day of July, 1927.

"Fourteenth: That the said A. E. Preciado did then and there advise and assure the said Frank M. Vierra that he, the said Frank M. Vierra, would be fully insured in the sum of Five Thousand Dollars from the date of the signing of said application, to-wit, from the said 23rd day of July, 1927; and the said A. E. Preciado did further advise and assure the said Frank M. Vierra that if he, the said Frank F. Vierra, should die the following day that his wife, the plaintiff in this action, would get the money from the said insurance, to-wit, the said sum of Five Thousand Dollars, and that the said New York Life Insurance Company, a corporation, would pay the said insurance to the said beneficiary."

"Twenty-second: That the said A. E. Preciado forwarded the said promissory note to the said defendant at its office at Fresno, California; and that the said note was kept in the files of the said New York Life Insurance Company, a corporation, until after the issuance of the said policy of insurance to the said Frank M. Vierra, as aforesaid, and after the death of the said Frank M. Vierra."

"Twenty-seventh: That the said New York Life Insurance Company, a corporation, and defendant herein, found that the said Frank M. Vierra was, at the time of making the said application for insurance, to-wit, on the said 23rd day of July, 1927, insurable and entitled under the Company's rules and standards to insurance, on the plan and for the amount applied for in Questions 2 and 3 of said application form.

"Twenty-eighth: That the New York Life Insurance Company, a corporation, holds its agents personally liable for the payment of notes taken for the first year's premium on insurance."

In addition, there is evidence to support the finding that the agent knew that the decedent could neither read nor write. There is also evidence from which the court could infer that the conditions in the policy in respect to the giving of a receipt and the signing of a declaration to that effect by the applicant were not complied with on account of the neglect and mistake of the agent. The finding to that effect (twenty-sixth) is supported by the evidence. There is also evidence to support the finding (thirty-second) that the applicant did all in his power to make the insurance effective from the date of the application.

Our conclusion is that there is ample evidence in the record to support the questioned findings.

The portion of the application which contains the conditions in question is as follows:

"It is mutually agreed as follows:

"1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the agent in cash the full amount of the first premium for the insurance applied for in questions 2 and 3 and so declares in this application and receives from the agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not."

[3-5] As pointed out by appellant, the conditions which would entitle the insured to temporary insurance are three in number, to wit: The first year's premium must be paid in cash; the applicant must so declare in writing on a form attached to the application; and the agent must execute a certain "receipt form," covering the premium. All of these forms were attached to, and constituted a part of, the application.

The evidence shows that the premium was

paid by the giving of a note in favor of the agent, covering the first year's premium and bearing interest at the rate of 10 per cent. per annum. The evidence further shows, from the original application admitted, that the applicant did not sign the receipt form, nor did the agent execute his receipt for the premium.

Was the applicant absolutely bound and concluded by these conditions, or can it be shown by parol evidence that they were waived? This is the crucial point in the case, and it is raised directly by objections to parol evidence showing such waiver. If the position of respondent is sustained, then the applicant was temporarily insured, irrespective of whether the policy was ever delivered or received by the applicant. See terms of application quoted supra.

Upon this point, appellant makes the following contention: "The application was made the basis of the action, defines and confines the authority of the soliciting agent, and applicant was bound by the terms thereof." This is not a correct statement of the law as laid down by the courts of this state. The authorities cited by appellant do not justify this contention. He quotes at length from Sharman v. Continental Ins. Co., 167 Cal. 117, 138 P. 708, 711, 52 L. R. A. (N. S.) 670. That case turned upon the authority of the alleged agent of the insurance company. The record showed that the party who wrote the policy was never actually the agent of the company. It was held that as ostensible agent he had no authority to waive conditions in the policy; but the court goes on to say: "Provisions in policies limiting the authority of agents to bind the company by waiver of conditions therein have been the frequent subject of consideration by the courts. It is held with practical unanimity that, notwithstanding such limitations upon the authority of these agents, conditions in policies may be waived by some agents of the company, and under some circumstances will be deemed to have been waived notwithstanding the method provided for in the policy has not been pursued." The case of Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 P. 740, is also authority for this rule.

The foregoing appears to be the rule in this state. The question narrows down to the authority of the agent. If he has such authority, he may waive written restrictions, either in the application or the policy. "The rule most liberal to the insured and the one which, perhaps, has the support of the weight of authority at the present day, is that against making restrictions in an insurance policy upon an agent's authority conclusive upon the insured, and which permits the company, or any agent with general or unlimited powers; or clothed with actual or apparent authority, to waive, either orally or in writing, or by his acts and conduct, any written or printed condition in the policy, notwithstanding such restrictions: and this, in many instances, though the policy provides that a distinct specific agreement shall be indorsed thereon, or otherwise prescribes a particular mode of waiver, or that only certain persons can waive, since, if the agent may waive the restrictions in the first case, he may in the latter." Cyc. of Insurance Law, [Couch] vol. 2, § 522e. Authorities from some thirty-three states, including California, are cited in support of this rule.

No contention is made by appellant that the agent had no power to waive the said conditions. It relies solely upon the rule that. since the conditions appear in the application. they could not be waived. "While, as a general rule, a party to a contract * * * will not be permitted to urge that he did not read it before he affixed his signature thereto, and that he was ignorant of its contents, and supposed them to conform to what he had agreed with or represented to the adverse party or his agent, the application of this rule has been almost uniformly denied when sought to be applied to the business of insurance as it is conducted in the United States." Note 9 Am. St. Rep. 232, citing numerous cases, including Menk v. Home Insurance Co., 76 Cal. 50, 14 P. 837, 18 P. 117, 9 Am. St. Rep. 158.

Much stress is laid by appellant upon the failure of the applicant to pay the first year's premium in cash. After an examination of the authorities bearing upon this question, we are satisfied with the rule laid down by Joyce on Insurance, volume 3, § 1202a: "As between insurer and insured, although agents are forbidden by the insurer to take notes for first premiums, the taking of a note will constitute a payment thereof, where the custom or common practice is for the agent to take the note in his own name and charge it to himself in his account with the company, being responsible for its collection."

That a note may be considered equivalent to, or received in lieu of, cash, is the statement of the same author in section 1202d. The failure to comply with this condition cannot therefore relieve appellant in this case. Especially is that true where the note bears interest from the date of the application. Why take a note bearing interest at ten per cent. from the date of the application, if the insured was not protected from that date? Why receive the note at the main office of appellant and issue a policy thereon, when the rules governing agents, admitted in evidence, forbid the taking of a note for the first year's premium? The policy would have been delivered, the testimony shows, except for the death of Vierra.

The salient facts remain: That the applicant understood and was told by the agent that he was temporarily insured; that the agent was authorized to so act; and that deceased paid for the insurance; and the insurance carrier will not be heard to say that deceased was not temporarily insured.

We therefore conclude that appellant waived the conditions, whose nonperformance is urged as a defense to this action.

Other points are urged by appellant. Most of them are disposed of in considering the foregoing questions, and the remainder are without merit.

The judgment of the trial court is both legal and just, and accordingly it is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 237

CHAINEY et ux. v. SHOSTROM et al.

Civ. 8052.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1931.

Rehearing Denied Jan. 15, 1932. Hearing Denied by Supreme Court Feb. 11, 1932.

1. Contracts 🔑90.

Contract between vendor and purchasers of land on installment, for division of royalties on oil and gas lease, *held* not without consideration (Code Civ. Proc. § 1963, subd. 39).

> In addition to presumption that there was a good and sufficient consideration for written contract in accordance with Code Civ. Proc. § 1963, subd. 39, testimony and terms of instrument itself conclusively showed that purchasers entered into contract for division of royalties in consideration of vendors giving their written consent to lease, as required by lessee.

2. Deeds 🔑94.

Deed conveying premises did not waive vendors' rights under contract for division of oil royalties (Civ. Code, § 1642).

> Regardless of whether contract between vendors and purchasers for division of oil royalties created an interest in land, both the terms of contract and terms of escrow agreement under which deed was delivered showed that it was at all times the intention of parties that vendors' right to share in royalty should continue for life of lease and after payment of purchase price and transfer of title to purchasers.

3. Cancellation of Instruments 🔑46.

Failure of court, in action to cancel contract for division of oil royalties, to permit testimony regarding attempt to reduce royalty *held* not erroneous, in view of contract fixing rights.

> Since under pleadings the trial court was only called upon to determine whether contract between vendor and purchaser under installment contract relating to division of royalty received under terms of original lease was valid, it was immaterial under issues whether purchasers desired to modify existing lease, or had attempted to do so.

Appeal from Superior Court, Los Angeles County; Edward W. Engs, Judge.

Action by George Chainey and wife against Emil Shostrom, as executor of the estate of Darlot Densmore, deceased, Margaret Densmore, and others. Judgment for defendant last named, and plaintiffs appeal.

Affirmed.

Frank McNulty, of Long Beach, for appellants.

Andrews & Gillham and Oliver O. Clark, all of Los Angeles, for respondent.

SPENCE, J.

Plaintiffs brought this action seeking the cancellation of a certain contract, and further seeking to obtain an accounting of and judgment for the sums previously received by Darlot Densmore, since deceased, and defendant Margaret Densmore, his wife, under said contract. From a judgment in favor of defendant Margaret Densmore, plaintiffs appeal.

Numerous other defendants were named in the complaint, but there is no controversy except that between the plaintiffs and the defendant Margaret Densmore, who was the sole defendant appearing at the trial, and is the sole respondent on this appeal. Upon the death of her husband, said defendant Margaret Densmore had succeeded to all of his rights under the contract.

In March, 1921, said Darlot Densmore and Margaret Densmore were the owners of certain property located on Signal Hill in Los Angeles county. They entered into a contract with plaintiffs by which they agreed to sell said property to plaintiffs for the sum of $15,000, which sum was to be paid by plaintiffs in installments as provided in the contract. In June, 1921, and at a time when approximately $3,000 of the purchase price had been paid, plaintiffs had an opportunity to enter into an oil and gas lease with the Oceanic Oil Company, which company was willing to pay for said lease a royalty of ⅙ part of the oil and gas extracted and saved from the premises. The company, however, required that plaintiffs should obtain the written consent of the Densmores, as owners of the property, to the making of said lease. The proposed lease was for the term of twenty years, and at the option of the lessee for as long thereafter as the wells thereon were producing oil in paying quantities. On or about

June 23, 1921, the Densmores gave their written consent indorsed upon said lease, and a written contract was entered into between the Densmores and plaintiffs, wherein it was agreed that the royalty provided for in the lease with the Oceanic Oil Company should be divided equally between them until the Densmores had received the full amount due them from the plaintiffs under the contract to purchase the land, and thereafter the royalty should be divided ⅗ to plaintiffs and ⅖ to the Densmores. It is this contract which is involved in the present action. In January, 1923, and before any royalty had been received by the parties, plaintiffs paid to the Densmores the full balance due upon the agreed purchase price for the property. In closing the transaction, a deed was executed by the Densmores and deposited with an escrow holder to be delivered to plaintiffs upon payment of the balance due. A clause included in the signed escrow agreement read as follows: "It is understood by the parties hereto that the royalties on the oil lease on this property is for ⅙ of production and that the same is to be distributed ⅗ths to purchaser and ⅖ to seller for life of lease." The deed executed by the Densmores and delivered to plaintiffs pursuant to the escrow instructions was in the ordinary form of a grant deed, and made no mention of the royalty. Thereafter oil was produced and the royalty, received each year under the lease and divided by plaintiffs and the Densmores under the terms of their contract, ran into large sums of money. Apparently no dispute arose until the plaintiffs sought to obtain the consent of defendant Margaret Densmore to a modification of the terms of the lease with the lessee. Upon her refusal to consent thereto, plaintiffs brought this action. Contrary to the contentions of plaintiffs, the trial court by its judgment declared, in effect, that the contract relating to the division of the royalty was a valid and existing contract; that defendant Margaret Densmore was entitled to ⅖ of the royalty received and to be received under the terms of said lease; and that plaintiffs were not entitled to recover from said defendant any of the money theretofore paid under the terms of said contract.

[1] Upon this appeal, appellants contend that the trial court erred in entering judgment in favor of respondent, and further contend that said appellants were entitled to judgment for the cancellation of said contract and for the recovery of the sums received by respondent thereunder. We find no merit in these contentions. In support thereof, appellants argue that the contract to divide the royalty was without consideration. In addition to the presumption that there was a good and sufficient consideration for the written contract (Code Civ. Proc. § 1963, subd. 39), the testimony of appellant George Chainey and the terms of the instrument itself conclusively showed that appellants entered into said contract in consideration of the Densmores giving their written consent to the lease. Said appellant testified: "* * * The understanding was that I was giving it to them * * * because the Oceanic asked that their signatures be there. * * *"

The following questions and answers are also found in the testimony of said appellant:

"Q. * * * In that conversation with Mr. and Mrs. Densmore at that time did you tell them for what purpose you were giving them or going to give them two-fifths of the royalty? A. Why, it was understood—

"Q. Just say yes or no, whether you told them or not. A. I did not tell them, only the fact that the Oceanic Oil Company required their signatures because I owed them that money."

The contract itself, as signed by the parties, contained the following clause after certain recitals: "Now, Therefore, in consideration of the mutual concessions of the parties hereto and the execution of said lease by each of the parties, it is agreed as follows. * * *" It requires no citation of authority nor further statement of the evidence to demonstrate that the trial court's findings, to the effect that the contract was based upon a good and valuable consideration, were amply sustained. It is further urged that the contract to divide the royalty was unconscionable and uncertain. In our opinion, these points are entirely without merit.

[2] In support of the foregoing contentions, it is further argued that, even assuming the validity of the contract, the Densmores' rights thereunder were waived by the execution and delivery to appellants of the grant deed containing no reservations. Appellants' argument is based upon the theory that "the agreement to divide the royalty or rent to be received under the lease amounted to a reservation of an interest in the land and, not having been reserved in the deed, was waived." On the other hand, respondent takes the position that the agreement was in the nature of a personal covenant not creating an interest in the land, and was unaffected by the delivery of the deed to appellants. Continuing, respondent argues that, even assuming the agreement created an interest in the land, the several instruments, including the deed and escrow agreement, must be taken together (Civ. Code, § 1642; 6 Cal. Jur. 298), and, when so considered, it affirmatively appears that there was no waiver. We deem it unnecessary to enter into discussion of whether the contract created "an interest in the land" as contended by appellants, as we do not believe that the rights of the Densmores under the contract would be affected by a determination of that question. Both the terms of the contract and the terms of the escrow agreement under which the deed was delivered showed that it was at all times the intention of the parties that the Densmores' right to share in the royalty should continue for the life of the lease, and after the payment of the purchase price and the transfer of title to appellants. Under these circumstances, the deed transferring title to appellants cannot be relied upon as a waiver of the rights of the Densmores under the contract. We are of the opinion that the trial court properly decreed that the grant deed did not impair or in any manner affect the right of the Densmores to continue to receive their agreed share of the royalty.

[3] The further contentions of appellants are closely related to those hereinbefore discussed. From what has been said, it follows that the trial court did not err, as contended by appellants, in failing to find the amount of money previously received by respondent under the contract. Such finding, if made, would have been immaterial, as appellants were not entitled to recover the sums theretofore paid to respondent. It likewise follows that there was no error in admitting in evidence the escrow agreement referred to above. It is also claimed that the trial court erred in not permitting testimony regarding the desire or attempt of appellants to reduce the royalty provided for in the original lease in order to induce the oil company to drill to deeper sands. There was no error in these rulings of the trial court, as the contract between the parties fixed the right of the Densmores to share in the royalty under the existing lease during the life thereof. Under the pleadings, the trial court was only called upon to determine whether the contract of the parties relating to the division of the royalty received under the terms of the original lease was valid. It was immaterial under the issues whether appellants desired to modify the existing lease or had attempted to do so.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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119 Cal.App. 243

WALKER v. MECHANICS' INS. CO. OF PHILADELPHIA.

Civ. 7024.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1931.

1. Insurance 🔑670.

In suit on fire policy for loss of house and additions, finding that subordinate structures communicated with house occupied as dwelling within policy *held* not supported by pleading or evidence, absent showing that house was occupied.

2. Insurance 🔑146(3).

Obvious departures from policy's terms cannot be disregarded, notwithstanding rule requiring liberal construction to favor insured.

3. Pleading 🔑433(7).

In suit on fire policy, judgment for insured did not cure defect that neither complaint alleged nor evidence showed that dwelling house was occupied as dwelling within fire policy, notwithstanding answer or demurrer did not raise objection.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Grace Walker against the Mechanics' Insurance Company of Philadelphia. From an adverse judgment, the defendant appeals.

Reversed, with directions.

Hindman & Davis, of Los Angeles, for appellant.

Walter L. Case, of Los Angeles, for respondent.

CRAIG, J.

An action was commenced upon a policy of fire insurance on a composition roof four-room frame building and its additions, if any, communicating and in contact therewith, while occupied only for dwelling purposes, light lunches, and soft drinks, and permanent fixtures. Following a trial by the court without a jury, judgment was rendered in favor of the plaintiff, from which judgment the defendant has appealed.

The respondent alleged in her complaint: That she was the owner of certain real property; that the defendant for an agreed consideration issued its policy "which is hereto annexed marked exhibit 'A', and by this reference made a part hereof, insuring the buildings on said property"; and that "that certain four-room dwelling and its additions as described in said policy of insurance were totally destroyed by fire"; that she furnished proofs of loss; and that the whole amount specified in said policy was due. The defendant denied the loss, admitted the furnishing of proofs of loss, and also denied compliance by the insured with the terms of the contract, and its liability thereunder.

The principal ground of appeal consists of an asserted insufficiency of the allegations of the complaint and of the evidence to justify a judgment in favor of the plaintiff. In amplification of this contention, it is claimed that the respondent did not plead that the premises were occupied solely for residence purposes, and that the evidence and findings of fact failed to specify any amount of loss, or that the contract embraced the property destroyed. It does appear that "the composition roof 4-room frame building and its additions * * * communicating and in contact therewith while occupied only for dwelling house purposes, light lunches and soft drinks," were insured in the sum of $1,000 against damage or loss by fire, and that the policy was made a part of the complaint. Respondent testified that there was a loss, and that she furnished proofs of loss, which proofs were admitted by the answer. She further testified that her dwelling house, garage, lunch stand, and oil station were located on the premises described as a four-room composition roof building, and "was all one big building," though each was leased and was separate and distinct from the others.

[1] Resolving all intendments in favor of the findings and judgment, we must presume that the trial court found that each of the subordinate structures consisted of additions in contact and communicating with the house while occupied only for dwelling purposes, within contemplation of the language of the policy. But there is neither allegation nor evidence tending to support such a finding, since it does not appear that the house was occupied, and said policy expressly became inoperative "while there be kept, used or allowed on the described premises * * * exceeding one quart each of benzine, gasoline, naphtha or ether." The respondent admitted from the stand that a portion of the premises was "being occupied as a lunch stand and oil station at the time of the fire." We think it not an abuse of judicial cognizance to assume that an "oil station," maintained for the storage and sale of gasoline, is a use of premises intended to be excepted by the above clause of the policy in question, covering a dwelling and specified incidents.

[2] We are not unmindful of the rule requiring liberal construction in favor of the insured, asserted by the respondent, but obvious departures from such contracts may not be lightly disregarded, nor their clear prohibitions sanctioned, by judicial construction in favor of one who violates their expressed and unambiguous provisions.

[3] The complaint nowhere alleged, nor did the plaintiff attempt to show by evidence, that the house was occupied as a dwelling house at the time of the fire. "That such allegations were essential to the statement of a cause of action is very clear, and is practically admitted by plaintiff, who relies entirely upon the contention that, it not appearing that the point was specially made in the lower court, any defect in this respect was cured by the answer thereto. * * * Such a defect is not cured by verdict and judgment, even in the absence of any objection by demurrer or answer in the lower court, and objection made on account thereof may be made at any time. Code Civ. Proc. § 434." Arnold v. American Insurance Co., 148 Cal. 660, 84 P. 182, 183, 25 L. R. A. (N. S.) 6.

The judgment is reversed, with directions that the respondent be granted leave to amend her complaint if she be so advised.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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121 Cal.App.(Supp.) 781

HOLBROOK et al. v. PHELAN et al.

Civ. 959.

Appellate Department, Superior Court, Los Angeles County, California.

Dec. 12, 1931.

1. Equity ⚷20.

Enforcement of liens is well-recognized function of equity courts.

2. Courts ⚷2.

Test of court's jurisdiction is ordinarily found in nature of case, as made by complaint and relief sought.

3. Courts ⚷188(10).

Complaint *held* to state cause of action for foreclosure of lien on land, so that superior court would have jurisdiction.

> The complaint showed the existence of an irrigation ditch operated through a mutual voluntary association, consisting of landowners within district, and that agreement was made as to apportionment of expense for acquiring water-bearing land and sinking well, and plaintiffs representing association prayed for judgment for amount due, and that it be adjudged and decreed that such obligation was lien on property described in complaint.

4. Courts ⚷188(10).

Municipal court *held* without jurisdiction of suit to recover landowners' share of expense of irrigation ditch association in acquiring water-bearing land and sinking well (St. 1929, p. 838, § 2).

> The municipal court was without jurisdiction to foreclose lien upon real estate, except in actions to enforce and foreclose liens of mechanics, materialmen, artisans, and laborers, where the amount of such liens is $2,000 or less, and municipal court had no jurisdiction of equity cases, except when pleaded as defensive matter or by way of cross-complaint in any case at law commencing in municipal court, of which it has exclusive jurisdiction.

5. Appeal and error ⚷878(2).

Where defendants took no appeal, judgment against them cannot be reversed, notwithstanding court's lack of jurisdiction.

6. Appeal and error ⚷839(1).

On appeal from portion of judgment only, appellate court cannot reverse any other part.

Appeal from Municipal Court, City of Los Angeles; Charles B. MacCoy, Judge.

Action to recover money and to foreclose a lien therefor on real estate brought by M. Holbrook and others against Mary Phelan and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Chapman & Chapman, of Los Angeles, for appellants.

G. P. Adams and W. W. Orme, both of Los Angeles, for respondents.

McLUCAS, P. J.

Plaintiffs allege in their complaint that for more than fifty years last past there has been in existence and continuous use an irrigating water ditch system known as the Banta ditch; that throughout the entire period of its existence the said ditch system has been owned and operated through a mutual voluntary association known as the Banta Ditch Association, and which consists of the landowners within said irrigation district; that a meeting of the members of the association was held on March 4, 1929, and that at said meeting it was decided by unanimous vote that immediate steps should be taken for acquiring a tract of water-bearing land, sinking a well for the development of water, and equipping the same with the necessary pump and power plant; and that, for the purpose of deferring the costs thereof, an assessment should be levied against the irrigators and members of the association in proportion to the acreage operated by them under the ditch system, to be collected in three installments over a period of three years, at such time as the board of trustees should determine. It is further alleged that pursuant to such action, the plaintiffs, as such board of trustees, acquired a water-bearing tract, sank a well and equipped the same, and did find and determine that the amount of the assessment necessary to defray the cost thereof was the sum of $17.54 per acre; that furthermore the water charge or assessment should be levied for the use of water by its members at the rate of thirty cents per hour; that the lands owned by defendants are situated within said Banta ditch district and supplied with water therefrom; that it was agreed between the Banta ditch irrigators that the expense of maintaining, repairing, and operating said ditch system should be apportioned between the irrigators in proportion to their acreage, which should be a charge against their respective properties and be binding upon their successors in interest. Plaintiffs pray for a judgment against the defendants, jointly and severally, in the sum of $1,316.10, with interest at 7 per cent. per annum from November 4, 1929, and that it be adjudged and decreed that said obligation is a lien upon the property described in the complaint, and that said lien may be enforced in the manner provided by law for the sale of property under execution, and that plaintiffs recover their costs, and whatever else may be just. The trial court awarded its judgment against defendant Mary Phelan in the sum of $111.80, against defendant Daniel Phelan in the sum of $602.58, and against defendant Edward Phelan in the sum of $74.11. The plaintiffs appeal from those portions of the judgment, in so far as it fails to adjudge that each of the defendants is jointly and severally liable to the plaintiffs for the full amount prayed for in the complaint, and in so far as said judgment fails to adjudge and decree that the full amount of said indebtedness is a lien upon the property described in the complaint.

[1-6] The enforcement of liens is a well-recognized function of courts of equity. Hibernia, etc., Soc. v. London, etc., Ins. Co., 138 Cal. 257, 71 P. 334; Kreling v. Kreling, 118 Cal. 413, 419, 50 P. 546. The test of the jurisdiction of a court is ordinarily to be found in the nature of the case, as made by the complaint, and the relief sought. Becker v. Superior Court, 151 Cal. 313, 316, 90 P. 689. In Urton v. Woolsey, 87 Cal. 38, 25 P. 154, the complaint set forth a written contract between plaintiff, as vendor, and defendant, as vendee, for the sale and purchase of certain lands, and averred facts showing plaintiff's right to enforce and foreclose a lien upon said land for the purchase money. There was a prayer for the foreclosure of the lien. It was held that the action was one to enforce a lien upon real property. Likewise the complaint herein sets forth a cause of action for the foreclosure of a lien on real estate, and the superior court would have jurisdiction; a suit for such foreclosure being a suit in equity. Curnow v. Blue Gravel, etc., Co., 68 Cal. 262, 264, 9 P. 149. The complaint was filed March 15, 1930, and the judgment was entered and filed on July 6, 1931. The municipal court was without jurisdiction to foreclose a lien on real estate, except in "actions to enforce and foreclose liens of mechanics, materialmen, artizans and laborers, where the amount of such liens is two thousand dollars, or less," and the municipal court had no jurisdiction of cases in equity, except "when pleaded as defensive matter or by way of cross-complaint in any case at law commenc-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ing in the municipal court, of which it has exclusive jurisdiction." St. 1929, p. 838, § 2. There was entire lack of jurisdiction of the municipal court in this case, but, no appeal being taken by defendants, we cannot reverse the judgment against defendants. It is also well settled that, upon an appeal from a portion of the judgment only, the appellate court has no jurisdiction to reverse any part of the judgment, except the part to which the appeal is directed. Lake v. Superior Court, 187 Cal. 116, 120, 200 P. 1041. Though we cannot reverse the judgment against defendants, when defendants have taken no appeal, we can and do refuse to grant the plaintiffs additional relief, where the trial court had no jurisdiction whatever to grant a judgment in an equity case of this character.

The judgment is affirmed, respondents to recover their costs of appeal from appellants.

SHAW, J., and CRAIG, Judge pro tem., concur.

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120 Cal.App.(Supp.) 773

RUDOLPH WURLITZER CO. v. FARB et al.

Civ. 1061.

Appellate Department, Superior Court, Los Angeles County, California.

Nov. 3, 1931.

1. Innkeepers ⚿13.

Civil Code providing for innkeeper's lien must be construed as a whole (Civ. Code, § 1861).

2. Innkeepers ⚿13.

Owner of violin *held* entitled to assert claim thereto as against innkeeper's assertion of lien thereon for accommodations furnished guest possessing violin (Civ. Code, § 1861; Code Civ. Proc. § 689).

3. Innkeepers ⚿13.

Owner of goods in guest's possession held under innkeeper's lien need not wait until execution sale is imminent before asserting his rights (Civ. Code, § 1861; Code Civ. Proc. § 689).

Appeal from Municipal Court of Los Angeles; A. B. Edler, Judge.

Action by the Rudolph Wurlitzer Company against H. E. Farb, doing business under the firm name and style of the Vanderbilt Hotel, and H. E. Farb. From a judgment for plaintiff, defendants appeal.

Affirmed.

W. L. Engelhardt, of Los Angeles, for appellants.

Samuel C. Cohn, of Los Angeles, for respondent.

Statement of Facts.

SHAW, J.

Plaintiff sued to recover a violin, bow, and case. The action was submitted to the trial court upon a stipulation of facts, from which it appeared that plaintiff, being the owner of said violin, bow, and case, delivered them to one Edward Foster, on approval, the title to remain in plaintiff; that thereafter said Foster, being a guest at the hotel operated by defendant Vanderbilt Hotel Company, brought said violin, bow, and case into his room in said hotel; that thereafter he left the hotel, being at the time indebted to defendant above named for lodging furnished him and for money advanced to him by the said defendant; that the said defendant held the violin, bow, and case, and refused to deliver them to plaintiff upon demand, claiming a lien thereon for the indebtedness above mentioned due to said defendant from said Foster. Judgment was rendered in favor of plaintiff for possession of the violin, bow, and case, and said defendant appeals.

Opinion.

[1-3] Civ. Code, § 1861, must be construed as a whole. While it states at first that hotel keepers shall have a lien on property belonging to or legally under the control of their guests, it later provides that, if property subject to the lien does not belong to the guest, it shall not be sold summarily after notice of that fact, but only in the manner provided by the Code of Civil Procedure, on execution to satisfy a judgment for the hotel charges. This proviso makes Code Civ. Proc. § 689 applicable to the situation; that section being a part of the chapter relating to sales on execution. Under it the owner of the property may claim it, and, if his claim proves well founded, he may recover it, unless for some reason growing out of his dealings with the guest the property can be held on the lien, which does not appear here. It was not the legislative intent that property which cannot be sold in satisfaction of the lien should be held for it against the true owner. McClain v. Williams, 11 S. D. 227, 76 N. W. 930, 49 L. R. A. 610, 74 Am. St. Rep. 791. The law does not require useless acts, and, to require the owner to wait until an execution sale is imminent before asserting his rights, would be such an act.

The judgment is affirmed, with costs of appeal to respondent.

CRAIG, Judge pro tem., concurs.

214 Cal. 521

BEATTY et al. v. HOOPER et al.

L. A. 11366.

Supreme Court of California.

Dec. 29, 1931.

Appeal and error 🔑1011(1).

Findings of trial court, where testimony is in substantial conflict, cannot be disturbed.

In Bank.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Carrie M. Beatty and others against Eugenia M. Hooper and another. Judgment for the defendants, and the plaintiffs appeal.

Affirmed.

Emmons, Aldrich & Mack, of Bakersfield, for appellants.

Harvey & Heard, of Bakersfield, for respondents.

PER CURIAM.

This is an action to have a trust declared in certain real property and to terminate the same. On March 30, 1905, Mrs. Chetwood, one of the plaintiffs, conveyed the property to defendant Thomas R. Hooper, who was and still is the husband of her daughter, defendant Eugenia Hooper. The deed was absolute in form. Mrs. Chetwood and three other daughters bring this action, claiming that at the time of the conveyance Thomas Hooper orally promised to hold all oil and minerals therein contained in trust for plaintiffs. It was further alleged that defendant Hooper held the legal title without repudiation of the trust until January 24, 1925, when he conveyed it to his wife, defendant Eugenia Hooper, without consideration; and that she had full knowledge of the trust. In June, 1926, plaintiffs demanded a conveyance to each of an undivided one-fourth interest in the oil and minerals, which was refused.

Upon the trial, the court found that there was no such promise on the part of defendant Thomas Hooper, and that the property had been conveyed in fee simple by plaintiff Mrs. Chetwood to said defendant either in consideration of love and affection, or upon the consideration that he pay certain sums to his wife, which sums were paid. The court also found that an oral reservation of oil and mineral rights was made by the grantor, but that defendant Eugenia Hooper had no knowledge thereof. The conclusion of the court was that plaintiffs had no interest in the property, and that the action was, moreover, barred by the statute of limitations.

Plaintiffs' appeal is based upon the claim that the evidence is insufficient to support the findings. The testimony is in substantial conflict and the findings cannot be disturbed. Nothing is said by plaintiffs about the conclusion of the court that the action was barred by limitations, and since they thus tacitly concede the point, their appeal is wholly without merit.

The judgment is affirmed.

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214 Cal. 516

BARCELOUX et ux. v. BARCELOUX et al.

Sac. 4532.

Supreme Court of California.

Dec. 29, 1931.

1. Deeds 🔑208(3).

In action to cancel deed, evidence supported finding that grantor handed deed to grantee with intent to reconvey undivided half interest in property without conditions or reservations (Civ. Code, § 1056).

> It was claimed that grantee owed his brother, grantor, some $9,000 to $12,000 and that, to be relieved of this indebtedness and his share of $32,500 mortgage, he conveyed his interest in property they owned jointly to grantor, and that grantor executed a deed back conveying an undivided one-half interest and handed it to grantee merely to be held in escrow until grantee repaid his indebtedness to grantor, when deed would be recorded.

2. Deeds 🔑211(3).

In action to cancel deed, evidence supported finding that delivery was not obtained through constructive fraud.

In Bank.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by George A. Barceloux and wife against H. J. Barceloux and wife and another. From the judgment, plaintiffs appeal.

Affirmed.

W. T. Belieu, of Willows, Huston, Huston & Huston, of Woodland, M. H. Iversen, of Ukiah, and Arthur Huston, of Woodland, for appellants.

George R. Freeman, of Willows, Marshall Nuckolls, of San Francisco, and Herbert V. Keeling, of Lockport, for respondents.

PRESTON, J.

Appeal from judgment for defendants in an action to cancel and annul a deed to real prop-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

erty upon the ground that there was no valid delivery of the deed to the grantee and that the delivery, if any, was obtained through constructive fraud.

Plaintiff George A. Barceloux and defendant H. J. Barceloux, hereinafter referred to as George and H. J., are brothers. For many years they engaged in joint enterprises and held joint properties, some of which stood at times in the name of one of them for the benefit of both. Their relationship was always one of the very highest confidence.

For several years they had been the joint owners of a large ranch upon which a $32,500 mortgage became due in the fall of 1922. H. J. also owed George some $9,000 to $12,000, representing debts which originated with the purchase of said ranch, stock, and attendant transactions. The property was not paying, and H. J. desired to be relieved of his portion of all said indebtedness. To this end he conveyed the property to George by a deed executed February 5, acknowledged at Willows February 6, and recorded February 7, 1923. George thereafter secured a release of said mortgage and refinanced the property by giving a new $30,000 bank mortgage. Said conveyance by H. J. to George was absolute and gave George title to the entire property in his own right.

But on the same day, February 5, George also executed to H. J. a deed conveying back to him an undivided one-half interest in said ranch, acknowledged it on February 6 at Orland, and handed it to the grantee. It was recorded May 26, 1924, under circumstances to be hereinafter related. This is the deed which plaintiffs here seek to have set aside. The question is whether George handed it to H. J. with the intention of delivering it and thereby conveying back said undivided half interest to H. J., or whether he handed the deed to H. J. merely to be held in escrow with the intention and under the belief that there could be no valid delivery and hence no conveyance of title without recordation. The trial court found for defendants, and plaintiffs appealed.

[1] Appellants claim that the facts surrounding the delivery of the deed are undisputed, and, under the rules of law properly applicable thereto, a failure of valid delivery is shown. Respondents urge that the facts are not undisputed, but that the case is one wherein the decision of the trial court, rendered upon conflicting evidence, must be affirmed. In this we agree. While the bare facts are undisputed, the further and determinative evidence bearing upon the intent of the parties, their acts and statements, is conflicting, and the trial court was warranted in resolving this conflict in favor of defendants. A brief discussion of such evidence follows:

H. J., who defaulted and upon the trial testified for his brother, stated, in substance, that, after deeding the property to George, they discussed the fact that the land contained mineral deposits which might or might not enhance greatly its value; that H. J. told George that he felt he should be in a position to realize upon this development and asked for an opportunity to repurchase his share of the ranch upon payment to George of whatever sums were due him; that to further this understanding George then executed said deed, which H. J. agreed he would not record unless and until he paid his indebtedness to George. H. J. was at the time president of a local bank, and he testified that he placed the deed in the bank vault, taking it, not as grantee, but in escrow to be held until the payment of said indebtedness. Prior to this time, in July, 1921, defendant Freeman's predecessor had obtained a judgment of $47,260.31 against H. J. and one Donohoe, affirmed on appeal February 24, 1924. Donohoe was almost immediately adjudged a voluntary bankrupt, and H. J., in consideration of Freeman withholding execution against his property, agreed that he would make no transfers thereof. Freeman, however, knowing of said unrecorded deed, requested its recordation, which request H. J. complied with on said May 26, 1924. Mr. Freeman testified that H. J. made no mention of the alleged escrow, of his unpaid debt to George, or of George's alleged ownership of the land. Furthermore, nothing having been paid upon the judgment, H. J. shortly thereafter, at Freeman's request, gave him as further security a trust deed upon the said property, which was placed of record July 3, 1926. During this same year, George testified, he learned for the first time of the recordation of said deed, and soon thereafter, in November, 1926, he instituted this action as aforesaid.

The trial court found that George handed said deed to H. J. with intent to reconvey to the latter an undivided half interest in and to said property, without conditions or reservations of any nature; that George retained no control over the deed, and there was no intent or agreement that it should be held or returned to him at any special time or upon any condition; that on the contrary it was intended to and did effect an immediate transfer to H. J.; and that it was executed for a good consideration without intent to defraud. Upon these findings the trial court denied plaintiffs relief, and, the default of H. J. having been duly entered, gave judgment to defendant Freeman for his costs. At the same time the trial court filed a memorandum opinion setting forth the views embodied in the findings and holding that said unconditional delivery of the deed by George to H. J., without reservation or power of recall, conveyed full title to H. J., thus making applicable the provisions of section 1056 of the Civil Code as follows: "A grant cannot be delivered to the grantee conditionally. Delivery to him

* * * is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

With the findings and opinion of the court below we find ourselves in full accord. There can be no question of the sufficiency of the evidence to support them. Appellants base their main contention upon the case of Hotaling v. Hotaling, 193 Cal. 381, 224 P. 455, 56 A. L. R. 734, urging that the intent of grantor and grantee, as testified to by them, must control, making the alleged delivery invalid as there was no intent to pass title. In this cause, however, there is nothing to indicate that either of the brothers believed that a deed was ineffective until recorded; they were both men of wide business experience, bank officials, and presumably understood the effect of executing and handing over to a grantee such a conveyance. No writings relative to the transaction passed between them; no definite amount was fixed as due from H. J. to George at any definite time, upon payment of which the deed was to take effect or upon nonpayment to be canceled. Despite the alleged intent to have ownership remain in George, the ranch was operated after the exchange of deeds in the same manner as before; that is, George continued to operate the ranch, keep the books, make annual statements to H. J., and H. J. continued on various occasions to contribute his share towards costs and assessments, acting in all respects as when he was admittedly a joint owner. The trial court did not have to credit the testimony of the brothers as to their intent, especially when it was in direct conflict with the intent plainly indicated by their own actions. Mr. Freeman testified that H. J., during their negotiations over a long period, never protested his lack of ownership or right to record the deed or give the trust deed upon said property. His testimony and other evidence credited by the trial court offered ample support for its conclusion.

[2] The claim of constructive fraud is untenable under the above findings and under the testimony of the brothers themselves as to their complete understanding with each other. H. J. himself testified that he took the deed without fraudulent intent and with every intention of not recording it.

Lastly, appellant pleads that to uphold the judgment is to permit H. J. and his successor in interest Freeman to secure title to said ranch after appellant has fully kept all the terms of his agreement and assumed a personal liability in excess of $30,000, besides operating the ranch at his own expense for many years, H. J. having been adjudged a bankrupt. Such a result would be unfortunate. The record, however, shows that many involved transactions and confidential dealings took place between these brothers over a long period, which suggests that as between them a proper adjustment of the equities may some time be had; at any rate, the result is no more inequitable than it would be to penalize the defendant Freeman for his aid in delaying execution upon the properties of his said judgment debtor.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.

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214 Cal. 455

DOUGERY v. BETTENCOURT et al.

Sac. 4411.

Supreme Court of California.

Dec. 23, 1931.

Rehearing Denied Jan. 21, 1932.

1. Levees and flood control ⟹28.

County recorder's writing on reclamation district tax sale certificate word "recorded," and placing it in desk drawer and entering memorandum of sales in book which was not official record of county, *held* not "recordation" (Pol. Code, § 3480).

[Ed. Note.—For other definitions of "Record (Verb)," see Words and Phrases.]

2. Taxation ⟹614.

Failure strictly to comply with statutory provisions respecting tax sales prescribed renders sale invalid (Pol. Code, § 3480).

3. Taxation ⟹658(2).

Failure to follow strictly statutory provisions respecting notice of tax sales renders sale void, even if owner has actual knowledge and attempts to waive defect (Pol. Code, § 3480).

4. Taxation ⟹695.

It is policy of state to give delinquent taxpayer every reasonable opportunity, compatible with rights of state, to redeem property.

5. Levees and flood control ⟹28.

Statute requires recordation of reclamation district tax sale certificate as jurisdictional step (Pol. Code, § 3480).

6. Levees and flood control ⟹28.

Word "record," in statute respecting reclamation district tax sale certificate, means copying instrument into proper book and indexing as provided by law (Pol. Code, § 3480).

Word "recorded" in ordinary usage signifies copied or transcribed into some permanent book, and word is also defined as copying an instrument into public records in book kept for that purpose by or under superintendence of officer appointed therefor.

7. Records 🔑6.

Statute providing instrument is recorded when deposited in recorder's office does not apply to recording intended to give third persons constructive notice (Civ. Code, § 1170).

8. Levees and flood control 🔑28.

Statute providing instrument is recorded when deposited in recorder's office does not apply to recordation of reclamation district tax sale certificate (Civ. Code, § 1170; Pol. Code, § 3480).

9. Records 🔑6.

Statute providing instrument is recorded when deposited in recorder's office applies where recordation is to make instrument matter of public record or to complete some act of the party (Civ. Code, § 1170).

10. Levees and flood control 🔑28.

Where reclamation district tax sale certificate was not recorded as required by statute, all subsequent proceedings based thereon were void as to owner (Pol. Code, § 3480).

11. Levees and flood control 🔑28.

Reclamation district tax sale certificate must be recorded by county recorder of county wherein real property affected is situated (Pol. Code, § 3480; Civ. Code, § 1169).

12. Levees and flood control 🔑28.

Matter of book in which reclamation district tax sale certificate is to be recorded is covered by statute relating to books for recording (Pol. Code, §§ 3480, 4132, and § 4131, subds. a, n).

13. Levees and flood control 🔑28.

Purchaser claiming under invalid reclamation district tax deed was entitled to be repaid in money sum he had expended on land as condition precedent to quieting owner's title (Pol. Code, § 3466½, as added by St. 1921, p. 555).

14. Taxation 🔑710.

Giving of lien *held* not "payment," within statute respecting invalid sales for delinquent assessments (Pol. Code, § 3466½, as added by St. 1921, p. 555).

[Ed. Note.—For other definitions of "Payment," see Words and Phrases.]

In Bank.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by James C. Dougery against Frank J. Bettencourt and others, to quiet title. From a judgment quieting title of defendant named, plaintiff appeals.

Judgment modified, and, as modified, affirmed.

Superseding opinion in 2 P.(2d) 765.

Joseph E. Bien, of San Francisco, Duard F. Geis, of Willows, and Werner Olds, of San Francisco, for appellant.

Sans & Hudson, of Watsonville, and W. T. Belieu, of Willows, for respondent Frank J. Bettencourt.

Hankins & Hankins, of San Francisco, for respondent Glenn-Colusa Irr. Dist.

H. C. Bell, of Willows, for respondent David E. Hughes.

PER CURIAM.

Plaintiff appeals from a judgment quieting the title of defendant Bettencourt to certain real property in Glenn county. Plaintiff's claim of title is based upon a tax deed of J. J. Ossenbriggen, county treasurer of Colusa county, as trustee of the bond fund of reclamation district 2047, within which district the lands involved herein are located. This deed is dated August 12, 1927, and was duly and properly recorded in Glenn county on August 13, 1927. Based upon this deed, plaintiff brought this action to quiet title, naming as party defendants Frank J. Bettencourt, the original owner of the land; David E. Hughes, holder of a mortgage on the property, dated September 3, 1921, which mortgage was given to secure an indebtedness of $8,000; and the Glenn-Colusa irrigation district. It appears that 80 acres of the 215 acres here involved are located within the boundaries of the irrigation district, and that said district has a claim based upon certain delinquent assessments levied by it against said 80 acres.

The record discloses that reclamation district 2047 was organized in 1920 and embraces within its boundaries lands in both Glenn and Colusa counties. Subsequent to its formation, and in accordance with the statutory provisions therefor, the district caused an assessment to be levied against all the properties within its boundaries. Bonds were issued and sold, and to meet the interest due thereon, an installment of the assessment was called. Bettencourt failed to pay this installment and, as a result of his delinquency, his property was placed on sale June 29, 1926. No bidders appearing at the time and place noticed for the sale, the county treasurer of Colusa county issued a certificate of sale to himself, as trustee of the district. Thereafter, upon the expiration of the one-year period of redemption, the trustee, on August 12, 1927, sold the property to plaintiff for the sum of $299.03, and executed and delivered to plaintiff the deed which forms the basis of his claim of title.

The lower court found against the claim of plaintiff, and quieted the title of Bettencourt, subject to the Hughes mortgage, but made its decree subject to Bettencourt's reimbursing the plaintiff in the sum of $299.03, with interest, together with any other sums paid or expended by plaintiff for any additional taxes or assessments against the property. In order to ascertain the amount of any such sums expended by the plaintiff, the court ordered plaintiff to file and serve a statement of the amount of any such sums so expended by him, and then made the $299.03 and any such further expenditures a lien upon the property superior to the Hughes mortgage.

The trial court based its conclusion that plaintiff's tax deed was invalid upon the finding that "there was not recorded in the office of the County Recorder of the County of Glenn, State of California, being the county in which said real property is situate, any duplicate or copy of the Certificate of Sale to the purchaser, as required by the provisions of section 3480 of the Political Code." The validity of the trial court's conclusion that the tax deed was not recorded as provided by that Code section presents the most important question on this appeal.

Before directly discussing that question, brief reference should be made to the statutory procedure provided for the sale of lands within a reclamation district for delinquent assessments. The governing provision is section 3480 of the Political Code. So far as pertinent here, that section provides that at least 90 days before interest on the bonds falls due, the county treasurer shall ascertain the amount necessary to pay interest and principal maturing on such interest date, and shall thereupon cause to be published in a newspaper in the county once a week for two weeks, a notice substantially in the form set forth in the section, to inform the property owners in the district that an installment of the assessment has been called and is payable 30 days from a specified date; and that, if any portion of the installment is unpaid on that date, the same shall become delinquent and a penalty shall be added; that when any installment shall become delinquent, the treasurer shall publish in a county newspaper once a week for two weeks a notice containing a description of each parcel of land whereon such installment is delinquent, and the amount of the installment, with interest and penalty, and shall also publish a notice that each of the parcels will be sold at a specified time and place at public auction to pay the delinquent installment; that unless said installment is paid before the date so specified, the county treasurer shall sell each parcel so described to the highest bidder, but if no bid is made, the treasurer shall bid in and sell said parcel to himself, as trustee of the bond fund of the district. The statute then provides: "The treasurer shall execute to each purchaser, including himself as trustee, a certificate of sale, and *shall record a duplicate in the county recorder's office.*"

The section then goes on to state that any interested person may redeem at any time within one year after the date of the sale, but if not so redeemed, the treasurer may (where he has bought the land in as trustee) at any time thereafter sell the land "at public or private sale and *with or without notice* to any person paying him the amount for which said parcel was bid in by said treasurer at delinquent sale, with interest. * * *"

It is to be noted that, although the landowners are given a newspaper notice that the installment has been called, and another such notice that the installment is delinquent and that, unless paid, their lands will be sold, there is no provision in the statute for any notice of the fact that their lands have been sold or that the period of redemption has expired or is about to expire, unless the provision in reference to recordation of the certificate of sale be so construed.

[1] The facts are not in dispute as to what occurred after the treasurer caused the lands to be sold to himself on June 29, 1926. He caused a certificate of sale to be issued to himself as trustee, and on July 19, 1926, *deposited* a duplicate thereof in the office of the county recorder of Glenn county. The recorder wrote upon it the words, "Recorded at request of J. J. Ossenbriggen," together with the time. The instrument was then placed by the recorder in a desk drawer, and a memorandum of the sales was entered in a book devoted to certificates of "Irrigation District Tax Sales," a book which apparently was not an official book or record of the county. However this may be, there was certainly no recordation of the instrument in the ordinary sense of copying the same into the proper book (Cady v. Purser, 131 Cal. 552, 63 P. 844, 82 Am. St. Rep. 391); nor was there any proper indexing thereof (Central Pacific Railway Company v. Droge, 171 Cal. 32, 151 P. 663; Pol. Code, § 4235a).

We turn now to a discussion of the question as to whether the provision of section 3480, Political Code, above quoted, requires an actual recording, or whether the *depositing* of the document with the recorder constitutes sufficient compliance with the section. We are of the opinion that the provision in the act requiring the recordation of the certificate of sale was inserted therein for the benefit of the property owner; that it was intended by such recordation to give the owner constructive notice of the date of sale and of the date the period of redemption starts; that, so construed, an *actual recordation* in the sense of copying the document into the proper book is required; that failure to comply with this provision of the statute renders subsequent proceedings, based on the certificate of sale, of no legal effect.

[2-4] That the above interpretation is the correct one becomes apparent when certain fundamental principles of interpretation applicable to proceedings for the sale of property for delinquent taxes are applied to the section under consideration. Proceedings on tax sales are in invitum and a failure strictly to comply with the statutory provisions prescribed as essential to effect a sale of the property renders the sale invalid. Hinds v. Clark, 173 Cal. 49, 159 P. 153; Los Angeles Olive Growers' Association v. Pozzi, 167 Cal. 454, 140 P. 581; Numitor Gold Mining Co. v. Katzer, 83 Cal. App. 161, 256 P. 464. Once it is determined that a particular step is necessary, the courts are not permitted to speculate as to whether a failure to observe or perform that step does or does not result in injury. Sawyer v. Berkeley Securities Co., 99 Cal. App. 545, 279 P. 217. A failure to comply strictly with the provisions of a statute in reference to notice of tax sales, renders the sale void, even if the owner has actual knowledge and attempts to waive the defect. This is so because the tax officer gains his right to sell, not from the owner, but from the statute, and the statute is the measure of his power. Southern California Bond & Finance Corporation v. Mathes, 206 Cal. 749, 276 P. 1013. In addition to the above principles, it must also be kept in mind that it is the policy of the state to give the delinquent taxpayer every reasonable opportunity, compatible with the rights of the state, to redeem his property. Hotchkiss v. Hansberger, 15 Cal. App. 603, 115 P. 957.

[5, 6] Interpreted according to the above principles, it is our opinion that section 3480 of the Political Code requires the recordation of the certificate of sale as a jurisdictional step, provided by the Legislature, which must be taken in order that the proceedings shall be valid. We are further of the opinion that, reasonably interpreted, the provision was inserted for the benefit of the property owner, and that, in order to accomplish this result, the word "record," found in that section, must be interpreted to mean record according to law, i. e., by copying the instrument into the proper book and indexing as provided by law. That the provision for recordation was, among other things, intended for the benefit of the property owner is apparent from the fact, pointed out above, that the act provides for a published notice of the assessment and of the proposed sale, but there is no provision giving the taxpayer any such notice of the fact that the sale has taken place, or that the period of redemption is about to expire. Although the Legislature could doubtless dispense entirely with the certificate of sale and, therefore, could dispense with notice thereof (McDonough v. Cooper, 179 Cal. 384, 177 P. 153), the fact remains that the Legislature has seen fit to provide for such certificate and for its recordation. In several cases, by way of dicta, it has been held that the purpose of the certificate of sale and its recordation is to give the owner constructive notice of the sale and of the date the period of redemption will expire. Bruschi v. Cooper, 30 Cal. App. 682, 159 P. 728, 734; Lewis v. Tulare Reclamation District, 56 Cal. App. 52, 204 P. 421; Hinds v. Clark, 173 Cal. 49, 159 P. 153. We are in accord with the views expressed in those cases.

Appellant contends, however, that there was sufficient compliance with the recordation provision by the mere deposit of a duplicate with the county recorder, and that an actual copying into the proper book is not required, citing in this regard section 1170 of the Civil Code. That section provides: "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, *it is deposited in the recorder's office, with the proper officer*, for record."

[7, 8] We are of the opinion that that section has no application to the recording of instruments which are intended to give third persons constructive notice. In other words, when section 3480 of the Political Code requires the recordation of the certificate of sale and it is determined that the purpose of such recordation is to give the owner constructive notice thereof, section 1170 of the Civil Code has no application. In Cady v. Purser, 131 Cal. 552, 63 P. 844, 82 Am. St. Rep. 391, it was held that in order for a recorded instrument to be constructive notice to subsequent purchasers or mortgagees, the instrument must be actually recorded, and that a mere deposit of the instrument with the recorder is not sufficient. The decision was based on the language of section 1213 of the Civil Code, which provides that "every conveyance of real property acknowledged * * * and recorded as prescribed by law * * * is constructive notice of the contents thereof to subsequent purchasers and mortgagees. * * *" The court properly held that in such a case actual recording was necessary and that a mere deposit of the instrument under section 1170 of the Civil Code was not sufficient. At page 557 of 131 Cal., 63 P. 844, 845, the court said: "For the purpose of complying with a statutory requirement, as in the case of official bonds or certificates of marriage, where the evident purpose of the statute is to make the instrument a matter of public record, or when the recording of an instrument is an essential step in perfecting some right or completing some act of the party, as in the case of a declaration of homestead, or an assignment for the benefit of creditors, the depositing of the instrument in the recorder's office is sufficient; but, when merely making a record of the instrument is not the ultimate purpose of the party, but the recording of the instrument is the means by which his ultimate purpose is to be carried into effect,—as when his purpose is to give notice of his interest in real estate,—section 1213 requires not only that the instrument shall be filed with the recorder for record, but that it shall also be 'recorded as prescribed by law.' By this requirement, in order that constructive notice of the contents shall be given to subsequent purchasers and mortgagees, the legislature must have intended something in addition to depositing the instrument in the recorder's office for record, since that had already been provided for in section 1170. The word 'recorded,' in ordinary usage, signifies copied or transcribed into some permanent book. In Anderson's Law Dictionary the term 'recording' is defined 'copying an instrument into the public records in a book kept for that purpose by or under the superintendence of the officer appointed therefor.' "

[9] We are of the opinion that section 3480 of the Political Code must be interpreted in the same way and for exactly the same reasons. Section 1170 of the Civil Code was never intended to apply to those situations where the recordation of the instrument was intended as constructive notice to third persons. As pointed out in the above quotation, that section applies where recordation is for the purpose of complying with a statutory requirement, where the purpose of the recordation is to make the instrument a matter of public record, or is required to complete some act of the party; but when the purpose of recordation is to give notice to third persons of the interest claimed under the instrument, section 1170 of the Civil Code has no application. In such a case, the term "record" must be given its usual and ordinary meaning, that is, the instrument must be copied into the proper book and indexed as provided by the Political Code.

Appellants strongly rely on Watkins v. Wilhoit, 104 Cal. 395, 38 P. 53. In that case, a debtor executed a deed to trustees conveying to them all his property for the benefit of creditors. The instrument (which involved real property and, under the Code, was required to be recorded) was deposited with the recorder for recordation, but was not transcribed by him into the proper book. Nonconsenting creditors attacked the assignment on the ground that it was not recorded. The court held that the instrument was properly recorded within the meaning of the section 1170 of the Civil Code, as far as nonconsenting creditors were concerned, for the reason that the object of the statute in requiring such assignments to be recorded was not to give nonconsenting creditors (who parted with nothing on the faith of the record) constructive notice; but was to make the assignment public and irrevocable. In other words, the recordation provision was not intended for the purpose of giving constructive notice to any one. The mere deposit of the assignment with the recorder irrevocably fixed the rights of all creditors. Nothing that any consenting or nonconsenting creditor could do could affect the status thus created. In the instant case, we have already held that the provision was intended, among other things, to give constructive notice to the owner.

[10] The mere deposit of the certificate of sale did not operate so as irrevocably to fix the status of the parties. The owner, against whose interests the sale operated, could change the status created by the sale by redemption within one year. If section 1213 of the Civil Code requires actual recordation in order to protect subsequent purchasers and incumbrancers, then section 3480 of the Political Code, being for the protection of the owner and to give him constructive notice of the sale, should be interpreted to give the owner no less protection than that afforded subsequent purchasers and mortgagees. It necessarily follows, therefore, that in the instant case, the instrument not having been recorded as required by section 3480 of the Political Code, all subsequent proceedings based thereon are void as to the owner.

[11] Appellant points out that the Legislature could hardly have expected strict compliance with the provisions of section 3480 of the Political Code, for the reason that the statute is silent as to what the certificate of sale must contain; as to the county in which it is to be recorded; as to the book in which it shall be recorded; and as to the time of recordation. However, by failing to mention these matters, it cannot be assumed that the Legislature intended that the requirement of recordation should be of no legal effect. The question as to what the certificate must contain is not before us on this appeal. In reference to another recordation statute, where the time was not specified, a reasonable time was implied. Wolpert v. Gripton (Cal. Sup.) 2 P.(2d) 767, and cases cited. Although the statute is silent as to the county in which the instrument must be recorded, that is taken care of by the express provisions of section 1169 of the Civil Code, which provides: "Instruments entitled to be recorded must be recorded by the county recorder of the county in which the real property affected thereby is situated."

[12] Although the statute does not prescribe the book in which the certificate of sale is to be recorded, that matter is covered by the provisions of the Political Code applicable to the duties of recorders. Section 4131, subdivision a, of the Political Code, provides that in a separate book the recorder must record "deeds, grants, transfers and mortgages of real estate." If a certificate of sale such

as here involved, does not come within that classification, it certainly does come within the provisions of subdivision n of that section. That subdivision provides that the recorder must record in a separate book "such other writings as are required or permitted by law to be recorded." Section 4132 of the Political Code provides for the keeping of indexes to such book. These points are without merit.

The conclusion that the certificate of sale and all proceedings based thereon are invalid, for the reason that the certificate was not recorded, makes it unnecessary to pass upon the question as to the effect of a valid sale for delinquent reclamation assessments upon prior or subsequent irrigation district liens. That question would become pertinent only in the event the sale here involved were valid.

[13] The last point made by appellant is that the expenditures made by him for taxes should be repaid by Bettencourt as a condition precedent to quieting the latter's title, and that the provision in the judgment merely making these sums a lien upon the property does not adequately protect him. Appellant is undoubtedly correct in this regard. As already pointed out, the court quieted Bettencourt's title subject to reimbursing Dougery for the sum of $299.03, with interest at 7 per cent. per annum from August 12, 1927, "together with any other sum or sums paid or expended by the said plaintiff in the payment of any additional taxes or assessment against said property and required to be paid, together with interest thereon from such payment at the rate of 7 per cent. per annum * * * and the said sums to be repaid to the said plaintiff, James C. Dougery, by the said defendant, Frank J. Bettencourt, are hereby made and constituted a lien upon the said real property * * * said lien to be superior to the lien of the mortgage of David E. Hughes. * * *" Subsequent to the entering of this judgment, the trial court permitted a hearing to ascertain the amount or amounts, in addition to the $299.03, that had been so expended by the plaintiff. At this hearing, it developed that, although over $1,200 in addition to the $299.03 had been expended in the payment of taxes and assessments on the property, said additional sums had been paid by one Culver, who holds a contract to buy the property from plaintiff, in the event good title can be conveyed; that Culver has been and still is in possession of the property; that, under this contract, Culver is to pay all taxes and assessments; that such sums are to be paid by Culver in lieu of rent; that, in the event plaintiff cannot convey good title to Culver, plaintiff is not to reimburse Culver for such sums. The trial court ruled that, inasmuch as plaintiff has not expended these sums and was not liable therefor, he should not be reimbursed in that amount. Appellant in his brief does not attack the *amount* of the award of the trial court—$299.03—but contends that he has not been assured of payment of the award by merely giving him a lien which, while superior to the Hughes mortgage, is subject to various tax liens. It is our opinion that appellant is entitled to be repaid the sum of $299.03 as a condition precedent to quieting Bettencourt's title. Section 3466½ of the Political Code (Stats. of 1921, p. 555) provides: "No sale, certificate or deed made for a valid delinquent assessment shall be adjudged invalid, without the payment to the purchaser of the land of the amount of the said delinquent assessment, penalties, interest and costs."

[14] Obviously the giving of a lien on the property is not the payment contemplated by that statute. It is, therefore, ordered that the judgment be modified to provide that the defendant Bettencourt's title to the property is quieted against Dougery upon condition that Bettencourt pay to Dougery, or deposit in court to his credit, the sum of $299.03, plus interest at 7 per cent. per annum from August 12, 1927, until the date of payment.

As so modified, the judgment is affirmed.

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214 Cal. 499

WEISBURG v. WEISBURG.

L. A. 11533.

Supreme Court of California.

Dec. 29, 1931.

Divorce ⚿184(10).

Where evidence was sufficient to support findings and judgment dismissing action for divorce, Supreme Court must affirm judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action for divorce by Mollie Weisburg against Henry J. Weisburg. From a judgment dismissing the action, plaintiff appeals. Affirmed.

J. L. Kearney, of Los Angeles, for appellant.

George Acret, of Los Angeles, for respondent.

SEAWELL, J.

Plaintiff appeals from a judgment dismissing her action for divorce against Henry J. Weisburg. She sought a divorce on the ground of extreme cruelty, which seriously affected her health. In his answer the defendant denied all allegations of cruelty. The court found that each and every allegation of paragraph IV of the complaint, wherein plaintiff set forth the acts of cruelty upon which she relied as cause for divorce, was not true. The sole question upon this appeal relates to the correctness of said finding. The issue of the marriage, two boys, have each attained their majority.

Appellant insists that the evidence clearly establishes her right to divorce without conflict, and therefore the law impels a judgment in her favor. From an examination of all the evidence in the case, we are unable to agree with this contention. The case is one upon which the trial court could, upon the printed record as it comes to us, have granted or denied a divorce, and this court, which is solely a reviewing court in such matters, would have been bound by its judgment in either event. Besides this, the trial court was in the presence of the parties, and was in a position to have gone deeper into the motives and good faith of the parties than we are able to do. Motives and designs often manifest themselves in ways other than by printed or spoken words. Appellant's case is weak in corroborating evidence as to acts of cruelty which the law requires. The pistol episode which appellant stresses, examined in the light of the habits, temperament, and history of the respondent, together with the incident itself as it was described by the two sons, is by no means conclusive, if accepted as true, that the respondent intended to do harm to anyone. It is apparent from the testimony of the sons that the respondent was not a dangerous or violent man.

Property rights are the sole cause of the differences which gave rise to the divorce action. The wife, because of business misfortunes of the husband, took over the clothier business in which he had long been engaged, first in New York and latterly in Los Angeles. The question of the wife's separate property entered into the settlement with the husband's creditors, which was made through the Board of Trade. The wife thereafter assumed all liabilities; the husband having relinquished all claims to property which stood in his name. The business was thereafter conducted by the wife with the aid of the younger son; the husband being made to understand that he was persona non grata in every way. He was sixty years of age and in poor health, and keenly felt the treatment he was receiving. He left home and went to work in Imperial Valley at a small wage, but finally returned perceptibly broken in health. Out of his claim to some interest in the business and property grew the troubles upon which the action is based. The record presents a conflict as to which was the greater offender against matrimonial tranquillity. The trial court held that the wife, who was then past fifty years of age and in possession of the business, which she seems to have conducted successfully with the aid of the younger son, was not entitled to a decree from her husband, with whom she had lived for thirty-two years and who was without funds and in ill health.

The trial judge saw and heard the parties, and was in close contact with them during the trial. Upon a reading of the entire record, it cannot be said that the evidence is insufficient to support the findings and judgment. In such a case we have no alternative but to affirm the judgment.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; CURTIS, J.

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214 Cal. 482

PASKLE v. WILLIAMS et al.

L. A. 11538.

Supreme Court of California.

Dec. 28, 1931.

1. Malicious prosecution 🔑35(2).

Where termination of civil action has been brought about by compromise and settlement, action for malicious prosecution cannot be maintained.

2. Malicious prosecution 🔑30.

In action for malicious prosecution, defendants' motive, even if malicious, was unimportant if legal ground existed upon which to predicate suit in question.

3. Malicious prosecution 🔑25(1).

Where defendant in malicious prosecution had legal claim against plaintiff for amount it sued for, legal cause existed for prosecution of litigation.

In Bank.

Appeal from Superior Court, Los Angeles County; Walter E. Herzinger, Judge.

Action by Ray Paskle against J. A. Williams and others. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Rollin L. McNitt and Loewenthal, Lissner, Roth & Gunter, all of Los Angeles (Edythe Jacobs, of Los Angeles, of counsel), for appellant.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, and Young & Hudson, of San Francisco, for respondents.

PRESTON, J.

Action for malicious prosecution. Judgment of nonsuit granted at the close of plaintiff's evidence. The appeal is from this judgment.

The action complained of was instituted by Seventh & Hill Building, Inc., a corporation, on November 22, 1923, against this plaintiff. The other defendants here are made parties to the present proceeding by allegations of conspiracy to bring about and prosecute said litigation. The action was brought in the superior court of Los Angeles county to recover rent, with prayer for a judgment of $750, upon which an attachment was sued out on said day and levied upon a small stock in trade of this plaintiff and trade fixtures to which he had no title. He defended in said action by answer and also by cross-complaint asking various kinds of affirmative relief, the exact nature of which is not disclosed by this record. No effort was made, so far as is disclosed, to have the attachment dissolved by order of court. The case, although at issue, dragged and was finally dismissed by a stipulation of the parties on July 22, 1927, which stipulation read: "No. 132-545—Stipulation. It is hereby stipulated that the complaint in the above entitled action may be dismissed. Dated at Los Angeles, California, July 22, 1927. Paul B. D'Orr, Carroll Allen, Attorneys for Plaintiff and cross-defendants Seventh & Hill Building, et al., Loewenthal, Lissner, Roth & Gunter, Attorneys for Defendant and cross-complainant."

To this stipulation was added an ex parte reservation as follows, to wit: "Defendant and cross-complainant hereby dismisses its cross-complaint on file herein without prejudice to its rights and not as consideration for the dismissal of plaintiff above. Defendant and cross-complainant hereby asserts and recites that he intends to enforce his rights as set forth in the facts alleged in his cross-complaint, the denials and averments of his answer and as they may otherwise exist. Loewenthal, Lissner, Roth & Gunter, Attorneys for defendant and cross-complainant."

[1] The question arises at this juncture whether such a termination of the litigation fixes a basis for the institution and maintenance of an action for malicious prosecution. For the rule in this behalf, see 38 Corpus Juris, pp. 443, 444, where it is stated as follows: "Where the termination of a criminal prosecution or civil action has been brought about by the procurement of defendant therein, or by compromise and settlement, an action for malicious prosecution cannot be maintained." Halberstadt v. N. Y. Life Ins. Co., 194 N. Y. 1, 10, 86 N. E. 801, 21 L. R. A. (N. S.) 293, 16 Ann. Cas. 1102.

In view of the cross-complaint, the cause could only be terminated by judgment on the merits or by action of the plaintiff with the consent of the defendant. Section 581, subds. 1 and 2, Code Civ. Proc. A large part of the claim for back rent would be lost in a new suit on a plea of the statute of limitations. No decision was ever made adjudicating the attachment void and it is difficult to draw a conclusion of lack of probable cause from such termination of the cause. It is at least doubtful whether the rule involved in Kinsey v. Wallace, 36 Cal. 462, has any application to a situation like the one before us. But it is unnecessary to pause for a definite determination of this question, for we think it otherwise appears that not only probable cause but legal cause existed for the prosecution of said litigation; hence for that reason alone the judgment of nonsuit was properly granted.

A recital of the essential underlying facts will now be made: Defendants Williams and wife, prior to March 22, 1922, owned a lot near the corner of Seventh and Hill streets in Los Angeles upon which was about to be erected a large building to be owned by the defendant Seventh & Hill Building, Inc., a corporation, in which the individual defendants were stockholders. Contemplating occupation of this building by a department store on the main floor and a large market in the basement, a lease prior to construction was executed by Williams and wife to one Goodman, who in turn began at once and before construction to make and issue subleases to various persons for space both in the basement and upon the main floor, among whom was plaintiff. To him he demised a space, known as concession 17-A, approximately nine feet by nine feet, in the basement, to be used for the sale of butter, eggs, cheese, etc. The sublease bore date of October 7, 1922, called for the deposit of $186.65 and a monthly rental of $160, and was to cover a term of five years commencing November 8, 1922. The deposit and one month's rental were paid, and plaintiff at about this time entered into possession of the concession and remained in possession of it until November 23, 1923, when said attachment was served, without any further payment of rent whatsoever except that in January, 1923, he paid a representative of the owner the sum of $80 on account of rent.

Goodman, without even opening the department store, deserted the project, and the owners, through defendant Dunn-Williams Company, a copartnership, repossessed the building on or about December 15, 1922. At this time Williams assembled the various concessionaires in groups and discussed their plight with them. The basement group was addressed, at which meeting plaintiff was present. Williams informed them that as owners they would try to operate the department store themselves and would cooperate to make the market project in the basement a success also. He also promised, if desired, to recognize their leases with Goodman. He also conceded a reduction in rent to about half the amount called for in said leases. He also requested from them a pro rata contribution to costs of advertising and other miscellaneous expenses incidental to the general plan for promoting said market.

Apparently plaintiff, with the rest, was well satisfied with this pledge by Williams and with the endeavor to make the store above and the market below a success. Plaintiff paid in January, 1923, the sum of $80 as rent, as aforesaid, and likewise paid from time to time his pro rata of the general expense. Plaintiff states that in the month of February he offered to pay a like sum of $80, but the party to whom he made the offer showed no particular inclination to accept it and the money was not paid. At about this time it also appeared that the plans to make the department store and market a success would probably fail and the owners decided, at an expense of about $80,000 to alter the building and convert it into an office building. To that end work was begun and operations were carried on for a long period of time in the upper portion of the building without substantial disturbance of conditions in the basement.

Plaintiff continued in possession at his stand until the levy of the attachment above mentioned—a period of more than eleven months after Goodman left—during which time he paid no rentals whatsoever other than the said item of $80. Prior to July 1, 1923, various statements were rendered to him by the owners, which included items for rent due at the rate of $160 per month, but plaintiff ignored these statements in so far as the rent demand was concerned. A statement on July 1, 1923, showed the sum of $898.84 due for unpaid rent. This demand plaintiff not only refused to pay, but he also repudiated defendants as his landlord and continued in possession as before. On July 16, 1923, a notice was served upon plaintiff that from and after September 1st, his rent would be $250 a month. This demand plaintiff likewise entirely ignored. Later, on November 8, 1923, a second notice was served upon him raising his rent to $500 per month from and after January 1, 1924. This, too, was ignored, but before the time mentioned therein expired, to wit, on November 22, 1923, the action complained of was begun against plaintiff.

The complaint is not set forth in the record, but excerpts from it are found from which plaintiff insists that the suit was merely for the September, October and November rent at $250 a month and it did not include a demand for other items of rent which might be claimed to be in arrears. Be that as it may, plaintiff was certainly indebted to the owners for rent for more than the amount sued for. He predicates his claim of malice upon the lack of probable cause and he bases the claim of lack of probable cause upon the contention that defendants admit that they preferred to have the plaintiff surrender his space in the basement rather than having him pay the items of rent then due. In other words, the claim is that avowedly defendants had decided upon other plans for use and occupation of the building which were inconsistent with allowing plaintiff to remain in said space and in furtherance of this change of plans they desired to force plaintiff out of the building and to do so brought said attachment suit.

[2] This contention may be practically conceded for the purposes of this case, but such concession is not decisive of the appeal. On the contrary, the motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate the suit in question. Enough has been set forth to show that when Goodman surrendered the premises, it was the duty of plaintiff here to attorn to the owners of the building as the surrenderee of the premises or else to make a new agreement with them. Certainly under the facts of this case it must be held that plaintiff did one or the other of these things. Or to put it another way, plaintiff either became a new tenant of the owners on a month to month basis or else the owners were substituted for Goodman under the original lease. Under either hypothesis it was the duty of plaintiff to pay his rent. That being true, the suit was proper and, of course, the attachment would lie as ancillary thereto. We see nothing whatever to justify a finding that during all these eleven months plaintiff suffered a partial eviction and for that reason was absolved from the payment of rent.

[3] Under this conclusion the principles of law controlling probable cause and malice as well as the termination of the action in question are not involved. The questions of conspiracy and errors, if any, in the admission and rejection of evidence, are likewise unimportant. The vital fact is that Seventh & Hill Building, Inc., had a legal claim against this plaintiff for as much or more than the amount it sued for.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

214 Cal. 488

SMITH et al. v. EDELMAN et al.

L. A. 11398.

Supreme Court of California.

Dec. 28, 1931.

Rehearing Denied Jan. 25, 1932.

Mines and minerals 🔑78(7).

In action to forfeit oil and gas leases for failure to do exploratory work, where leases required 90 days' written notice before forfeiture could be declared, evidence *held* to show lessees resumed drilling operations prior to expiration of 90 days.

In Bank.

Appeal from Superior Court, Kern County; William D. Dehy, Judge.

Action by Charles G. Smith and others against A. S. Edelman and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Harvey & Heard, of Bakersfield, for appellants.

Borton & Petrini, of Bakersfield, Herbert Moore, of Long Beach, and Dorsey & Campbell, of Bakersfield, for respondents.

PRESTON, J.

This cause appears to be at this time, at least, entirely without merit. The action is by a group of landowners to have certain oil and gas leases on their unproved lands declared forfeited for failure of the lessees to do the required exploratory work and, as a consequence of such forfeiture, to have their respective titles quieted. Judgment went for defendants denying the right of forfeiture, and plaintiffs have appealed.

The leases bear date in September, 1925, were to run for five years, and then terminate unless oil or gas in paying quantities on said lands had been discovered; hence, if drilling was not resumed, the leases have now expired by limitation, but, if the lands are now proven oil or gas fields, plaintiffs are doubtless overjoyed.

But, irrespective of this situation and on the merits, we could not interfere with the judgment of the court below, although we admit a strong leaning to the view that respondents abandoned the leases. The court below, however, thought otherwise, and its finding is not without support. The leases required drilling to begin within six months and to proceed to a depth of at least 3,500 feet, unless at a lesser depth oil was found in commercial quantities. The first well was begun in time and pushed to a depth of 4,865 feet at a cost of sixty-seven thousand odd dollars. Oil or gas not being found, this well was abandoned and within six months thereafter a second well was begun and drilled to a depth of 1,500 feet at a cost of about eighteen thousand odd dollars. Admittedly to go deeper at this point it would have been necessary to get different equipment and to erect a new derrick. Accordingly, the derrick and other equipment was removed from the second well. But the lease required that before a forfeiture could be declared, ninety days' written notice must be given. Appellants therefore, on June 29, 1927, gave such notice. On or about September 1st thereafter respondents acted as though they intended to resume the drilling operations and to that end they did construct some pillars or foundations for a new derrick. But again the operations were abandoned. This suit, however, was begun October 13, 1927. Therefore, if the action of respondents in apparently resuming operations was in good faith, a new notice would be required, and the court found that such operations were so resumed in good faith.

In the face of this finding, it is our duty to affirm the judgment and it is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

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214 Cal. 472

BELLANDI v. PARK SANITARIUM ASS'N et al.

S. F. 13333.

Supreme Court of California.

Dec. 24, 1931.

Rehearing Denied Jan. 21, 1932.

1. Hospitals 🔑7.

Institutions receiving for hire persons affected with nervous diseases should have reasonable devices of restraint and sufficient attendants to handle violent cases with minimum of danger to patient.

2. Hospitals 🔑8.

Evidence supported finding that agents of sanitarium improperly and negligently treated patient in attempt to quiet or subdue him (Code Civ. Proc. § 377).

> Evidence tended to show that patient was not violent, but that his mental condition was merely one of excitability, or a sudden outburst, which frequently yields to rest and treatment, that sanitarium was equipped with restraining straps, which were not used, and that patient's death resulted either from excessive use of ether or from application of tourniquet, which consisted of towel placed about neck

and drawn sufficiently tight to produce stoppage of flow of blood to brain.

3. Appeal and error 🔑994(2), 1005(1).

Finding of jury and judge on question of witnesses' credibility is conclusive on Supreme Court.

4. Physicians and surgeons 🔑18(8).

Whether efforts to subdue patient by medical director of sanitarium were proper could be determined without medical learning; scientific knowledge being unnecessary to determine obvious fact.

5. Physicians and surgeons 🔑18(8).

Whether patient's mental condition was only temporary and whether prognosis was reasonably favorable *held* questions to be answered by medical skill.

> Probability that patient's condition was no more than temporary and that prognosis was reasonably favorable for complete restoration to health was a question which must be submitted to medical skill, and its answer on matters which are beyond the ken of the layman furnishes a basis on which courts of law may base a judgment.

6. Appeal and error 🔑1002.

Supreme Court is bound by jury's finding where there is any evidence reasonably tending to support verdict, notwithstanding contrary evidence.

7. Death 🔑99(5).

$15,000 to mother, whose life expectancy was 13 years at time of death of son 33, in robust health, *held* not excessive (Code Civ. Proc. § 377; Prob. Code, § 225).

> It appeared that son, during the fifteen or sixteen years preceding his death, had contributed over $12,000 for support of mother.

8. Trial 🔑261.

Refusing instructions in amplified and argumentative form, containing no principle of law not embraced in those given, *held* not error.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George F. Buck, Judge.

Action by Enrico Bellandi, as administrator of the estate of Antonio Bellandi, deceased, against the Park Sanitarium Association, a corporation, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hadsell, Sweet & Ingalls and Ford, Johnson & Bourquin, all of San Francisco, for appellants.

James Walter Scott and Howard Harron, both of San Francisco, for respondent.

SEAWELL, J.

This cause was instituted and maintained by virtue of the provisions of section 377, Code of Civil Procedure, which provide that, when the death of a person is caused by the wrongful act or neglect of another, his heirs may maintain an action against the person causing the death.

The appeal is from a judgment entered therein upon the verdict of a jury rendered in the sum of $15,000 in favor of plaintiff as the administrator of the estate of Antonio Bellandi, deceased, and against appellants, Park Sanitarium, a corporation, and Dr. Vincent P. Mulligan, physician and medical director of said Park Sanitarium, and Alice Keeffe, head nurse at said sanitarium, who has since become the wife of Dr. Vincent P. Mulligan. The latter was also secretary and a member of the board of directors of said corporation. The action was brought by the respondent, a brother of decedent, in his representative capacity, for the benefit of Mrs. Elena Bellandi, the mother of decedent (section 377, Code Civ. Proc.), who succeeded to the corpus of her deceased unmarried son's estate (section 225, Probate Code). The mother is a native and resident of Italy. Her two sons, Enrico and Antonio, came to this country as young men; Antonio arriving in 1907 at the age of 17 years. During the sixteen years of his residence in America, which terminated with his death in 1923, he had contributed to his mother's support more than $12,000. His very large and continuous contributions to his mother's support following his father's death in 1916 and his brother's inability to contribute his accustomed share, consequent upon his marriage, which occurred the same year in which the father died, cannot be seriously questioned in the face of the convincing evidence which amply establishes that issue. Upon his brother's marriage, Antonio assumed the whole burden of supporting the mother.

It appears from uncontradicted statements in the briefs that this appeal is taken from the fourth trial of the cause. The results of the former trials are not given and are immaterial.

Appellant, a private corporation, conducted in the city of San Francisco a private hospital or sanitarium, for hire, for the care and treatment of mental, nervous, and alcoholic cases. The decedent, Antonio Bellandi, was a native of Italy and came to this country in 1907. His brother Enrico, respondent administrator, had preceded him in arriving in

America. At the time of his death he was 33 years of age, remarkably robust in stature and health. He was a cook, and was usually employed in restaurants managed or owned by his brother, and at times for others. The bonds of attachment existing between the brothers and between the decedent and Enrico's family were very strong. His affection for his brother's child and his consideration for his sister-in-law's comfort were quite marked. Having been employed as a cook for some seventeen years continuously, he finally yielded to a growing desire to visit his mother in her native land and bring her to this country that she might make her home with him. About a week before his death, as hereafter related, he notified his brother of his plans and spoke with him about getting some one to take his place. Antonio spoke but little English and conversed very little except with his brother, his family, and those with whom he was intimately acquainted. He shunned the companionship of all females who were not members of the family household. His diffidence or shyness at the feminine sex had been a marked characteristic with him since boyhood, which did not diminish with maturer years. We thus early emphasize this pronounced timidity as a factor to be kept in mind in accounting for his conduct at the time he was placed in charge of female nurses at the sanitarium, whose proffered assistance in disrobing him was vehemently declined.

Antonio Bellandi expired at approximately 9 o'clock a. m., June 19, 1923. He returned to his brother's home at about 2 o'clock on the morning of June 18, the day before he died, having completed his night shift as a cook. The next day he was to start on his journey to the old country, stopping at Los Angeles en route to visit for a few days with a sister. He went to bed as usual on the morning of the 18th, but later in the day his brother Enrico and his wife noted that Antonio was unusually loquacious and somewhat excited concerning his trip to Italy. There was sufficient in his manner to cause the brother, in view of the journey he was to begin, to have a physician examine him before leaving on his trip. This was agreed upon, and Dr. Edward Ghidella, whom Antonio and his brother had known for many years, was called. Dr. Ghidella was a graduate of several famous medical colleges, had associated with eminent alienists, and was experienced both as a physician and alienist. He had served in the United States army as a surgeon and physician and was later connected with the Letterman Hospital. There can be no doubt as to his wide experience with nervous diseases. Upon his arrival at the Bellandi home he made a physical examination of Antonio and found his heart and lungs to be in perfect condition. He described him as a perfect specimen of a man, 33 years of age. He found him overexcited in preparing for his journey to Italy to visit his mother, but he exhibited no signs of insanity, as that term is medically known. Antonio complained to him of stomach trouble, and he gave him a prescription of bromide and a large dose of epsom salts, and left the case feeling perfectly sure that the patient was not dangerous to himself or to others. The only abnormal thing which the doctor, who had known the deceased through many years, had observed, was his bashfulness with respect to women and his inordinate desire to see his mother. He was in no sense violent. The doctor diagnosed his case as one of acute neurasthenia. The deceased was so strongly affected with the one desire to see his mother that he was greatly excited, but he was not violent. It was, in his opinion, a temporary condition, and would have been relieved by making the trip and seeing his mother. Antonio took but one dose of bromide. He had been packing his trunk and preparing for his trip until about midnight when his brother returned home from his restaurant. Antonio was still quite voluble and excited, and Enrico attempted to call the doctor, but, as the latter was then engaged, he advised that Antonio be taken to the Franklin Hospital, an institution which he visited. Accordingly Enrico, his wife, and brother-in-law took Antonio to the hospital in a taxicab. He was assigned to a room, and, after entering it, a female nurse followed him in and attempted to assist him in removing his jacket. In an excited and loud voice he ordered her out of his room. At about the same time another nurse entered with a pillow, whereupon he said to her in a loud voice that he did not want any one in his room. From this the head nurse concluded that he was noisy, and, as the hospital did not receive nervous cases and as many serious operations were constantly being performed in said hospital, she insisted that Antonio be taken to some other hospital. He had retired, but, when informed by his sister-in-law that he could not remain, he replied: "All right, you go away from my room and I dress myself and I go away." He dressed himself and left with his relatives, who took him to the emergency hospital in a taxicab, but on the advice of the person in charge of said emergency hospital they took him to the Park Sanitarium, arriving at about 1:30 a. m. The night woman nurse, who was not a trained nurse, admitted the party and was particularly informed as to Antonio's extreme diffidence with respect to women. She replied that they had a male nurse to take charge of him. He was assigned to a room on the third floor, the floor that was set apart for the treatment of severe mental and alcoholic cases. No examination was made of him nor was any treatment of any kind administered. His entire clothing was removed and taken from the room. The room contained neither toilet conveniences nor mechanical call or alarm device. The situation was strange to him, and he was totally unacquainted with the attendants. He slept until about 5 o'clock a. m., when he desired to go to the toilet, as he had taken a heavy dose of salts several hours before. He attracted the attention of the nurse by whistling. The male nurse responded to his call. While being taken to the toilet without clothing and with nothing but a sheet wrapped about him, he found himself unexpectedly confronted by a female nurse, and he said to her, "Don't touch me, if you do I will kill you, I am an Italian." He made no attempt, however, to do violence to any one. He was soon thereafter transferred to the "strong room," which was a room with barred windows, a double door, and a bed chained to the floor with a mattress thereon. The door was locked. There he remained without making any disturbance until about 7:30 a. m. he broke the panels of the doors and got into the hall, and went into the room of Mr. Swanson, a patient, and asked him for some clothes, as he wanted to get out and go. Swanson testified that he talked rationally to him, and he told Antonio that he had no clothing except the bathrobe which he was wearing. The deceased offered to buy clothing, and requested Swanson to call a taxi. Swanson and Antonio walked up and down the hall for some time. Presently Hazel Herdman, a nurse, appeared upon the floor, and Antonio, wrapped in a sheet, approached her, and asked her for his clothing and requested that she call a taxicab for him. She started to leave him to ring the emergency bell, whereupon he grabbed or took her by the arm to detain her, when she commanded him to "leave her alone."

At this juncture another patient, Mr. Cruise, who was quite a large man, came from his room fully dressed and ordered him to "leave that nurse alone." Upon being thus addressed, Antonio left Miss Herdman and, engaging Mr. Cruise, asked him for his clothes. They then went into Mr. Cruise's room. Miss Herdman, the nurse from whom he had attempted to recover his clothing, testified that all the deceased wanted was his clothing. He wanted to go home. He kept asking for his clothing. He made no threats. She said: "Aside from taking hold of my arm he didn't take hold of me in any other way at all." He requested Cruise to let him have his clothes. At about this time Dr. Mulligan stepped from the elevator. Miss Herdman said to Dr. Mulligan that there was a patient (meaning Antonio) whom she thought he should see about. The patient was then in Mr. Cruise's room. Shortly thereafter Dr. Mulligan was seen pursuing the patient with an upraised chair up and down the hall. Antonio crashed against one or two doors in an effort to escape as he ran. The commotion brought several nurses to the hall, male and female. Dr. Mulligan called to a male nurse to trip Antonio, who was a very powerful man, which he did, and Antonio fell to the floor.

He was immediately set upon by Dr. Mulligan and some five or six nurses. In the struggle, which seems to have lasted from thirty to forty-five minutes, two of Dr. Mulligan's fingers were bitten by the deceased. Antonio never thereafter rose from the floor, as his body was held down by said physician and attendants. Straps and other restraining apparatus were furnished, but not used. Instead a tourniquet was improvised with the aid of a towel by Dr. Mulligan. A tourniquet consists of placing a strap or towel about the neck and drawing it so tightly that it produces a cerebro-anemia—a stoppage of the flow of blood to the brain. The use of the tourniquet continued quite a long time. Its efficacy in subduing the patient was strengthened by the free use of ether. While the struggle was in progress, a nurse was ordered to go to a nearby drug store and procure a pound can of ether, which was vigorously applied to the patient. According to the testimony of one of the nurses, practically the whole content of the can was literally poured upon a piece of gauze, which was placed over the nose and mouth. The attention of the doctor was called to the cyanotic condition of the patient during the protracted struggle, and also the necessity of giving the patient air was suggested, but the reply was that he would give him nothing. The use of other language was testified to, which, if believed, would indicate that the doctor was greatly excited. At about 9 o'clock a. m. Dr. Edward Solomon, who had a patient at the hospital, stepped from the elevator and observed Dr. Mulligan with a patient on the floor over whom he was reclining. The patient looked blue, and he called Dr. Mulligan's attention to his appearance. He went a little closer and noticed that the patient's pupils were dilated, and he felt his pulse and found that he had no pulse. He was then dead. An attempt on his part at restoration proved futile. Some two hours thereafter the deputy coroner and a police officer called at the hospital, and as they moved the body they noticed a strong odor of ether, and the doctor was asked where the ether was coming from, and he replied that there was no ether there; that none was used. The soiled condition of the floor gave evidence of the physical and mental suffering that Antonio endured while the struggle lasted. Witnesses testified to statements made by the doctor and certain nurses immediately following the fatality which would tend to account for Antonio Bellandi's death on grounds of natural causes and exculpate the persons connected with the hospital from blame by suppressing the intensity of the struggle and the kind of force and methods used to overcome him. Very substantial evidence was adduced at the trial which tends strongly to support the contention of respondent that decedent was etherized or choked to death. There are grounds for claiming that either of the methods adopted, as described by certain witnesses, would probably have resulted fatally. Very eminent alienists testified that either of the methods resorted to was improper and fraught with danger and that such modes of restraint are not used in the state hospitals or in orderly conducted private institutions.

[1] Institutions which receive persons affected with nervous diseases for hire should be supplied with reasonable devices of restraint, such as straps, jackets, wristlets, anklets, blankets, and other approved apparatus, and also sufficient man power to take care of violent cases, which may develop at any moment, at the least minimum of danger to the patient. While the appellant hospital seems to have been supplied with restraining straps, it did not use them.

[2-4] In considering the appeal, we have, as we must do under the rule, considered the evidence adduced by the respondent and its sufficiency to support the implied finding of the jury. It is true that the facts above reviewed were disputed by Dr. Mulligan and witnessses produced by him as to the manner in which said Antonio Bellandi was handled and as to the cause of death. We have not set out all of the evidence upon which respondent relies, but sufficient only to show that there is substantial evidence in the record to support the finding of improper and negligent treatment of the decedent by the agents of appellant hospital. The question of credibility of the witnesses has been determined by the jury and the trial court, and their finding on that issue is conclusive on this court. Much evidence was introduced on both sides, and a number of the state's most eminent alienists or psychiatrists testified in the case, giving the weight of their opinion to one side or the other. If the jury accepted the testimony of those who appeared for the respondent and described the treatment to which the decedent was subjected, we need not go into the question as to whether the attending physician used the degree of skill ordinarily possessed by reputable physicians engaged in the practice of a special branch of science in the locality where the treatment was administered, for the reason that scientific knowledge is not essential for the determination of an obvious fact. But, if medical learning is necessary to guide the mind of the unskilled as to whether the treatment was proper, there is ample evidence of physicians and alienists in the record to support the verdict and judgment on the issue of improper or negligent treatment.

Appellants make the further objection to the judgment that the decedent was entering the realm of insanity, and therefore his earning power was gone, and for like reason the basis of a claim for loss of society or comfort could not exist.

[5, 6] The probability that the deceased's condition was no more than temporary and that the prognosis was reasonably favorable for a complete restoration to health is a question which must be submitted to medical skill, and its answer on matters which are beyond the ken of the layman furnishes a basis upon which courts of law may predicate a judgment. The judgment in this respect finds support in the testimony of certain alienists called on behalf of respondent. The mental condition was one of excitability superinduced by a let-down from a long period of assiduous labor and the anticipation of meeting his mother and visiting the scenes of his boyhood. His condition did not come upon him by slow development, and therefore was not chronic, nor did it have the appearance of settled insanity. It was a sudden outburst, which frequently yields to rest and treatment. On this subject the physicians have spoken. While there may be room for doubt as to what the prognosis as to a complete restoration to health may have been, we are bound by the finding of the jury on this as on all other issues where there is any evidence which reasonably tends to support the verdict notwithstanding evidence of a contrary nature.

[7] Appellants complain that the award of damages is grossly excessive in the circumstances of the case. We agree that the judgment does seem quite large, and it is possibly larger than we would have awarded if sitting as a jury or judges in the case. But on the other hand the evidence lends support to it. Unquestionably Antonio, who commanded quite a large salary as a cook, going as high as $150 per month, sent practically all of his earnings less the niggardly amount which he required for his personal wants to his mother. This in the aggregate exceeded $12,000 for the fifteen or sixteen years he lived in America. At the time of the trial, the mother's life expectancy was a fraction more than nine years. Four years had then passed since the son's death. The four years passed, plus the nine years of expectancy, would equal thirteen years. We cannot say, in the face of the evidence, that the amount of the award is so large as to suggest passion or prejudice or corruption on the part of the jury.

[8] We have examined the instructions delivered to the jury, and find no error in them. Appellants complain that the court rejected several proposed instructions requested by the defendants which should have been given. Said rejected instructions contained no principle of law not embraced in those given. Furthermore, said refused instructions were

objectionable in the amplified and argumentative form in which they were cast.

Exceptions are taken to the court's ruling on matters of evidence. The rulings complained of, if conceded to be error, did not in all probability influence the jury in the slightest degree in its determination. The matters complained of are of small importance, and it would not be helpful to review them in detail. One which appellants stress is the court's ruling on the question of Enrico, the living brother, having once been ill with a mental disturbance. This was doubtless done for the purpose of placing before the jury, as a fact, that insanity was congenital in the Bellandi family. The methods of introducing such a suggestion did not conform to the rules of evidence, and the subject-matter, if admitted, was not convincing.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

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214 Cal. 490

In re GOLDSTONE.

S. F. 14072.

Supreme Court of California.

Dec. 28, 1931.

1. Attorney and client 🔑58.

Attorney's charging $310 out of award of $882.96, for going to insurance carrier's office and identifying claimant, *held* such flagrant misconduct as justified suspension from practice for three months (Code Civ. Proc. § 287, subd. 5).

2. Attorney and client 🔑44(1).

If fee charged by attorney is so exorbitant and wholly disproportionate to services rendered as to shock the conscience, disciplinary action by the court is called for.

In Bank.

Application by Louis Goldstone, attorney at law, to review order of the Board of Governors of the State Bar of California recommending suspension.

Petitioner ordered suspended for three months from date of filing of order.

Louis Goldstone, of San Francisco, in pro. per.

Thomas C. Ridgway and Philbrick McCoy, both of Los Angeles (James A. Miller, of Los Angeles, of counsel), for the State Bar.

PER CURIAM.

The petitioner herein, Louis Goldstone, has filed in this court his application, under section 26 of the State Bar Act (St. 1927, p. 41 as amended by St. 1929, p. 1257, § 3), for a review by this court of the findings and recommendation of the Board of Governors of the State Bar recommending his suspension from the practice of law in this state for a period of three months. A complete record of the proceedings, both before the Board of Bar Governors and before the two local administrative committees which acted in this matter, has been duly certified to this court.

The charge against petitioner upon which the recommendation of suspension for three months by the Board of Governors of the State Bar is predicated is based upon one transaction, but is twofold in character. Stated in its simplest terms, the charge is that in exacting and accepting a fee clearly and grossly disproportionate to the services rendered in the collection of an award in an industrial accident case petitioner was (1) guilty of a violation of sections 24 (a) and 24 (d) of the Workmen's Compensation Act (as amended by St. 1925, p. 644), and (2) guilty of conduct which was in violation of his duty as an attorney, involving moral turpitude dishonesty, and corruption.

There is very little conflict in the evidence presented with reference to the circumstances under which this charge arose. The following findings of fact, with some slight omissions which are not material, which are amply supported by the evidence adduced, were made by the local administrative committee and thereafter presented to the Board of Bar Governors for their consideration:

"Theodore McGee was injured on August 21, 1926, while in the employ of Steel-Form Construction Company. For reasons which do not appear, McGee waited until March 27, 1927, before filing an application with the Industrial Accident Commission of California for compensation. A hearing was had which resulted in an award in McGee's favor in the sum of $2,547.00, payable sixteen and 98/100 dollars per week, commencing as of August 29, 1926. McGee was ignorant of this award in his favor and notices from the Commission, advising him of that fact, were returned to the Commission, due to McGee's change of address and his failure to leave a forwarding address.

"About November 23, 1927, McGee called on Mr. Goldstone, the accused, and told him of his injuries and of the proceedings before the Industrial Accident Commission and that he desired Mr. Goldstone to assist him in obtaining compensation for his injuries. At this first visit the accused prepared a contingent fee contract, under which the accused was to receive 40% of all moneys recovered by Mc-

Gee by way of compensation for his injuries. The accused testified that immediately after the agreement was drawn, it was destroyed.

"Nothing was done either by the accused or McGee towards collecting this compensation until the Spring of 1928, at which time McGee again called on the accused and directed his attention to the fact that he wanted something done about his compensation for the injuries suffered in August, 1926. At this second visit, which we find to be the very last of February or the first of March, 1928, the accused went to the Industrial Accident Commission and for the first time examined the file in McGee's case and immediately ascertained that there had been an award in McGee's favor. He was also advised, at the same time, that the Pacific Employers Insurance Company was the insurance carrier. The accused then went to the office of the insurance carrier and asked for the compensation due McGee, which was refused him. The accused then telephoned McGee to come to his office the following morning, which McGee did, and thereupon the two of them went to the insurance carrier's office and there received a number of checks, payable to McGree, totalling $882.96.

"After the accused and his client had received the aforesaid sum of $882.96, they went two or three blocks to the banking offices of Wells-Fargo Bank and Union Trust Company, where the checks were cashed. The accused then and there received $310 for his fee. Thus for the services above set forth, the accused charged and received a fee of $310. Thereafter the insurance carrier sent McGee his compensation money each week, but McGee sent no part of it to the accused. Then the accused got in touch with McGee and asked him to come to his office to pay him further money on account of his fees. McGee refused to pay anything further to the accused, whereupon the accused assigned his alleged cause of action against McGee to one Jenkyn and, as Jenkyn's attorney, filed suit against McGee 'for legal services rendered to said defendant within two years immediately last past, in the stated and agreed, and mutually stipulated sum of $101.98.' At the same time the accused sought and obtained a writ of attachment against McGee and filed an affidavit, wherein he alleged that the defendant was indebted to the accused in the sum of $101.98 'upon an express written contract for the direct payment of money, to-wit, for legal services heretofore rendered, and that such contract was made and is payable in this State.'

"It is interesting here to observe that the sum of $101.98 sued for is 40% of fifteen weeks' compensation due McGee as awarded by the Commission at the rate of sixteen and 98/100 dollars per week. (40% figured exactly is $101.88.) After summons was served on McGee, he sought the services of another lawyer, and was sent by him to Mr. Trowbridge, a member of the Industrial Accident Commission. Mr. Trowbridge then caused a hearing to be had by the Commission to fix the fee of the accused as attorney for McGee. The accused refused to attend that hearing. The Industrial Accident Commission awarded the accused a fee of $20 and ordered him to refund the difference between that and what he had received to his client. According to the records of the Commission the accused had received notice of the hearing and of the Commission's decision."

Thereafter, "the accused dismissed the case he had caused to be filed against McGee and also released the attachment he had served on McGee's bank account."

The findings of the committee point out that the only service performed by the accused for his client was to go to the industrial accident commission and by looking through the file of the case ascertain that an award had already been granted, and to accompany McGee to the office of the insurance carrier and identify him, and that for this insignificant service he collected a fee of $310 from a client who was admittedly of limited means, earning a livelihood by day labor, and later sued for the further sum of $101.98.

In fairness to the accused it should be stated, perhaps, that he denied that the suit instituted by him was to collect a further fee for this particular service. He was, however, unable to make a satisfactory explanation of any other services rendered by him to his client for which he would be justified in seeking compensation in such suit. We are, however, of the opinion that the charge may stand or fall, not upon what he may have attempted to collect, but upon what he actually did collect and retain, and we will, therefore, eliminate it from our discussion.

As before indicated, the charge in the instant case was acted upon by two local administrative committees. The charge as originally instituted by a representative of the industrial accident commission concerned itself only with a violation of the provisions of the Workmen's Compensation Act. The hearing which was before local administrative committee No. 4 resulted in a recommendation that the charge be dismissed. The finding of the committee is as follows: "It is our opinion that the contract between the accused and McGee was not in violation of Sections 24 (a) and 24 (d) of the Workmen's Compensation Insurance Act, because the agreement, as a matter of fact, was made after the award had been passed upon. We are of the opinion that the accused is guilty of unprofessional conduct in this transaction, in the matter of collecting a fee wholly inconsistent with the service rendered. However, he is charged only with violating the two sections of the Workmen's Compensation Insurance Act, and we are of the opinion he is not guilty as charged." The recommendation of a dismissal of the charge of violating said sections of the Workmen's Compensation Act was, however, accompanied with a recommendation that an order to show cause be issued "wherein the accused should be charged with unprofessional conduct in the charging of a fee of $310 for a very few hours work in collecting $822.96, [$882.96] which was at all times available to McGee merely by calling at his Insurance Company's office for it."

In accordance with the recommendation of local administrative committee No. 4, another order to show cause was served upon the accused which, after setting forth in almost identical terms the charges contained in the first order to show cause, continued: "That on or about the 3rd day of March, 1928, there was delivered to said Theodore McGee, in your presence and at the office of the Pacific Employers' Insurance Company nine checks of said insurance company, payable to T. McGee, for the total sum of Eight Hundred Eighty-two and 96/100 dollars ($882.96), that the only legal service you rendered said McGee was going with him to the insurance company's office and identifying him as the person to whom the checks of said Insurance Company should be delivered; that you went directly from the office of said Insurance Company to the office of Wells-Fargo Bank, and you accepted from said McGee the sum of $310, which sum represented 40% of the total amount of said checks delivered by said Insurance Company to said McGee, and that going with him to the offices of the insurance company for the purpose of identifying him and assisting him to receive said checks were not such legal services as to demand anything other than nominal compensation; that your demanding and accepting and retaining 40% of said money received by said McGee was unconscionable and the charging and accepting of such a fee was exorbitant and excessive; and in violation of your duty as a member of the Bar of California."

There is no question but that under the provisions of section 24 (a), (b), and (d) of the Workmen's Compensation Act the industrial accident commission has the power and the authority at the time of making the award to fix the compensation of attorneys appearing in an industrial accident proceeding prior to the final judgment and award therein. The question, however, of whether or not power is conferred by the Workmen's Compensation Act upon the industrial accident commission to fix the fees of an attorney who enters the proceedings after the final judgment and award is not entirely free from doubt. The petitioner insists, and in this contention he was sustained by the first local administrative committee, that legal services performed subsequent to the time the award for compensation had become a finality are not legal services "pertaining to a claim for compensation either before the commission or before any of the appellate courts," and that, therefore, the industrial accident commission is without authority to fix an attorney's fees for such services. On the other hand, the position of the industrial accident commission that the continuing jurisdiction conferred by section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850) to "rescind, alter or amend any such order, decision or award made by it upon good cause appearing therefor" for a period of two hundred and forty-five weeks from the date of the injury included the right to fix reasonable attorneys' fees for services performed subsequent to the final judgment and award, was sustained by the second local administrative committee. The fact that an opposite conclusion was reached by the two local administrative committees which had the question before them shows clearly that the question is a debatable one, and in view of the fact that the question is presented to us in a proceeding for the discipline of an attorney for the violation of these specific sections of the statute, we are of the opinion that, inasmuch as their interpretation admits of some uncertainty, the suspension of the petitioner should not be predicated upon the charge that he acted in willful violation of these sections.

[1] There is no question in our minds, however, that his suspension was warranted under the charge that he was guilty of conduct in violation of subdivision 5 of section 287 of the Code of Civil Procedure, which conduct merits the disciplinary action of this court. The conduct of the petitioner in charging a fee so wholly disproportionate to the services performed, and particularly in a proceeding for industrial compensation in which all the legislation relative thereto emphasizes the purpose of securing justice for injured employees expeditiously and inexpensively, is conduct which cannot be reconciled with that honesty and fair dealing required of an attorney in his relations with his client.

If the contract providing for a commission of 40 per cent. upon the amount collected as an attorney's fee was actually executed prior to the acceptance of the employment by petitioner, there can be no doubt that petitioner intended to circumvent the provisions of the Workmen's Compensation Act and to frustrate any attempt by the commission to fix a reasonable attorney's fee. Petitioner, however, in an effort to repel the charge that he did so intend to circumvent these provisions, denied that the contract, although typed, was ever executed, and declared that almost immediately after it was typed it was destroyed by him and that he never acted under it. Such disclaimer removes the slightest justification that may have existed for the exaction of a fee such as was exacted in this case. For, if the petitioner did not act in reliance upon said contract, then payment for his services was not made upon a contingent basis pursuant to a contract entered into before the amount of services to be performed could be ascertained, but was paid after the services were performed and in full realization that the only legal services performed by him was the looking through the file of the proceedings of the industrial accident commission and ascertaining that an award had been made, and the further service, which cannot be designated as legal in any sense of the word, of accompanying McGee to the office of the insurance carrier and there identifying him. The service performed was so slight as scarcely to deserve the name of "service." And the receipt of money as payment for services when no service has been performed is certainly a species of dishonesty which no court could condone. We are satisfied that, had the client been in a position to know of his own knowledge the value of the services performed for him by the petitioner, he would have known that he was being grossly overcharged and would have refused to pay so large a proportion of his award for such slight service, and unless the petitioner misrepresented to him the value of his services, thereby overreaching one with whom he had confidential relations, petitioner could not have collected such a fee as he claims was "voluntarily" paid to him. It is true that contingent contracts are justified and an attorney embarking upon litigation, especially where the outcome is uncertain, is well within his rights in charging a substantial percentage of the amount recovered. This is so for the reason that such contracts are based upon the uncertainties of litigation, both as to the amount of services to be rendered in the future and as to the outcome of the litigation, and such contracts are entered into while yet these factors are undeterminable. The moment, however, a disclaimer is made that the services were performed upon a contingent basis, we have the proposition that a fee of $310, out of an award of $882.96, was exacted by an attorney from a client admittedly of limited means for a most trivial service. We entertain no doubt that such a flagrant overreaching of a client amounts to misconduct on the part of an attorney such as would subject him to the disciplinary powers of this court. It was expressly so held in the case of In re Cary, 146 Minn. 80, 177 N. W. 801, 9 A. L. R. 1272, in an opinion in which we are in thorough accord.

We do not feel that the conclusion reached by us places autocratic power in the hands of the Board of Bar Governors to supervise all the fees charged by attorneys for their services. Nor are we unduly apprehensive that the decision in this case will result in the Board of Bar Governors being deluged with complaints by disgruntled clients who believe that they have been overcharged for professional services. The power to suspend or disbar resides not in the Board of Bar Governors, but in the Supreme Court of the state, and the Board of Bar Governors has only the power to recommend, after careful and thorough examination into the facts, the action to be taken by this court.

[2] Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the attorney performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court. In view of the facts of the instant case, we are of the opinion that the disciplinary action recommended by the Board of Bar Governors is not excessive. It is, therefore, ordered that the petitioner be and he is hereby suspended from the practice of law in this state for a period of three months from the date of the filing of this order.

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119 Cal.App. 393

PEOPLE v. RALLO.

Cr. 1178.

District Court of Appeal, Third District, California.

Dec. 23, 1931.

1. Criminal law ⚷877.

Automobile owner sitting beside driver could be lawfully convicted of failing to render aid to pedestrian struck though driver was acquitted (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

2. Automobiles ⚷323.

Owner riding in automobile and having control may be deemed "driver" within statute respecting rendering aid to person injured, though another was actually driving (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

[Ed. Note.—For other definitions of "Driver," see Words and Phrases.]

3. Criminal law ⚷553.

Jury could disregard defendant's evidence entirely where he was successfully impeached.

4. Automobiles 🔑355(8).

Evidence *held* sufficient to support conviction of owner riding beside driver for failure to render aid to pedestrian struck by automobile (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

5. Criminal law 🔑1175.

Defendant cannot complain of having been convicted of failing to render "all necessary assistance" to pedestrian struck by automobile rather than mere "reasonable assistance," where record showed he rendered no assistance (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62; Pen. Code, § 367c).

6. Automobiles 🔑357.

Instruction that driver of automobile striking person must stop and render assistance in all cases *held* reversible error because omitting element of defendant's knowledge of injury (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

> The instruction was in substance that duty imposed upon driver of automobile striking person to stop and render assistance is duty which he must perform in all cases, and it is immaterial whether such accident was caused by carelessness of person struck, or of both, or was unavoidable accident, and that such duty arises whenever such a collision occurs.

7. Automobiles 🔑319.

Automobile driver is not criminally guilty of failing to render aid to injured person when he does not know of injury (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544, § 62).

8. Criminal law 🔑1186(4).

Refusing instruction that automobile owner could not be convicted of failing to render assistance to pedestrian struck if he had no knowledge of injury but believed automobile hit truck *held* reversible error (Const. art. 6, § 4½).

9. Criminal law 🔑770(1).

Defendant was entitled to have his theory of defense presented to jury.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Gaetano Rallo was convicted of failing to render aid to a pedestrian who was struck by his automobile and killed, and he appeals. Reversed and remanded.

David E. Peckinpah, of Fresno, and Joseph Barcroft, of Madera, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

R. L. THOMPSON, J.

The defendant was convicted of a violation of section 141 of the California Vehicle Act (as amended by St. 1929, p. 544, § 62), consisting of a failure to render aid to a pedestrian who was struck by his automobile and killed. The defendant was jointly charged and tried with one Jack Gallo, who was driving the machine at the time of the accident. The machine was owned by the appellant. He sat by the driver's side at the time of the accident, but claimed to have been asleep. The driver was acquitted, while the owner of the machine was convicted.

The appellant contends that the evidence fails to support the judgment of conviction; that the owner of the machine was a mere accessory to the alleged offense and could not be lawfully convicted thereof since the principal was acquitted; and that the court erred in giving and refusing certain instructions.

About 4 o'clock on the morning of May 25, 1931, the appellant and an associate by the name of Gallo were driving a Ford automobile southerly along the Golden State highway between Madera and Fresno. The machine was owned by the appellant. It was being driven by Gallo. The appellant sat by the driver's side and claims to have been asleep when the accident occurred. The headlamps were lighted. It had been raining during the night. Suddenly the machine struck an object at the edge of the roadway which proved to be a pedestrian by the name of Gust Johnson. He was apparently instantly killed. The body was discovered by a truckman that morning huddled against a slight embankment at the outer edge of the right of way some fifteen feet from the paved portion of the highway. His right leg was fractured below the knee and the bone protruded through the flesh. The left leg was broken at the hip. His arm, his back, and his neck were also broken. Both occupants of the machine declared they did not know they had hit or killed a man. He was struck with such force, however, that the bumper was broken and the right headlamp was damaged. The driver said, "All I see, that bump, and jump right over it." The machine left the paved highway and shoved the body of Johnson across a shallow depression adjoining the roadway a distance of about thirty-five feet before it became dislodged. The soil by the roadside over which the machine traveled was so soft that the tires left a trail several inches in depth. After the body was dislodged the machine was pulled back to the pavement a further distance of about thirty feet. A portion of the broken bumper left a gouged line in the surface of the concrete. When they reached the pavement again the dragging bumper impeded their progress so they were required to stop. Both men got out of the vehicle. The driver then claims to have said: "We hit an automobile * * * or something, * * * let's go back. * * * Rallo, let's go back. * * * It is a bad thing if we kill somebody, and if somebody is under there." The driver further asserted that the appellant replied: "No, let's go. * * * I am covered with insurance." The driver, however, claims to have walked back along the side of the roadway a distance of nearly a mile looking for the truck which he said he thought they had struck. In the meantime the appellant detached the broken bumper and placed it in the machine. He then turned the machine around and soon met Gallo returning from his trip down the roadway. They immediately proceeded to Fresno. The machine was left in a garage for repairs. No one was informed of the accident.

In the early morning the driver of a passing vehicle discovered the body of Johnson at the point where it had fallen and promptly notified the sheriff's office. An investigation followed. The scene of the accident was visited. The trail of the machine was readily traced from the point where it left the paved portion of the highway to the place where the body lay, and thence back to the pavement, which was a total distance of sixty-seven feet. Half a bottle of gin was found just over the fence near by. The bottle contained the finger prints of the appellant. The machine was subsequently discovered in the garage and examined. The sheriff testified that he observed the broken bumper and headlight. He further said: "I found * * * mud, grass and hair, and things I made my examination for." Both defendants were subsequently arrested and made contradictory statements which were offered in evidence at the trial.

[1] There is no merit in the appellant's contention that he is a mere accessory to the offense with which he was charged, and that he may not be lawfully convicted since Gallo, the driver of the automobile, was acquitted. The appellant is the owner of the machine. Its operation, at the time of the accident, was under his direct control. Both men were jointly charged as principals in the commission of the offense. They were not charged with homicide. They were charged with violating the provisions of section 141 of the California Vehicle Act as amended in failing to render assistance to a pedestrian who had been struck and injured by their machine. The gist of this offense is not the unfortunate injury or death of the victim. It is the willful failure to render reasonable assistance. The purpose of this statute is to deter the perpetrator of the casualty from fleeing from the scene of the accident and concealing his identity so as to escape responsibility therefor, and to prevent the victim from being left to suffer or die without timely aid. It is true that section 141, supra, provides in part: "The *driver* of any vehicle involved in any accident resulting in injury or death to any person * * * shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or such carrying is requested by the injured person."

[2] Evidently the Legislature intended by this language to prescribe a penalty against the owner of a machine who occupies the vehicle and has the control over its operation at the time of the accident, and who willfully omits to render reasonable assistance to the injured party, as well as the actual driver thereof. Any other construction of the language would seem to be unreasonable because the owner of the vehicle who has the legal right to control the operation thereof may actually discourage or prevent the driver from rendering the aid which he might be willing or anxious to perform. We are therefore of the opinion that the owner of a machine who is riding therein having the control of its operation at the time of an accident may be deemed to be the driver thereof, for the purposes of this section, even though another person may be actually seated at the steering wheel. People v. Steele, 100 Cal. App. 639, 644, 280 P. 999, 1001. In the case cited the facts were quite similar to those of the present action. In that cause the owner and the driver of a machine were also jointly charged with a violation of the provisions of section 141 of the California Vehicle Act (St. 1923, p. 562). Kearney, who was one of the occupants of the machine, had the control thereof, although Steele was driving it at the time of the accident. The vehicle was owned by Kearney's employer. Both Steele and Kearney were convicted. On appeal, it was contended that section 141, supra, applied only to the person actually engaged in driving the machine. The court said: "Kearney, having control of the car which Steele was merely driving with his permission becomes equally guilty with Steele of a violation of the section of the Motor Vehicle Act."

The judgment of conviction in the present case seems to be sufficiently supported by the evidence. The vital question is whether there is substantial evidence upon which the jury was warranted in finding that the appellant willfully failed to render aid to the injured man. For the purpose of determining this question it may be conceded that if, in good faith, he did not possess reasonable cause to believe they had struck and injured a man, he would not be guilty of violating the statute in driving away without rendering or offering to render aid. If, upon the contrary, there is substantial evidence upon which the jury was warranted in finding the appellant knew, or as a reasonable man should have known, they had struck and injured a man, and deliberately left without rendering him aid, then this judgment should be affirmed. We think the record of this case amply supports the assumption that they both knew, or should have known, their machine struck and injured a human being.

[3] It must be conceded the appellant denied that he ever had any such knowledge. It must also be acknowledged that the driver of the vehicle also repeatedly said he thought they must have struck a truck. The jury had a right to doubt these statements. The conduct and admissions of Gallo, the driver, indicate that he believed they had struck and injured a man. He clearly indicates this belief from his statements which were made to the appellant at the time of the accident. Gallo did make contradictory statements regarding this matter. But the jury had a right to accept his admissions together with the surrounding circumstances in support of their theory that he believed he had struck and injured a man. So far as the appellant is concerned, the jury had a right to disregard his evidence entirely, for he was successfully impeached. First, because there is uncontradicted evidence that he had been previously convicted of a felony. Second, because the jury was warranted in assuming his conduct at the time of the accident refutes his denial that he had any such knowledge or belief.

Assuming that the appellant was asleep just before the accident occurred, he awoke immediately at the terrific blow which broke the bumper and damaged the headlight when the man was struck, and he then seized the steering wheel. Mr. Gallo said regarding this matter: "I turn my car to the right, and I steer the car right out into the side, and in the meantime Mr. Rallo grabbed the wheel, and we pretty near missed a telephone pole." It seems improbable that this man was struck with such force as to do the damage which resulted therefrom and that his body was dragged a distance of thirty-five feet and that the occupants of the machine knew nothing of the cause. Moreover, a gin bottle containing the finger prints of the appellant was found not far from the place where the body lay. It will be recalled the machine returned to the pavement some thirty feet beyond the place where the body was left and that this is where the broken bumper caused them to get out of the vehicle. Gallo must have had a conviction that they had struck a man, for he then said to the appellant, "It is a bad thing if we kill somebody." He also added, "Let's go look good, let's go back." To this request the appellant replied, "Let's go (on to Fresno), because I am covered with full insurance in accident." In his statement to the sheriff in the presence of the appellant, Gallo said: "I don't know if I kill somebody or not, * * * I drive the machine and I don't know whether I kill somebody or not, but he (Rallo) don't want to come back." In this statement in the presence of the sheriff and Rallo the driver of the machine further said: "'It is a shame,' I told you (Rallo). * * * 'Somebody die there.' * * * You (Rallo) said, 'I am covered with insurance.'" It was light enough for them to see the telephone pole near which the body was left. Gallo said in this regard: "I says, I think I hit something, * * * I jump right off (the pavement), I was going for a telephone post, and I remember we been right up to that telephone post, and I tried to straighten it right out from that telephone post." In spite of the difficulty encountered while the body was being dragged through the soft ground to the margin of the right of way, it appears they made no effort to look in that vicinity for the injured man. The following examination of Gallo confirms this conclusion: "Q. Did you follow these tracks back to that telephone post? A. No, I go a little ways, and it was muddy there and slippery, all the way, lots of water in (the depression), and I never follow back, I go, kind of follow the highway." After reaching home, Gallo admits that he could not sleep because he was worrying over the affair. He procured a newspaper the following morning, which contained a story of the discovery of the body of Johnson. He called the appellant's attention to this newspaper item. They evidently realized their accident was the cause of his death. Yet the appellant warned Gallo to tell no one about it. No effort was made on the part of either of them to tell the authorities of their participation in the affair. While the statement was repeatedly made to the effect that they thought they had struck a truck, the good faith of these parties in making this statement may reasonably be doubted. Mr. Francisco, who repaired the automobile after the accident occurred, said that Rallo told him the damage was caused by striking the limb of a tree. He said: "Did he state how it was caused? A. He said that it was a very wet morning, * * * he hit a limb of a tree, or something that fell across the road."

[4] The circumstances of this case furnish sufficient evidence upon which the jury was warranted in believing the appellant knew, or should have known, they had injured or killed a man, and that he wilfully failed to make any effort to render assistance to the victim of the accident. The judgment is therefore adequately supported by the evidence.

[5] It is claimed there is a fatal variance between the degree of assistance which is required of a driver of an automobile by the provisions of section 141, supra, in the event of an injury to another person, and the omission of which the appellant was found guilty. Section 141 of the California Vehicle Act requires one to render only "reasonable assistance." The jury found the appellant in the

present case guilty of failure to render "all necessary assistance." This variance occurred by adhering to the language of section 367c of the Penal Code. The last-mentioned section requires a driver to render "all necessary assistance" to the injured party. It is argued that the phrase " all necessary assistance" is more comprehensive than mere reasonable assistance, and exceeds the requirements of the statute as it exists in the California Vehicle Act. It is unnecessary to attempt to distinguish between the nature of the acts which may be required under the terms of these two statutes, for the reason that the evidence is undisputed that no assistance whatever was rendered. The appellant may not complain of having been convicted of failing to render all necessary assistance rather than mere reasonable assistance, when the record shows that he rendered no assistance at all. The objection to this inadvertence with reference to the degree of assistance which is required by the statute is therefore without merit.

[6, 7] The giving of the following instruction constitutes reversible error, to wit: "The duty imposed upon the driver of an automobile, who strikes a person, to stop and render assistance required by the law, is a duty which he must perform *in all cases*, and it is immaterial whether such accident was caused by the carelessness of the person struck, or of both, or was an unavoidable accident. Such duty arises whenever such a collision occurs, regardless of whether the person struck was killed or only injured."

This instruction is fatally defective. It omits the essential element of knowledge on the part of the accused of the infliction of injury upon another person. One may not be deemed to be criminally guilty of failing to render aid to an injured person when he is ignorant of the fact that injury has been inflicted. The gist of this offense is the willful omission to render reasonable assistance to one who has been injured. Upon the contrary, the jury was instructed in the present case, without reservation, that the driver of an automobile, who has injured another person, must stop and render assistance *in all cases* of accident. Apparently this is not the law.

In the case of People v. Scofield, 203 Cal. 703, 265 P. 914, 916, the defendant was convicted under section 141 of the California Vehicle Act, of failure to render assistance to the victim of an automobile accident. The facts of that case show that the injured person was rendered unconscious as the result of a collision. The defendant did stop his machine, but failed to give the injured person the statement required by the statute because the victim, being unconscious, was unable to receive the information. He did not render assistance because other bystanders were assisting in caring for him. There was no opportunity for the defendant to assist. The judgment was reversed in that case. An instruction which was similar to the one which is here involved was condemned. The court said: "It is obvious that criminal liability should not attach in all cases where a literal application of the language of the statute might be made. * * * The defendant takes exception to the following instruction which was given by the court: 'The duty imposed upon a driver of an automobile which collides with another vehicle to stop, render assistance, and furnish the information required by the law, is a duty which he must perform *in all cases.*' It is insisted that the phrase 'in all cases' is too broad. We think the criticism well taken as the facts before us in the present case illustrate. This instruction has been under review before, and it has been stated that, while the instruction is no broader than the section itself, it is inconceivable that the Legislature intended to make the provision of the section applicable, for instance, to a person who was ignorant of the fact that the automobile which he was driving had struck another person. People v. Graves, 74 Cal. App. 415, 240 P. 1019."

The foregoing illustration which was used by the Supreme Court fits the present case exactly. The instruction is fatally defective.

[8, 9] A refusal to give the following instruction which was offered by the appellant was also erroneous: "You are instructed that the defendant, Gaetano Rallo, is charged in the second count of the information with a violation of section 141 of the California Vehicle Act, which has been heretofore read to you. If you find from the evidence that at the time of the accident, the defendant, Gaetano Rallo, was not the driver of the vehicle involved in said accident, but at the time of said accident was asleep in said automobile as a passenger, and that when he awakened, he was advised by the driver of the automobile and he believed that the automobile had collided with another vehicle which had not stopped and defendant Gaetano Rallo was not aware that a human being had been struck, then it is your duty to bring in a verdict finding the defendant Gaetano Rallo not guilty of the charge set forth in the second count of the information."

This instruction contains a clear statement to the effect that the defendant could not be lawfully convicted of failing to render assistance if he had no knowledge of the striking or injury of Johnson, and upon the contrary believed their machine had merely hit a truck which had not even stopped. This is a correct statement of the law. It is based upon the defendant's theory of the case. There is substantial evidence to support this theory. It is not covered by any other instruction. The appellant was entitled to have this theory of his defense presented to the jury. A refusal to give this instruction was therefore erroneous.

In view of the application of the rules of law heretofore announced, it becomes unnecessary to further comment on other challenged instructions.

Since there is a serious conflict of evidence regarding the knowledge of the appellant of the injury of Johnson, we are unable to positively say his conviction did not result in a miscarriage of justice. This question should be determined by the jury. We may therefore not affirm this judgment under the provisions of article 6, § 4½, of the Constitution.

The judgment is reversed, and the cause remanded for new trial.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 517

PEOPLE v. ADAMS.

Cr. 1175.

District Court of Appeal, Third District, California.

Jan. 4, 1932.

Criminal law 🔑1182.

No brief having been filed and no appearance having been made for accused when case was called for hearing, conviction was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Curley Calvin Adams was convicted of rape, and he appeals

Affirmed.

C. I. Bennington, of Oroville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Dep. Atty. Gen., for the People.

PER CURIAM.

The defendant was convicted in the superior court of Butte county of a felony; to wit, the crime of rape.

The transcript on appeal was filed in this court September 24, 1931. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on January 4, 1932. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

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119 Cal.App. 490

LINNE v. UNION CENTRAL LIFE INS. CO.

Civ. 7004.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1932.

Appeal and error 🔑113(3).

Order refusing to set aside default judgment *held* not appealable.

Defendant could not appeal from such order, since point that court abused its discretion in refusing to set aside default judgment, and that judgment was void because granting relief in excess of that prayed for in complaint, could have been fully presented on an appeal from judgment itself.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by Bernard F. Linne against the Union Central Life Insurance Company. From an order denying defendant's motion to set aside a default judgment in favor of plaintiff, defendant appeals.

Appeal dismissed.

John M. Thomas, Jr., of Los Angeles, for appellant.

Oliver O. Clark, Henry Brown, and Margaret E. Faires, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

We are of the opinion that this appeal must be dismissed because it is taken from a nonappealable order. Appellant's default having been entered, it moved to have the default set aside because of its excusable neglect. This motion was denied and judgment entered. Appellant then moved to have the judgment set aside, relying on the same grounds it had advanced on the previous motion. From the order denying the motion to set aside the judgment it appeals, now urging, not only that the court abused its discretion in refusing to vacate the default judgment, but also that the judgment was void because granting relief in excess of that prayed for in the complaint.

As on an appeal from the judgment itself appellant could have fully presented these two points, it cannot appeal from the order refusing to set aside that judgment. Mantel v. Mantel (1902) 135 Cal. 315, 67 P. 758; Bell v. Solomons (1912) 162 Cal. 105, 121 P. 377; Reynolds v. Reynolds (1923) 191 Cal. 435, 216 P. 619; Hall v. Imperial Water Co. (1926) 200 Cal. 77, 251 P. 912.

The appeal is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

120 Cal.App. 139

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF LOS ANGELES et al. v. DYSINGER et al.

Civ. 8063.

District Court of Appeal, First District, Division 2, California.

Dec. 16, 1931.

As Modified on Rehearing Jan. 23, 1932. Rehearing Denied Feb. 20, 1932. Hearing Denied by Supreme Court March 21, 1932.

1. Religious societies 🔑12(5).

Determination of district synod, of which plaintiff church was member, of conflicting claims to church property in favor of plaintiff church, *held* conclusive.

2. Religious societies 🔑12(5).

Purported amendments of Constitution of church and withdrawal from synod *held* not to defeat conclusiveness of synod's determination of conflicting claims to church property.

> The purported amendments of constitution and withdrawal from district synod did not defeat conclusiveness of district synod's determination of conflicting claims to church property, since the amendments relied on were not passed by unanimous vote of members of church as required by church constitution, and the amendments were not approved by the president of the synod as required by the synod constitution.

3. Religious societies 🔑5.

Church may not change synod form of organization into congregation form by amending its constitution.

4. Religious societies 🔑18.

As regards right to church property, whether plaintiffs representing church as it existed before purported amendments to constitution constituted large or small minority of members *held* immaterial.

5. Religious societies 🔑11.

That church, organized subordinate to general synod and later organizing district synod, was incorporated, *held* not to make church independent congregation.

6. Religious societies 🔑12(5).

Ruling of synod that there had been change of doctrine and discipline of church *held* conclusive.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by the First English Evangelical Lutheran Church of Los Angeles and others against Reverend William S. Dysinger and others. Judgment for defendants, and plaintiffs appeal.

Reversed.

Hearing denied by Supreme Court; CURTIS, J., dissenting.

Holcomb & Holcomb and Clarence B. Runkle, all of Los Angeles, for appellants.

Schweitzer & Hutton, of Los Angeles, for respondents.

STURTEVANT, J.

From a judgment in favor of the defendants determining conflicting claims to the church property, the plaintiffs have appealed.

The First English Evangelical Lutheran Church of Los Angeles, hereinafter called the church, was organized many years ago. In 1887 it was incorporated. In the following year it bought land and commenced to build thereon a church building and to furnish it. That is the property that is the subject of this action. It was stipulated that the property was paid for, in part, out of a donation received from the board of missions of the English Evangelical Church and in part by contributions from members of the church. It is not claimed that the property was conveyed in trust. In 1895 the Evangelical Lutheran Synod of California was organized. Its members include the plaintiff church, other churches in this state, and also many pastors. As early as 1869 the general synod was organized and since then it has consolidated with other general synods and since 1916 has been called United Lutheran Church of America. The general synod is composed of district synods, one of which is the Evangelical Lutheran Synod of California. The church, the California synod, and the general synod each have separate constitutions. In appropriate places we will refer to passages in those instruments, but it is not necessary at this time to go into detail as to the contents of each document. For many years Rev. Wm. S. Dysinger was the pastor of the plaintiff church. In 1925 some controversy arose about his work. He was charged with certain acts of insubordination. Charges were filed, a trial was had, and the decision of the district synod was against him. By the terms of that decision he was asked to resign within a given time or his appointment would be terminated as of a certain date. That judgment has become final. But before the date of the termination of his pastorate arrived, many purported changes were attempted. A notice was given of a meeting at which certain amendments of the constitution of the church would be tendered. Prior to September 22, 1926, among other things the constitution contained the following passages without deletion or interlineation:

"Art. II. Doctrinal Position. Sec. 1. This church in accordance with the doctrinal position of the general synod of the Evangelical

Lutheran Church in the United States, and in the words thereof, receives and holds the canonical scriptures of the Old and New Testaments as the Word of God, and the only infallible rule of faith and practice, and it receives and holds the unaltered Augsburg confession as a correct exhibition of the faith and doctrine of our church as founded upon that Word, adopts for its government and discipline the formula of government and discipline of the general synod of the Evangelical Lutheran Church in the United States, ~~and it shall always be connected with a district synod of the general synod of the Evangelical Lutheran Church in the United States.~~

"Art IV. The Pastor. Sec. I. The pastor of this church ~~shall~~ may be a member of the Evangelical Lutheran Synod in connection with the general synod, within whose bounds this church is located, ~~and with which this church itself is connected~~.

"Art. XII. Amendments. Sec. I. No alterations or amendments to this constitution shall be made unless recommended by at least three members of the church council, or fifteen members of the church who are electors; then approved by two thirds of the voters of the church present at a meeting, lawfully called after at least one month's notice of the amendment proposed, ~~but no alteration or amendment of Article II, or Article IV, Sec. 1, or Article XII, Sec. 1, shall ever be made, so long as one member of the church is opposed to such alteration or amendment."~~

On the date last mentioned purported amendments were adopted attempting to make the changes indicated. No single vote was unanimous. There was a substantial negative on each vote. Claiming to rely on the said purported amendments, the defendants, since September 22, 1926, have claimed to be a congregation sole not attached to any synod and not under the government or control of any synod. The majority of the members, the former officials, and the pastor are holding, and claiming to hold, the church property of right as against the minority and the governing synods, both district and general. The minority members have not been excluded but have been permitted to attend the church as reorganized or to go hence. After the purported amendments were adopted, they were never submitted to the president of the California Synod for his approval notwithstanding that the constitution of that synod contains a section in part as follows: "A congregation desiring admission to the synod shall place in the hands of the president a formal application signed by the secretary of the church council and by the pastor, * * * it shall submit a copy of its constitution and of its charter, if incorporated. If the executive committee finds these in accord with the requirements of the constitution of the synod, the congregation may be received into membership by a majority vote of the synod at any meeting. Contemplated changes of its constitution, affecting the articles of faith, adherence to the synod and the United Lutheran Church in America and disposition of its property shall be reported to the president of the synod for his approval." A number of the minority members protested, but their protest was not heeded. They appealed to the California Synod and that body rendered a decree in their favor. The decree was not obeyed by the defendants. The minority members elected the plaintiffs as the trustees of the church and as the trustees they commenced this action.

The preamble of the constitution of the general synod is a full statement of the doctrine of the Evangelical Lutherans. That statement is repeated in substance in the constitution of the district synod. It is again repeated in the constitution of the plaintiff. A document, "Formula for the Government and Discipline of the Evangelical Lutheran Church," adopted by the general synod, revised in 1888, is referred to in plaintiff's articles of incorporation and in its constitution. It is a detailed statement of the purposes and meanings of the provisions of the constitution. From these documents it is apparent that the individual is to be allowed the utmost liberty, but that the doctrines of the church are to be preserved; that, unto that end, the church is governed by three judicatories: the council of each individual church, the district synod, and the general synod. One of the powers of the district synod is to ordain ministers, to suspend and depose them for cause after a trial duly had, and to exercise other powers of discipline. Before any church can become a member of the district synod it must submit its constitution for approval. Relying on these facts, the plaintiffs claim to be the true representatives of the church and to be entitled to the custody of the church property.

In the leading case entitled Watson v. Jones, 13 Wall. 679, at page 722, 20 L. Ed. 666, Mr. Justice Miller writing the opinion said:

"The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state.

"1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

"2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

"3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization."

[1-3] Then on page 726 of 13 Wall., speaking of the third class above mentioned, Mr. Justice Miller said: "Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact *that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments.*" (Italics ours.) That case has frequently been cited and followed. Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 128, 106 P. 395.

As we have shown above, the district synod has decided the controversy in favor of the plaintiff in this case. It follows that the judgment of the trial court should have been for the plaintiff. But the defendants assert that before the district synod rendered its decisions the defendants amended their constitution and withdrew. The point is not well taken for several reasons. To pass each amendment required a unanimous vote. It was not had on any one of the amendments. The first, second and third amendments as printed above needed the approval of the president of the synod. That approval was not had. Furthermore, the amendments, if regular, operated to change a synod form of organization into a congregation form. That may not be done by the church amending its constitution. Similar acts were attempted on other occasions. In Borgman v. Bultema, 213 Mich. 684, 182 N. W. 91, the Supreme Court of Michigan was considering the point. At page 96 of 182 N. W., Mr. Justice Clark, speaking for the court, said:

"The amendment attempted is void. It is an effort to set up in this church of presbyterial form of government a congregational form of government. What was said in Fuchs v. Meisel, 102 Mich. 357, 60 N. W. 773, 32 L. R. A. 92, is applicable:

"'In the freedom of conscience and the right to worship allowed in this country, the defendants and the members of this church undoubtedly possessed the right to withdraw from it, with or without reason. But they could not take with them, for their own purposes, or transfer to any other religious body, the property dedicated to and conveyed for the worship of God under the discipline of this religious association; nor could they prevent its use by those who chose to remain in the church, and who represent the regular church organization. If complainants maintain the allegations of their bill, that they represent the regularly organized body of the church, and are its regular appointees, they are entitled to the relief prayed.'"

In Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, at page 128, 106 P. 395, 403, the court quotes with approval as follows: "'Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of the church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.' Watson v. Jones, 80 U. S. [13 Wall.] 727, 20 L. Ed. 666." Some courts have applied that same rule and when, as here, the ecclesiastical judicatory has determined the validity or invalidity of the amendments, such determination is binding on the courts. Lamb v. Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518, 528, 529; Mattson v. Saastamoinen (1926) 168 Minn. 178, 209 N. W. 648. Finally, other cases are to be found which reach the same conclusion but through a slightly different reasoning. In Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783, at page 792, the Supreme Court of Tennessee said:

"It may be for the good of the church, under some circumstances that may be conceived, to dissolve the organization, or to unite with another church on such terms as may be agreed upon. Such union may involve a change of name, or faith, or both. The constituent contract, the constitution, may point out how both of these ends may be effected, and if so, must be complied with. After these changes have been made there may still remain the organization—the framework of the church which must, in effect, be dissolved, by the act of union with another church. The authority to effect this must be found where the supreme legislative power of the organization resides, because it requires the exercise of the will, and the expression of the will of the whole organization as a unit, on a proposition affecting the whole in respect of its existence and organic activity. There being a question for the whole church, it cannot be a matter to be determined by the individual congregation. The whole church itself is a unit—a composite unit, it is true, but still a unit—and in determining questions addressed to it, it must act in accordance with its nature, by that body or bodies through which it speaks its will.

"The union must be effected in strict accord with the constitution; that is, if it requires a preliminary change of faith and of name, and these changes can only be made by amendment, then such amendment must precede the actual union, and must be made in the manner pointed out in the contract. The principle is that as far as the method is distinctly pointed out it should be pursued." See, also, Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805, 821.

As to these purported amendments, the defendants assert that the limitations on the power to amend are not addressed to article XII, hence the defendants had the power to amend section 1, article XII; having eliminated the last clause by their purported amendment, they assert they had the right to make the other amendments. Such reasoning assumes that the Los Angeles church was not otherwise under contract. If it had not been, the reasoning might have efficacy. But, having first adopted its constitution and that constitution having been incorporated in the larger contract as between each member and each of the governing entities, the reasoning adopted by the defendants finds no support in the authorities which we have cited above.

In this connection the defendants stress the first two paragraphs of the conclusions of law as made by the trial court. Those paragraphs are to the effect that the acts of the "defendants were no departure by the defendants from the doctrines and practices of the Lutheran denomination." But the vice in that reasoning is that the judicatory of the denomination has found otherwise, and the courts may not substitute their opinions in lieu of the determinations of the authorized tribunals of the church.

[4] Something is said about majorities and minorities. If we are correct in selecting the classification, under Watson v. Jones, supra, it is immaterial whether the plaintiffs constitute a large or small minority of all the members of the church, they represent the church. Baker v. Ducker, 79 Cal. 365, 374, 21 P. 764; 34 Cyc. 1164.

[5, 6] But the defendants claim the plaintiff was organized as an independent congregation. There is no conflict in the evidence. It is to the contrary. The most that the evidence shows is that originally the church was organized subordinate to the general synod; but at that time there was no district synod. Later the plaintiff church and others organized the district synod. The fact that the church was incorporated did not make it an independent congregation. Wheelock v. First Pres. Church, 119 Cal. 477, 485, 51 P. 841. Furthermore, even though it was independent in the beginning, that status was clearly changed by the new contract. It is said there has not as yet been any change of doctrine and discipline. But the synod has decided that there has been. That ruling is conclusive. Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 128, 106 P. 395. Continuing, the defendants assert: "The constitution, formulas, and articles of the various divisions of the Lutheran structure and the posers and limitation therein contained furnish the field of research." But, when that field of research is examined, nothing is found helpful to the contention of the defendants. In nearly every instrument so referred to, if not in every single one of them, passages are to be found showing the existence of ecclesiastical judicatories over and above the church council. When that fact appears, the investigation of a civil court should stop. Mack v. Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675, 687. The defendants stress the fact that the synods are to "advise" as distinguished from "command." When the spiritual nature of this organization is considered, it is clear that the use of the expression "advise," by the framers of the organic instrument under consideration, was intentional and is to be commended and enforced and not belittled. The words selected are easily to be understood and followed.

As opposed to nearly everything we have said, the defendants cite and rely on Gudmundson v. Church, 29 N. D. 291, 150 N. W. 750. That case involved the organization, etc., of the Icelandic Lutheran Church of America. It does not appear that that sect is a branch of, or similar to, the United Lutheran Church. In that case an ex parte order was made by the ruling synod. No ex parte order was here involved. That case contains some language intimating that the determination, by an ecclesiastical tribunal having jurisdiction to act and acting within its jurisdiction, is not conclusive in the courts on matters ecclesiastical. Such is not the rule in California. Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 128, 106 P. 395.

The plaintiffs claim that there are a large number of findings of fact that are not sustained by the evidence. That is true. Furthermore, there is no conflict in the evidence on any issue which is material to the cause of action.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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119 Cal.App. 425

KOENIG v. STEINBACH et al.

Civ. 6908.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1931.

1. Evidence ⚷450(11).

Contract guaranteeing payment of note *held* ambiguous authorizing admission of parol evidence to explain its meaning, where guarantor signed "as trustee" and beneficiaries of trust were other two parties to note itself.

2. Evidence ⚷179(1).

Copy of document *held* properly admitted in evidence, where at time of trial original was being used in connection with other litigation.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by E. M. Koenig against W. Steinbach and another. Judgment by default was entered against W. Steinbach. From the judgment for defendant Edwin Larson, plaintiff appeals.

Affirmed.

D. Chase Rich, of Los Angeles, for appellant.

Crail, Shutt, Penprase & Miller, of Los Angeles, for respondent.

CONREY, P. J.

On the 16th day of December, 1927, the defendant Steinbach was indebted to the plaintiff on a promissory note, and plaintiff held as security therefor an assignment by Steinbach of a property interest described as a "unit" interest in certain oil wells in the state of Texas. By reason of pending litigation in courts of the state of Texas, wherein Steinbach and numerous other owners of unit interests in said oil wells were defendants, it was found to be desirable that the owners should transfer their units to some person to hold the same as trustee for the owners. Defendant Larson was selected to act as such trustee, and assignments of those units were made to him as trustee. With respect to the Steinbach unit, it was necessary that Koenig, by reason of his interest, join in the assignment. When Koenig was asked to do this, he insisted upon a renewal note, and that Larson should guarantee payment of the new note, which is the note sued on in this action. Larson refused to become personally responsible, but was willing to indorse the note as trustee, with the understanding that thereby he would be under obligation to apply toward the satisfaction of the note any money which he might receive on account of the Steinbach unit.

We have stated the foregoing facts as constituting, in substance, the defense made to this action, wherein the plaintiff seeks to recover personal judgment against both Steinbach and Larson, without regard to the fact that Larson has not received any proceeds of the Steinbach property so held in trust. Judgment by default was entered against Steinbach. Judgment was also entered in favor of the defendant Larson, and it is from this part of the judgment that the plaintiff appeals.

The note on the face thereof was signed by Steinbach, and an agreement of guaranty of payment thereof was placed on back of the note and signed by Larson "as trustee." The principal ground of appeal is that the court erred in overruling plaintiff's objections to the testimony presented by respondent Larson showing the actual facts of the transaction, which were, in substance, as hereinabove stated. It is claimed by appellant that the contract of guaranty was on its face a positive personal agreement of Larson, which agreement appellant contends contained no ambiguity which would authorize the introduction of oral testimony to contradict or vary the terms of the writing. In support of his contention, appellant relies upon decisions of the Supreme Court as found in Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529, and Hall v. Jameson, 151 Cal. 606, 91 P. 518, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137. In the Conner Case, there was a note signed, "R. C. Clark, Trustee," and it was held that Clark was not entitled to introduce parol evidence to show that he was to be bound only to pay out of a particular fund. The court called attention to the fact that no authority was shown in Clark to bind the beneficiaries of the trust by the said note, and that the note must bind the maker, or would, in effect, be no note at all. In Hall v. Jameson, supra, the note was signed "William H. Jameson, Trustee." At the time of signing, Jameson held in trust for stated purposes certain real property, the beneficiary being one Joy, who was not a party to the action. Under a power given in the trust, Jameson borrowed of plaintiff's assignor a sum of money for which he executed a note, together with a mortgage on the trust property, which was located in Massachusetts, where both note and mortgage were executed. It was held that with respect to the note Jameson was acting solely in his own behalf, for the reason that he had no authority to make the contract except for himself.

[1] We think that neither of the foregoing authorities is applicable to the case at bar. Not only did Larson sign the guaranty contract "as trustee," but the beneficiaries of the trust, instead of being third parties for whom the trustee would not be authorized to act, were the other two parties to the note itself. Under these conditions, the provisions of the guaranty contract as written were, to say the least, so far ambiguous that parol evidence was admissible to show the circumstances under which the note was made, and to explain the true meaning and intent of the contract.

[2] Appellant contends that the court erred in admitting in evidence a document offered by Larson which (with an exception apparently not material to the present controversy) was a copy of the original document by which the unit holders transferred their units to Larson as trustee. It appears that in connection with the litigation in Texas Larson had sent the original document to Texas and only had the copy in California at the time of the trial. There is nothing to indicate that he had sent the original out of the state for any improper purpose. We think the court did not err in admitting the copy which was received in evidence. Moreover, there is abundant evidence, aside from that document, that Larson, at the time of making of the note and guaranty, was acting in the capacity of a trustee for Koenig and Steinbach as well as others.

The judgment is affirmed.

We concur: **HOUSER, J.; YORK, J.**

119 Cal.App. 756

BAY LAND & TERMINAL COMPANY (a Corporation), Petitioner, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO, et al., Respondents.

Civ. 8353.

District Court of Appeal, First District, Division 1, California.

Dec. 19, 1931.

Morgan J. Doyle, of San Francisco, and Walter M. Gleason, Norman J. Ronald, and George W. Hickman, all of Oakland, for petitioner.

PER CURIAM.

The petition for a writ of prohibition is denied under the authority of the following cases: Brooks v. White, 22 Cal. App. 719, 136 P. 500; Sormano v. Wood, 179 Cal. 102, 175 P. 451; Jeffords v. Young, 98 Cal. App. 400, 277 P. 163.

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119 Cal.App. 435

PEOPLE v. RADZ.

Cr. 2146.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1931.

1. Robbery 🔑24(3).

Service station attendant's identification of defendant as one of robbers supported conviction.

It appeared that service station where robbery occurred was brilliantly lighted, and that robbers, one of whom was masked and the other unmasked, were at their work of opening the till and effecting the robbery for some three to four minutes, during which period attendant saw the one who wore no mask full face, profile, and from the rear.

2. Criminal law 🔑958(1).

Hearsay statements in affidavit supporting motion for new trial for newly discovered evidence must be disregarded.

3. Criminal law 🔑945(1).

New trial for newly discovered evidence should not be granted unless different result appears probable.

4. Criminal law 🔑938(1), 1156(3).

Whether showing on motion for new trial for newly discovered evidence renders different result probable is within discretion of judge, whose action will not be disturbed except for manifest abuse thereof.

5. Criminal law 🔑945(1).

In robbery prosecution, denying new trial for newly discovered evidence, which was not necessarily inconsistent with facts found by jury, *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Walter J. Radz was convicted of robbery in the first degree, and he appeals.

Affirmed.

David Welts, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BISHOP, Justice pro tem.

On this appeal from a judgment, following his conviction of robbery in the first degree, and from the order denying his motion for a new trial, appellant presents but two points for our consideration.

[1] The first, that the evidence is insufficient, is fully disposed of by noting the testimony of the service station attendant. He stated that he was robbed at the point of a gun by two men, one masked and one unmasked, at 10:30 p. m. on April 28. The service station where the robbery occurred was brilliantly lighted; the men were at their work of opening the till and effecting the robbery, some three to four minutes, during which period the witness saw the one who wore no mask full face, profile, and from the rear. The one who wore no mask, the witness stated, was the appellant. This alone is sufficient evidence to support the verdict.

[2] Appellant's second point is that a new trial should have been granted him because of newly discovered evidence. Two affidavits were filed in support of the motion for a new trial. One, by a woman who was in attendance at the trial, but not in the role of witness, recited that appellant's codefendant and a man known to her as Shapiro, were constant visitors at her home during the last week in April. On the night of the robbery, the two arrived at her house early in the evening, remained there until about 10 o'clock, left in an automobile, to return forty-five minutes to an hour later. On their return they had money, "whereas to the best of affiant's knowledge, they did not have before." Where they were or what they were doing during their absence, she states she did not know. Shapiro, the affidavit continued, was a man five feet four or five inches in height, with a swarthy complexion and of

a stocky build. So far as affiant was aware, Shapiro had but two suits, one brown, the other dark blue, with a noticeable white stripe in it, and "to the best of her recollection" he was wearing the blue suit the night of the robbery. The other affidavit was from a woman who, as a witness at the trial, presented an alibi for the appellant, which the jury did not accept. In addition to some statements which are purely hearsay, and as such to be disregarded, her affidavit merely corroborates the contents of the first as to Shapiro's general description and his being seen in a dark blue suit with a noticeable white stripe.

[3, 4] The test which we are to apply to these affidavits is stated for us in People v. Buckley (1904) 143 Cal. 375, 392, 77 P. 169, 176, as follows:

> "A new trial should not * * * be granted upon the ground of newly discovered evidence, unless the showing as to such newly discovered evidence is sufficiently strong to render a different result probable.
>
> "The question as to whether such a showing is made is one that is addressed to the sound legal discretion of the trial court, and the action of that tribunal in regard thereto will not be disturbed, except in cases of manifest abuse."

See, also, People v. Ledbetter (1930) 106 Cal. App. 109, 288 P. 832, and cases cited.

[5] The most that appellants' newly discovered evidence would do, if presented on a new trial, would be to advance Shapiro as a person who might have been the unmasked robber. Obviously it does not establish him as the man; it only offers him as a possible candidate for the position. Shapiro's appearance, however, as portrayed in the affidavits, was not such as to make likely the conclusion that it was he, and not the appellant, who had his hand in the service station till. The description as to the complexion and build of the robber agrees fairly well with that given of Shapiro. As to the clothes worn by each, the parallel is not complete. Shapiro, to the best of affiant's recollection, wore his dark blue suit with its noticeable white stripe. The color of the unmasked robber's suit is not given us by the service station operator, nor by any one else, but "it was a pencil stripe," "a very fine thread stripe (of) white." The owner of the service station, who identified appellant as the man leaving the station just after it was robbed, characterized the robber's suit as a dark one with a fine pin stripe in it. We are told what sort of a hat, shirt, tie, and shoes the robber had, but no word as to these articles of dress as worn by Shapiro. The silence of the affidavit on these matters may well have caused the trial judge to believe that the facts would have required a description out of harmony with that given of the robber.

Moreover, Shapiro's height, as set forth in the affidavit, was five feet four or five inches. This, instead of raising a suspicion that he and not appellant might have been the robber, rather removes him from further consideration, for nowhere in the evidence was the robber described as being less than five feet eight inches in stature. The service station operator stated that the unmasked bandit was five feet eight to ten inches in height. As appellant says in his opening brief: "The difference between the height of a man five feet four inches and a man five feet eight to ten inches, is far greater to the eye than the mere number of inches would indicate." The service station owner fixed the robber's height at five feet nine inches. The trial court may well have said to himself: "Inserting Shapiro, with his five feet four inches, into this case, would not serve to push appellant, with his five feet eight, nine or ten inches, out of it." True, an attempt was made to impeach the service station operator by showing that he had previously stated that the robber was five feet four. The trial judge may have been satisfied that the attempt was unsuccessful. He was in a position to view the witnesses; we are not. But, if successful, the result was not to introduce into the case any evidence that the unmasked robber was five feet four, but only to discredit the estimate of five feet eight to ten. Albert v. McKay & Co. (1917) 174 Cal. 451, 456, 163 P. 666.

But, beyond all this, there is nothing at all inconsistent between the recitals of the affidavits and the facts as found by the jury and approved by the court, as shown by his denial of a new trial. Shapiro in his blue suit may have gone out and returned with the masked robber, just as stated, and yet the fact be that the appellant was the man who had difficulty opening the cash register, as the service station operator insisted. The trial court heard the testimony of the witnesses, and we do not find that he abused the discretion vested in him, in concluding that the newly discovered evidence would not make probable a disbelief in the prosecution's case.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

119 Cal.App. 442

UNITED STATES NAT. BANK OF LOS ANGELES v. STILLER.

Civ. 7053.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1931.

1. Fraud 🔑13(1).

Truth or falsity of representations must be determined as of time they were relied and acted on.

2. Fraud 🔑13(2).

Misrepresentation of fact cannot be justified by alleged belief wholly unwarranted by facts.

3. Fraud 🔑52.

In bank's action for fraud and deceit, defendant's financial statement, requested and relied on by plaintiff in making loan and bank's trial balance, *held* admissible.

Such documents were admissible, since they were a part of the transaction with defendant, and were relied on by the bank in making the loan, in addition to which financial statement was competent as tending to show an intent to defraud; it having been shown to be false.

4. Appeal and error 🔑1011(1).

Court's findings of fact sustained by evidence in record are final, even though there be contrary evidence, and other findings might have been possible.

5. Fraud 🔑58(1).

In action for fraud and deceit, circumstances *held* to warrant conclusion that defendant, with intent to defraud, misrepresented financial condition of plaintiff's prospective borrower, inducing plaintiff to make loan.

6. Fraud 🔑36.

That bank which made loan on fraudulent representations could have at some time thereafter collected note would not preclude bank's right of action for fraud.

Appeal from Superior Court, Los Angeles County; William Frederickson, Judge.

Action by the United States National Bank of Los Angeles against William Stiller. From a judgment for plaintiff, defendant appeals.

Affirmed.

E. A. Miller and Wolfson & Swarthe, all of Los Angeles, for appellant.

Patterson, Bailey & Montgomery, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

[1, 2] Plaintiff brought action for fraud and deceit, alleging that defendant, with intent to deceive, made certain representations to the plaintiff, which induced the latter to loan to Pacific Cotton & Finance Corporation the sum of $15,000 on its promissory note. The representations were that defendant was the owner of a one-third interest in the Pacific Cotton & Finance Corporation, that said corporation had a surplus of assets over liabilities in the sum of $7,118.28, and that the corporation had a paid-in capital stock of $60,300. These representations were made to the plaintiff through the medium of a balance sheet of the assets and liabilities of the corporation, signed by defendant as its president and a personal financial statement of the defendant, both of which were delivered to the plaintiff bank by defendant. Defendant's answer does not deny the allegations in the complaint that defendant was not the owner of one-third of the capital stock of the corporation and that the corporation did not have $60,300 paid in on capital stock. The falsity of the latter representations, as well as the falsity of the representation as to surplus, is supported by evidence more than sufficient to support the findings. It appears that in fact the capital stock paid in amounted to only $40,000, that, instead of a surplus, there was a deficit of $4,018.84, and that defendant had only 100 shares, to wit, $1,000 of the capital stock. Appellant seeks to argue that the representations were really not false because the corporation was later permitted to increase its capital stock to $60,300 and because he had loaned the corporation $15,000 which he considered as giving him a one-third interest in the corporation. However, the truth or falsity of the representations must and can only be determined as of the time when they were relied and acted upon by the respondent bank, and a misrepresentation of fact cannot be justified by an alleged belief wholly unwarranted by the facts.

Appellant contends that the court erred in overruling his objection to the introduction of any evidence on the ground that the complaint was insufficient. No authorities are cited nor is the assignment sustained by argument. We find no substantial defect in the complaint.

[3] The objection that the personal financial statement of appellant was inadmissible was properly overruled. It was a part of the transaction with respondent, requested by respondent to substantiate the statement of the corporation, and was relied upon in the making of the loan. Furthermore, having been shown to be false, it was competent evidence tending to show an intent to defraud. For similar reasons, the trial balance of the bank was admissible.

[4] Appellant's attack upon the court's findings of fact is without merit. They are disposed of by the rule that, where there is evidence in the record sustaining them, the findings of the trial court are final, even though there be evidence to the contrary or other inferences and findings might have been possible.

[5] Appellant argues that he was not guilty of fraud because there was no misrepresentation of any material fact and because he had no fraudulent intent. The record fully justifies the conclusion that the representations were made to secure the loan, that appellant knew them to be false and misleading, and that the bank relied upon the truthfulness of the statements, and was induced thereby to part with its money. The circumstances fully warrant the conclusion that appellant, actuated by an intent to defraud, made false statements as to facts concerning a most material matter, the financial condition of the prospective borrower.

[6] Appellant devotes a substantial portion of his brief to argument which is inapplicable to an action for fraud and deceit, and cannot be considered here. The matters subsequent to the making of the loan have little or no bearing upon the action here. When the loan was made and the money turned over to the corporation, the cause of action was complete, the bank had been defrauded of its $15,000. The fact, if it be a fact, that the bank could have at some time thereafter collected the note from the maker would not deprive it of its right of action against appellant for fraud.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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119 Cal.App. 381

ANGEL v. JOLLY.

Civ. 7809.

District Court of Appeal, Second District, Division 1, California.

Dec. 22, 1931.

1. **Deeds** ⚷208(4).

In action to cancel of record deed purporting to convey realty to defendant, evidence *held* not to show grantor's consent to delivery and record of deed.

2. **Appeal and error** ⚷1011(1).

On conflicting testimony, appellate court will accept as true trial court's findings abundantly sustained by evidence.

3. **Appeal and error** ⚷1071(6).

In action to cancel deed of record, trial court's failure to find on some allegations of fraudulent acts on defendant's part *held* not error, where such failure had no effect on result of action.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Adelia Annette Angel against Lura Angel Jolly. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Walter Gould Lincoln, of Los Angeles, for appellant.

H. A. Miller and J. W. Falkner, both of Los Angeles, for respondent.

CONREY, P. J.

The plaintiff is the mother of the defendant. In the year 1925, and prior thereto, plaintiff was the owner of the property described in the complaint, and was living thereon with the defendant and the defendant's husband. In the year 1925 the plaintiff signed and acknowledged a grant deed of said property to the defendant, and placed the same in the plaintiff's safe deposit box, intending that it should be delivered to the defendant at plaintiff's death. This deed, hereafter referred to herein as the first deed, was never delivered, but remained in plaintiff's possession at the time of trial of this action. The foregoing facts are admitted, except that appellant now suggests that there is no evidence that plaintiff had title to the property, and that therefore plaintiff is not in a position to demand a decree quieting title. We think, however, that the case was tried upon the theory, accepted by both parties at the trial, that plaintiff was the owner of the property, unless she had conveyed it to the defendant. Incidentally, there is abundant evidence that the plaintiff does have the title, unless the defendant is entitled to prevail by virtue of the deed of conveyance to her. The chief controversy is over what is called the second deed.

The plaintiff alleged that in March, 1926, the defendant and her husband falsely and fraudulently represented to the plaintiff that her first deed was void for the reason that it had become outlawed; that, relying on said statement, and being thereby deceived, the plaintiff signed and acknowledged a new deed upon the understanding that the new deed would be placed in plaintiff's safe deposit box and there remain, and not be delivered or recorded until after the death of the plaintiff; that thereupon, after plaintiff had acknowledged and signed said deed, defendant, without the consent of the plaintiff, and against her will and protest, took possession of said deed, and thereafter caused it to be recorded in the official records of the county. Omitting some of the details of fact alleged in the complaint, the foregoing allegations of fact constitute the principal issues tendered, and which were denied by the answer, and upon which the court made its finding in favor of the plaintiff, and the judgment was entered, from which the defendant appeals.

[1] At the time of the trial of this action in May, 1929, the plaintiff was eighty-nine years of age. Nevertheless, she appears to have had a very good memory, and her statement of facts as shown in the record was quite as clear and distinct as that of the defendant. In their testimony, they directly contradict each other concerning the transactions between them in relation to the second deed. The court having found those facts in favor of the plaintiff, and the findings being abundantly sustained by the evidence, we must accept those findings as true.

In the brief for appellant, we find a series of twelve sentences or clauses of the findings which appellant claims are not sustained by the evidence. Upon examination, we find, as to some of these assignments of error, that the findings are sustained by the evidence, and as to the others that they are not of substantial importance or materiality.

[2, 3] Appellant claims further that the court erred in failing to find upon the issues presented in relation to certain of the alleged fraudulent acts of the defendant, and also failed to find upon the allegation made in the answer that the plaintiff in July, 1928, in violation of her agreement with the defendant, made and delivered to her son C. D. Rogers a grant deed conveying said real property to him. On the first part of this objection it appears that there were some allegations of fraudulent acts on the part of the defendant, concerning which no evidence was introduced, and that the court failed to make any findings thereon. This, however, had no effect upon the result of the action. As to the second objection, in relation to the deed made to C. D. Rogers, the matter is sufficiently covered by the court's finding that the agreement alleged in the answer was not made. Therefore there could have been no violation thereof. The evidence does show that, after the plaintiff learned that the defendant had recorded the second deed, she caused to be executed and recorded a deed to her son for the purpose of blocking any sale and conveyance of the property by the defendant. But the evidence does not show that such deed was ever delivered to C. D. Rogers, or that any title was thereby conveyed to him. We think that the failure to make a specific finding on this question had no effect upon the result of the action.

There is a series of additional points suggested by appellant in her brief; such as, that there is a fatal variance between the allegations of the complaint and the proof; that the plaintiff was guilty of laches; that no delivery of the second deed was necessary; that the second deed was delivered. We think that there is no merit in either one of these assignments of error or in those others of lesser importance which complete the list. In view of our conclusions upon the facts which have been stated, the plaintiff was entitled to the judgment which was rendered in her favor. We think it unnecessary to extend the discussion further.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

THOMAS v. LAVERY et al.*

Civ. 8045.

District Court of Appeal, First District,
Division 2, California.
Dec. 12, 1931.

Hearing Granted by Supreme Court
Jan. 11, 1932.

1. Appeal and error 🔑882(3).

Where parties stipulated and evidence disclosed that plaintiff suing on real estate contract was duly licensed broker, fact not being pleaded nor found by court, *held*, parties made issue on subject, so that neither can complain on appeal.

2. Appeal and error 🔑1071(6).

Where, if finding be made on record, it would be against party bringing appeal, judgment will not be reversed solely because of trial court's failure to make finding on that particular issue.

3. Brokers 🔑86(1).

Evidence did not sustain allegations of broker, suing on contract of employment to sell lots, that he had performed all things to be performed under contract.

4. Brokers 🔑63(1).

Conveyance by owner to daughter of lots which broker undertook to sell *held* not to constitute breach of broker's contract of employment.

No breach of contract was shown where it appeared that no one of the parties treated the conveyance as being an act of abandonment by owner or intended to

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 12 P.2d 636.

have that effect, and broker knew that conveyance was to be made for purpose of enabling owner to avoid making of numerous contracts, and he did not object thereto, and it further appeared that, after deed was made, executory contracts were made by owner which broker without objection accepted and negotiated sales thereof.

5. Brokers ⚷86(1).

In broker's action for breach of employment contract, broker's own testimony *held* not to show performance of contract by broker.

6. Brokers ⚷86(1).

Broker's contract for sale of lots *held* not shown to be modified by oral evidence that resale would be counted as new sale in measuring terms of contract, where no consideration for modification of contract was shown.

7. Brokers ⚷43(3).

Instruments relating to employment of broker to sell lots containing descriptions of lots to be sold, price to be paid, etc., *held* sufficient written contract on which to base action for breach (Civ. Code, § 1624).

8. Brokers ⚷87.

Trial court's failure in measuring damages to provide against broker's expenses in action by broker on contract to sell lots, it not appearing he had expenses, *held* not error.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by J. D. Thomas against Jessie E. Lavery and others. From a judgment for plaintiff, defendant Jessie E. Lavery appeals.

Reversed.

Superseding, 4 P.(2d) 973.

Paul Friedman, of Los Angeles, for appellant.

Charles E. Hobart, of Los Angeles, for respondent.

PER CURIAM.

The petition for a rehearing filed in the above-entitled cause is hereby denied. The opinion filed November 13, 1931, is changed in certain respects as follows:

The plaintiff commenced an action to recover damages alleged to have been incurred by reason of prevention of performance of a real estate sale's contract. He named as defendants Mrs. J. E. Lavery, the owner of the land, and he also named her daughter, Emma L. Barnett, and the daughter's husband, W. C. Barnett. Mrs. Lavery filed an answer, and Mr. and Mrs. Barnett filed a separate answer. On the trial of the action, a nonsuit was granted to Mr. and Mrs. Barnett and a judgment in the sum of $30,856 was rendered against Mrs. Lavery. From that judgment she has appealed.

[1, 2] In her opening brief, the defendant makes the point that the plaintiff's complaint is fatally defective, because it is not alleged that the plaintiff was during the life of the contract a duly licensed real estate broker, and that the trial court made no finding on that subject. The same points were made on the motion for a new trial. On the hearing of that motion, the plaintiff presented an affidavit made by one of his attorneys in which the attorney stated that during the trial, and when the plaintiff was on the stand as a witness, the attorney for this defendant stipulated "* * * that Mr. Thomas was a licensed real estate broker at all the times necessary or involved in this action." Furthermore, in the affidavit it was alleged, and the reporter's notes also show, that without objection the plaintiff was asked if he was a duly licensed real estate broker in this state at all times involved in this action, and he answered he was. Whether or not the pleadings made an issue on the subject it is clear the parties did, and neither can complain at this late hour. Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 P. 90. There was not introduced any evidence that the plaintiff was not a duly licensed real estate broker. If a finding should now be made on the record as made, such finding must necessarily be against the defendant. When that is the condition of the case, the judgment will not be reversed solely because of the failure to make a finding on that particular issue. 2 Cal. Jur. p. 1033, note 14.

[3] In his complaint the plaintiff pleaded that he was at all times ready, willing, and able to perform the terms of his contract, and that he had done and performed all things to be done and performed under the terms of the contract. The defendant asserts that the judgment should be reversed because those allegations were not proved. The plaintiff asserts that there was an abundance of evidence to support his allegations. In this assertion we think he is clearly in error when one searches the record for evidence that is both material and competent. By the terms of his contract, the plaintiff undertook to sell fifty-seven lots. He further covenanted that he would sell three in January, 1926, the same number in February, 1926, and the same number during each month thereafter until all of the lots had been sold. Time was expressly made of the essence of the contract. The contract was signed November 12, 1925. By virtue of the covenants just recited its term expired nineteen months from January 1, 1926, or July 31, 1927.

[4-6] With reference to Mr. and Mrs. Barnett, we need not pause to make any examination of the record, because a nonsuit was granted to them, and no appeal was taken from that order. As to Mrs. Lavery, the contention of the plaintiff is twofold. He does not contend that she discharged him, and, indeed, he may not so contend, for there is no evidence whatever to that effect. However, he adverts to the fact that on the 26th day of May, 1926, Mrs. Lavery conveyed to her daughter, Mrs. Barnett. The plaintiff states that thereby she put it out of her power to comply with the terms of the contract. The act had no such effect. Garberino v. Roberts, 109 Cal. 125, 41 P. 857. The record shows that no one of the parties treated the conveyance as being an act of abandonment by Mrs. Lavery or intended to have that effect. The plaintiff knew that the conveyance was to be made for the purpose of saving trouble to a very aged woman and avoid bothering her in the making of numerous contracts. He did not object. After the deed was made, executory contracts were signed by Mrs. Barnett. The plaintiff, without objection, accepted them and negotiated sales. Before any troubles arose between the parties, the plaintiff received numerous contracts signed by Mrs. Barnett extending over a period of time from November, 1926, until June, 1927. Then, and not till then, for some reason, the plaintiff sought to have eleven contracts signed by Mrs. Lavery. When he applied to her directly, he obtained her signature. The plaintiff introduced in evidence the sworn statement of Mrs. Lavery that the conveyance made by her to her daughter was solely in trust for the grantor and for the purposes hereinabove stated. There is no evidence in the record to the contrary. We think it is clear, therefore, that Mrs. Lavery never in any manner prevented the plaintiff from selling a single lot. Nevertheless, it is not even claimed that the plaintiff sold all of the lots. He testified that he made 56 sales although the contract covered 57. Therefore, even under his own testimony, the plaintiff had not performed. The 56 sales so claimed included certain resales, but such resales were not to be counted for the purpose of measuring the term of the contract. The contract provided: "J. It is further hereby agreed by and between the said parties hereto that in case the purchasers of said lots, or any of them, or the purchasers of parts of said lots, shall be unable to make the payments when due, said party of the second part may, at his option, pay the balance of said purchase price in accordance with the terms and conditions of said agreement for the sale of said lots, or parts of lots, and said parties of the first part agree to execute and deliver a deed and certificate of title to said party of the second part." At no time did the plaintiff attempt to comply with said paragraph. He attempted to evade it, and the trial court, over the objection of the defendant, received a vast amount of oral evidence to prove that the written contract was so modified that a resale would be counted as a new sale in measuring the term of the contract. No written modification was offered. No consideration for a contract of modification was pleaded, proved, or found, and there was no modification. 6 Cal. Jur. 167; 12 Cal. Jur. 925. Therefore the subject of resales ceases to be a material factor in estimating the term of the contract. It follows that the plaintiff did not perform those things by him to be done and performed. In this same connection it should be noted that on the eleven contracts signed by Mrs. Lavery in the month of June, 1927, the plaintiff never tendered to her nor to Mrs. Barnett the down payment of $25 on each lot nor any other sum. Here was another omission on his part to perform.

[7] In the brief of the defendant, there is the suggestion that the plaintiff holds no written contract signed by the defendant, and that therefore he has no cause of action. Civ. Code, § 1624. The point is more fully set forth in her reply brief. We think the point is not well taken. Prior to November 12, 1925, the parties arranged their plan. This defendant owned the ground which had been mapped for sale in subdivisions, and the map had been recorded. Some of the streets were paved, some of the pipes were in place, and some other subdivision work had been done. They prepared a written form of contract for sales on the instalment plan. Each contract had a list of blanks for payments of (1) interest, (2) principal, (3) balance, and (4) by whom paid. On each contract was a map showing each lot by number. They also prepared a power of attorney by which the defendant authorized her son-in-law, W. C. Barnett, to act as her selling agent and to enter into a secondary selling contract. She signed and delivered that power on November 12, 1925. On the same day the defendant made, executed, and delivered to the plaintiff a selling contract which contained a list of all the lots, stated the price on each one, designated the terms on which they could be sold, and, in subdivision (c), it included an appropriate reference to the blank form of sales contract above mentioned, and authorized the plaintiff to make the sales. The latter instrument was signed by W. C. Barnett and by the plaintiff. We see no frailty in the plaintiff's contract.

[8] The defendant complains because the trial court, in applying the rule as to measuring damages, did not provide against plaintiff's expenses. It does not appear he had any expenses. It does not appear the trial court did not inquire into the subject and then deduct those expenses. The point is without merit.

The judgment is reversed.

119 Cal.App. 389

REXON v. GAFFEY et al.

Civ. 4466.

District Court of Appeal, Third District, California.

Dec. 23, 1931.

Rehearing Denied Jan. 22, 1932. Hearing Denied by Supreme Court Feb. 18, 1932.

1. Taxation 🔑734(7).

Tax sale and deed *held* void, where delinquent list failed to state whether list contained amount of taxes, penalties, and costs (Pol. Code, § 3764).

2. Taxation 🔑627.

Description of property in delinquent tax list merely giving lot and block number and name of tract wherein situated, without map reference, *held* insufficient.

3. Taxation 🔑810(3).

Evidence in quiet title action against tax deed claimant established existence of plaintiff.

4. Limitation of actions 🔑39(8).

Statute that action for relief not hereinafter provided for must be commenced within four years from accrual of cause of action *held* inapplicable to quiet title action against tax deed claimant (Code Civ. Proc. § 343).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Max G. Rexon against Philip M. Gaffey and others. From an adverse judgment, the named defendant appeals.

Affirmed.

S. C. Schaefer, of Los Angeles, for appellant.

Raphael Dechter, of Los Angeles, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

An action to quiet title to certain real property in the county of Los Angeles.

Plaintiff prevailed in the trial court, and defendant has appealed. Plaintiff proved a perfect record title to the property in question. Defendant claims title by virtue of a tax deed. The court found that the proceedings leading up to the sale of the property for delinquent taxes were invalid, and consequently the tax deed relied upon by appellant was void.

We are in full accord with all of the findings of the trial court.

[1] The tax deed is based upon a sale for delinquent taxes of 1914. The requirements of section 3764 of the Political Code that the delinquent list published by the tax collector must contain the amount of taxes, penalties, and costs due, opposite each name and description, etc., was not followed in the tax proceedings under which appellant claims title. This section, as it read at the time of the sale to the state, provided that the delinquent list should contain alongside of the name and the description the amount due for taxes, penalties, and costs and that the sale to the state should be made for taxes, penalties, and costs. The only intimation as to what the amount placed alongside of each assessment in said delinquent tax list signifies is contained in the notice preceding the list, which reads to the effect that, unless the taxes delinquent as appears by said list are paid, the real property will be sold, etc. In other words, the notice preceding the list specifically states that the list contains the amount of taxes due, but makes no mention as to whether the list contains the amount of taxes, penalties, and costs. And the fact that no mention is made in such list of such penalties and costs is further strengthened by the statement in said notice that unless "taxes delinquent as appears by said list, together with the costs and penalties are paid," etc.

This would seem to indicate from the reading of said notice that said list contained the taxes only, and that the owner of the property would, in addition to the amount of taxes shown in said list, be compelled to pay some other sum representing penalties and costs in order to redeem his property and prevent a sale to the state.

This deficiency in the delinquent notice has been held to render the tax proceedings void. This precise question has been decided in the following cases: Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371, 373; Snodgrass v. Errengy, 86 Cal. App. 664, 261 P. 497; Wyser v. Truitt, 95 Cal. App. 727, 273 P. 147; Gottstein v. Kelly, 206 Cal. 742, 276 P. 347; Gramson v. Geniella, 209 Cal. 610, 289 P. 817.

In Bussenius v. Warden, supra, the court said: "Section 3764 of the Political Code * * * provided, among other things, that the delinquent list to be published by the tax collector 'must contain the names of the persons and a description of the property delinquent, and the amount of taxes, penalties, and costs due, opposite each name and description. * * *' The foregoing statement from the findings shows that said delinquent tax list failed to set forth the amount due for penalties; although the notice of sale stated (as required by section 3765) that, 'unless the taxes delinquent, together with the costs and penalties, are paid, the real property upon which such taxes are a lien will be sold.' It thus appears that, although the proposed sale was conditioned upon nonpayment of penalties, the delinquent list as published was defective, in that it failed to state the amount of those penalties. Respondents contend, and apparently there is no answer thereto, that by reason of this defect the subsequent sale to the state was void, and that consequently the deed relied upon by appellant was likewise void."

[2] The description of the real property, as given in the assessment published in the delinquent list for the year 1914 on which the sale is based, merely reads: "Lot 41, Block 2, Montana Tract," without any map reference of any kind.

This description was entirely insufficient to give notice to the property owner that his property was being sold for delinquent taxes. McLauchlan v. Bonynge, 15 Cal. App. 239, 114 P. 798, and cases cited; Warden v. Brandes, 103 Cal. App. 744, 284 P. 1050. In McLauchlan v. Bonynge, supra, the court said: "The description of the property as contained in both the assessment roll and deeds under which defendants claim title is as follows: 'In Los Angeles city, in Los Angeles county, in Clifton Tr., lots 6, 7 and 8'—the same, however, being separately assessed. It has been repeatedly held that such an assessment is insufficient to identify the property, and hence, standing alone, it is prima facie invalid. Baird v. Monroe, 150 Cal. 560, 89 P. 352; Fox v. Townsend, 152 Cal. 51, 91 P. 1004, 1007; Houghton v. Kern Valley Bank, 157 Cal. 289, 107 P. 113. Notwithstanding the fact that such description is, when considered alone, insufficient, the party relying upon the assessment containing such incomplete description 'may supplement his case by showing that the description in the assessment is in fact sufficient to identify the property.'"

No such evidence appears to have been offered by appellant in the case at bar. Other defects appear in the tax proceedings, but it is unnecessary to discuss them in detail, for, as above stated, we are fully convinced that the defects pointed out render the tax deed void.

[3] Appellant seems to lay great stress upon the contention that it is incumbent upon the plaintiff and respondent herein to prove the existence of himself; in fact, a large portion of appellant's brief is devoted to a discussion of this question, but not one bit of evidence is pointed out from which it could be inferred that the plaintiff and respondent, Max G. Rexon, is not a real, live, breathing, human being. On the contrary, his existence is fully established by the record; there appears the sworn verification of Mr. Rexon, the plaintiff, to the complaint before one Mabel Myer, a notary public, on August 31, 1927. There also appears the sworn verification of the plaintiff in his answer to the cross-complaint before Evalyn McCombs, a notary public, on September 22, 1927. He is also named as grantee in the deed to the property in question. The appellant called one or two witnesses and had them testify that they had never seen the plaintiff. Such statements are negative, and amount to absolutely nothing. He might as well have called members of this court to testify to the fact that they had not seen Max G. Rexon, and therefore could not say whether or not he is in fact in being.

[4] Appellant seems further to contend that plaintiff's action is barred by the statute of limitations; but on examination of the pleadings we find that the statute of limitations set forth in the brief are not pleaded in the answer or cross-complaint except section 343 of the Code of Civil Procedure, which has no application under the facts of this case. We find no merit whatever in the appeal.

The judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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119 Cal.App. 446

GERBER et al. v. DAY.

Civ. 6925.

District Court of Appeal, Second District, Division 1, California.

Dec. 29, 1931.

Physicians and surgeons ⚷17.

Physician *held* not liable for malpractice, where patient failed to have prescription filled and return to physician for further treatment as directed.

> Patient called at physician's office for treatment of an injury. Physician instructed patient to take prescription to druggist and procure some tetanus antitoxin serum and bring it back immediately. Patient took prescription, but failed to have it filled, and did not return to physician. At that time, physician did not know where patient lived. Later he was called to patient's house where he learned the facts and immediately procured antitoxin and administered it to defendant, but too late to prevent a tetanus infection of which the patient died.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by Jessie F. Gerber and others against Dr. Emory C. Day. From judgment for defendant, plaintiffs appeal.

Affirmed.

Rosenthal & Rosenthal, of Los Angeles, and Nelson & Burns, of Santa Ana, for appellants.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Head, Wellington & Jacobs, of Santa Ana, for respondent.

YORK, J.

This is an appeal from a judgment of nonsuit, in an action for alleged malpractice brought against the defendant and respondent, a practicing physician and surgeon. The complaint alleged that the death of one Charles J. Gerber, who was the husband and father of the plaintiffs respectively, was caused by the failure of respondent to administer tetanus antitoxin serum in time to prevent an infection of tetanus. At the close of plaintiffs' case, a motion for nonsuit was made, upon the ground that the evidence was insufficient to establish the plaintiffs' case.

It is the undisputed evidence that the deceased came to the defendant for treatment after sustaining an injury, and that when the wound was being dressed the defendant instructed decedent to procure some tetanus antitoxin serum and bring it back immediately, and for that purpose gave him a note to the druggist; that the deceased demurred to its administration, but took the prescription and failed to have the same filled; that at that time defendant did not know where the patient lived; that on the next day defendant being called to the house of the decedent, he discovered that the prescription had not been filled; that defendant sent the prescription out to be filled and the serum was administered immediately by the defendant, but the administration was too late, and the patient died from a tetanus infection.

There is nothing in the evidence to show any dereliction of duty on the part of the defendant physician and surgeon. No dereliction of duty being shown on the part of the physician, the motion for nonsuit was properly granted.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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119 Cal.App. 384

SCOTT v. REMLEY et al.

Civ. 567.

District Court of Appeal, Fourth District, California.

Dec. 22, 1931.

1. Executors and administrators 🔑444(3).

Where word "as" did not precede word "executrix" after widow's name in caption of complaint, reference to plaintiff as executrix should be taken as descriptive.

Widow brought action against sisters of deceased husband and others, seeking to recover certain money as community property, and following plaintiff's name in caption of complaint were words "duly qualified executrix of the estate of H. A. S., deceased."

2. Husband and wife 🔑262(1).

Presumption that property in possession of husband is community property is disputable.

3. Husband and wife 🔑262(1).

Presumption that property in husband's possession is community property applies only to property acquired in California or by persons domiciled there.

4. Husband and wife 🔑249.

Property of husband, acquired in Arkansas and brought to California, remained separate property of husband.

5. Husband and wife 🔑264.

Evidence conclusively showed that amount which deceased husband had given his sisters was his separate property.

6. Husband and wife 🔑279(2).

If property settlement agreement between husband and wife was annulled, the only effect was to return property to its previous position as separate property of husband.

7. Husband and wife 🔑249.

Mere mingling of separate property owned by husband and wife respectively cannot change character to community property, where it can still be traced, and especially where mingled property is used to purchase property in another state.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Evelyn L. Scott, duly qualified executrix of the estate of Hugh A. Scott, deceased, against Maude Remley, Mary Bailey and others. From a judgment for plaintiff, defendants named appeal.

Reversed, with instructions.

J. A. Gardiner and G. E. Bradley, both of Santa Ana, for appellants.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

BARNARD, P. J.

The plaintiff is the widow of Hugh A. Scott, deceased, and the executrix of his estate. They were married in Arkansas in 1915, and removed from that state to California in 1919. On October 25, 1928, Hugh A. Scott executed a will in which he made the plaintiff his sole legatee. On November

7, 1928, a written agreement was entered into between these parties in which it was provided that the husband would give to the wife the sum of $4,000, and that all property then owned or later acquired by either, should be the separate property of the respective parties. The $4,000 was paid to the plaintiff and was still on deposit in a bank in her name at the time of the trial. Hugh A. Scott delivered to his sisters, Mary Bailey and Maude Remley, the sum of $2,000 on January 29, 1928, and the further sum of $2,135.27 on March 15, 1930. On March 17, 1930, the said Hugh A. Scott died. His widow brought this action against the two sisters and certain nominal defendants, seeking to recover the two amounts referred to as being the community property of herself and the deceased and as having been given away without her consent. The court found that Scott and his wife had entered into the property settlement agreement above referred to, but that the same was subsequently annulled and abrogated; that the two amounts mentioned were, on the dates named, delivered by Scott to the defendant sisters; that at the times of said transfers the respective amounts were the community property of Scott and the plaintiff; and that the said transfers were made without consideration. Judgment in favor of the plaintiff for $4,135.27 was entered as against the defendant sisters, from which judgment this appeal is taken.

[1] Some point is made by the appellants that the respondent could not maintain this action, in that the action was brought by her as executrix of her husband's estate and not for herself, as the surviving widow. The word "as" does not precede the word "executrix" in the caption of the complaint, and the reference to the plaintiff as the executrix of the estate should be taken as descriptive only. Burling v. Thompkins, 77 Cal. 257, 19 P. 429. This is particularly true here, since it is fully apparent that the entire case was tried upon the theory that the respondent was suing as the surviving widow, to recover the amounts claimed to have been wrongfully given away.

[2-5] The main question raised, the answer to which we think is decisive of this appeal, is as to whether the court's findings that the respective amounts delivered to the appellants were community property of Scott and his wife are sustained by the evidence. The respondent concedes that there is no direct evidence sustaining these findings, but insists that they are sustained by a presumption of law that the property in the possession of a husband is community property. While such a presumption ordinarily exists, it is a disputable one and may be controverted by other evidence. In re Estate of Jolly, 196 Cal. 547, 238 P. 353. In this case, the respondent testified that at the time of their marriage her husband had between $5,000 and $6,000; that she at that time had $1,500; that she turned her money over to him when they were married; that they both worked and put their money in the bank together; that they bought no property while in the East; that they came to California in 1919, bringing with them between $20,000 and $25,000 in money; and that they bought no property and made no investments in this state. Not only is there neither evidence nor presumption of law that the amount here in controversy did not come from the amount of cash which the husband had at the time of the marriage, but the presumption that the property in the possession of a husband is community property applies only to property acquired in California, or by persons domiciled here. In re Estate of Frees, 187 Cal. 150, 201 P. 112. Furthermore, the evidence here clearly establishes the fact that all of the property of the deceased was acquired in Arkansas and brought to California in 1919. The authorities in relation to such a situation have been so frequently reviewed in recent decisions that it would serve no useful purpose to repeat it here. Under these authorities these funds remained the separate property of the husband. In re Estate of Frees, supra; In re Estate of Arms, 186 Cal. 554, 199 P. 1053; In re Estate of Drishaus, 199 Cal. 369, 249 P. 515; Williams v. Sutphen, 92 Cal. App. 697, 268 P. 946; McKay v. Lauriston, 204 Cal. 557, 269 P. 519; In re Estate of Bruggemeyer (Cal. App.) 2 P.(2d) 534; Melvin v. Carl (Cal. App.) 4 P.(2d) 954. The evidence does not support the findings in question, but, on the contrary, it conclusively appears that these amounts were the separate property of the husband.

[6, 7] The respondent contends that all of the money possessed by the husband became community property in 1928 by reason of the fact that the property settlement agreement entered into between them was annulled and abrogated, and the further fact that these parties commingled their funds and purchased property jointly. The only evidence as to these matters is that, after the property settlement agreement of November 7, 1928, was entered into, respondent and her husband separated for about a week; that they then decided to return to Louisiana; that Scott laughingly told the respondent, in referring to the property settlement agreement, "That is a thing of the past, there is no use of that agreement," and "The agreement is no more good if we are going back together"; that the two went to Louisiana and bought the lease and fixtures of a hotel; that the $4,000 which had been paid to the respondent under the terms of the property settlement agreement was used in the purchase of this hotel; that after about a month the parties returned to California; that when the hotel was sold Scott gave back to the respondent the $4,000; and that this amount was still deposited in a bank in the name of the respondent at the time of the trial. It will have to be admitted that any evidence that the property settlement agreement was annulled is very slight, especially in view of the fact that the respondent retained the consideration paid. However, that matter is immaterial, since, if the agreement was annulled, the only effect thereof was to return the property to its previous position as the separate property of the husband. Neither can it be maintained that the mere mingling of separate property owned by a husband and wife respectively can change its character from separate to community property, where it can still be traced, and especially where the mingled property is used to purchase property situated in another state, to which the parties had gone for the purpose of making their residence.

A number of other points are raised, which it is not necessary to consider under the view we take of the main question involved.

The judgment is reversed, with instructions to the trial court to enter a judgment in favor of the appellants.

We concur: MARKS, J.; JENNINGS, J.

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119 Cal.App. 523

PEOPLE v. BUCHANAN et al.

Cr. 2151.

District Court of Appeal, Second District, Division 2, California.

Jan. 5, 1932.

1. Witnesses 🔑274(2).

In robbery case, state's cross-examination whether accused's character witness knew he had been arrested for grand larceny and receiving stolen property *held* proper after direct testimony of good reputation for honesty.

> Cross-examination was proper, since accused's good character for traits involved in offense tends to prove improbability of his having committed that offense; and after defense has introduced evidence of accused's good reputation, derived from character witness' contact with people likely to know his character, state may cross-examine character witness as to basis of direct testimony by inquiring whether witness has heard of certain specified matters adversely affecting accused's character.

2. Witnesses 🔑274(1).

State may cross-examine accused's character witness respecting specified detrimental matters when justifiably believing that adverse comments were made.

3. Witnesses 🔑274(1).

That offenses, respecting which state cross-examines accused's character witness, were committed by accused when minor does not affect admissibility of evidence.

4. Witnesses 🔑274(1).

On cross-examination of witness testifying to accused's good character, question whether accused had been convicted of drunkenness *held* proper.

5. Criminal law 🔑1169(5).

Instruction, presumably followed, to disregard state's excluded questions on cross-examination of accused's character witness rendered questions harmless.

6. Criminal law 🔑378.

Where accused introduced good character evidence before attack thereon, rules governing witness' impeachment are inapplicable (Code Civ. Proc. § 2051).

7. Robbery 🔑24(3).

Evidence of victim's identification of accused as man holding him up justified conviction of robbery, notwithstanding accused's alibi.

8. Criminal law 🔑1175.

That jury's failure to convict codefendant on two of three counts may have been too favorable did not justify complaint by accused.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Donald Davis was convicted of robbery in first degree, and he appeals; appeal of George Buchanan being dismissed.

Affirmed.

Joseph W. Ryan and Frank J. Ryan, both of Los Angeles, for appellant Davis.

U. S. Webb, Atty. Gen., and Frank Richards, Dep. Atty. Gen., for the People.

FRICKE, Justice pro tem.

Defendant Donald Davis appeals from a judgment of conviction of the crime of robbery in the first degree. The appeal of defendant George Buchanan, taken at the same time, has heretofore been dismissed.

Appellant's first point is that the district attorney was guilty of prejudicial misconduct in the cross-examination of a defense witness who testified that the general reputation of appellant in the community in which he lived "for truth, honesty and integrity" was very good. On cross-examination, the witness stated, "Well, all I know is just good things about him; I don't know anything otherwise." The prosecutor then put the question: "Do you know that he has been arrested for the crime of delinquency and grand larceny in 1926?" The court sustained an objection to this question. The district attorney then asked the witness: "Do you know that he was arrested for receiving stolen property on June 1st, 1927?" to which the court also sustained an objection. The ruling of the court appears to have been based upon the fact that, at the times referred to, appellant was only seventeen years of age, and that the arrests referred to in the questions were disposed of in the juvenile court. The prosecutor next asked the witness whether she knew that appellant was in 1930 convicted and sentenced on a charge of drunkenness. To this no objection was made, but the court declared the matter incompetent of its own motion, and the question was not answered.

[1-3] The questions as to the knowledge of the witness of the arrest for delinquency and grand larceny in 1926, and for receiving stolen property in 1927, were proper. The witness had on direct examination stated that the general reputation of appellant for honesty and integrity was very good, and on cross-examination amplified this by saying that all she knew about him was "just good things," and that she didn't know anything otherwise.

Evidence of the good character of a defendant for the traits involved in the offense for which he is on trial is admissible on the theory that it tends toward proving the improbability that the accused was the person who committed the offense. The issue as to such character can be raised only by the defense first introducing evidence of the good reputation of the accused. It then becomes competent for the prosecutor to meet such proof by evidence of bad reputation for the traits of character involved in the offense charged, and to inquire on cross-examination of the character witnesses for the defense as to the basis of their direct testimony; "and to that end he is entitled to and should be given the privilege of asking the witness about any fact or circumstance adversely affecting the defendant's personal character." People v. Stennett, 51 Cal. App. 370, 381, 197 P. 372, 378. Thus it has been repeatedly held proper to inquire on cross-examination of the character witness as to his knowledge or reports of specific charges of acts inconsistent with the character he is called on to prove. People v. Steele, 100 Cal. App. 639, 280 P. 999; People v. Smith, 100 Cal. App. 344, 279 P. 1022; People v. Rice, 90 Cal. App. 590, 266 P. 295; People v. Sieber, 201 Cal. 341, 257 P. 64; People v. Hightower, 65 Cal. App. 331, 224 P. 110; People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Simons, 70 Cal. App. 143, 232 P. 772. A witness who testifies that the general reputation of the accused is good in a particular respect is not declaring his personal opinion, for that is inadmissible, but is stating in effect that, having contacted with a substantial number of the people of the community who would be likely to know the character of the accused, he has not heard or learned of anything which would justify the conclusion that the latter was not of good character. Obviously, the prosecutor is not bound by such a statement on direct examination, and, under his basic right to cross-examine the witness upon the subject of his direct testimony, the district attorney may inquire whether the witness did not hear of a certain specified matter detrimental to the character to which he has testified. While the rule requires that such questions may properly be asked only when propounded in good faith and under a justifiable belief that such adverse comments were made, that limitation does not exist here, for it is apparent from the transcript that defense counsel was familiar with the fact of the arrests and the consequent proceedings in the juvenile court, and no contention is made that there was any lack of good faith on the part of the prosecutor. As the defendant was being tried upon charges of robbery and theft, involving the traits of honesty and integrity, it was proper for the district attorney to inquire of the witness whether she had not heard that the defendant had in one instance been arrested for delinquency and grand theft, and on another occasion upon the charge of receiving stolen property; offenses which involve these identical traits. The fact that the arrests and charges were made while appellant was a minor and resulted in proceedings in the juvenile court does not affect the admissibility of the evidence or the propriety of the questions. The mere accusation of appellant of offenses involving dishonesty and lack of integrity would warrant the cross-examination of the character witness as to her knowledge of such accusation, and the fact of accusation would still exist, regardless of whatever proceedings were subsequently taken upon such charges.

[4] As to the question involving the charge of drunkenness, while appellant made no objection, the trial court ruled that the matter was incompetent, and the question was never answered. The question was, however, proper, in view of the fact that the witness had stated, "Well, all I know is just good things about him; I don't know anything otherwise." Appellant was not entitled to have this declaration of a character sans reproche pass unquestioned, and it is quite apparent that, had the witness admitted knowing of the arrest, such admission would materially have decreased the weight of her testimony.

[5] Finally, the court instructed the jury to disregard the entire matter involved in the questions referred to, and, in its instructions at the close of the case, directed the jurors to

disregard and draw no inferences from questions asked by counsel which the court did not permit to be answered. We must presume that the jury followed these instructions. The appellant has no cause for complaint because of the asking of the questions.

[6] Appellant cites section 2051 of the Code of Civil Procedure, refers to the rule that a witness may not be impeached by proof of his conviction of a misdemeanor, and calls attention to the fact that a proceeding against a delinquent minor in the juvenile court is not a criminal matter and could not be used in an application of section 2051. In this argument, counsel has confused the law as to proof of the character of a defendant for the traits of character involved in the offense charged with the law governing the impeachment of a witness. In the law of impeachment, evidence of good character is inadmissible until such character has been attacked by the adverse party. The fact that the evidence of good character was introduced by the defense without it having been first attacked by the prosecution shows, at least as against appellant, that this proof was offered under the rules governing proof of the character of the accused for the traits involved in the offenses charged. The rules governing the impeachment of witnesses are therefore inapplicable.

The second and third points of appellant relate to the similar cross-examination of character witnesses for appellant's codefendant. This examination was proper under the rules above set forth.

[7] Appellant's final contention is that the evidence is insufficient to sustain the verdict. The victim of the robbery, one George La Boye, testified that he was held up by appellant, who had a gun in his hand, ordered him to "stick them up," and threatened to shoot him if he ran, and that in the meantime the codefendant, Buchanan, came up and took some change from the victim's trouser pocket, and appellant relieved him of a wallet which he had on his person. These facts, believed by the jury, are sufficient to sustain the conviction of robbery in the first degree. While there was testimony tending to prove an alibi, this merely created a conflict in the evidence, and the conclusion of the jury, rejecting the alibi and accepting the testimony of the victim of the robbery, is final and presents no question of law for review by this court. As has been so frequently stated, the jury is the sole judge of the weight of evidence and the credibility of witnesses.

[8] Appellant calls attention to the fact that, while both defendants were charged in count 2 of the information with the robbery of George La Boye, they were also charged in count 1 with the theft of an automobile and in count 3 with the robbery of one Ray McMillan, and that at the conclusion of the state's case counts 1 and 3 were dismissed as to appellant. Appellant argues that since the jury convicted the codefendant Buchanan only on count 2, and disagreed as to the other two counts, this evidences a compromise on the conviction of appellant. We fail to see the logic of this argument. As both defendants were identified by the victim La Boye, we find ample support for the verdict convicting defendants of the robbery charged in count 2. The failure of the jury to agree upon the guilt or innocence of Buchanan of the other two offenses charged against him may have been more favorable to him than the facts warranted, but appellant cannot complain because the jury did not exercise sufficient severity against his codefendant. People v. Black, 80 Cal. App. 605, 251 P. 321; People v. Richardson, 83 Cal. App. 302, 256 P. 616; People v. Burdg, 95 Cal. App. 259, 272 P. 816.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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119 Cal.App. 341

CHASE v. SOUTHERN PAC. CO.

Civ. 6885.

District Court of Appeal, Second District, Division 1, California.

Dec. 21, 1931.

Rehearing Denied Jan. 19, 1932. Hearing Denied by Supreme Court Feb. 18, 1932.

1. **Railroads** ⚷398(2).

Evidence sustained jury's finding that railroad was negligent in giving no warning of switched box car, injuring paper company's watchman attaching lock to gate at entrance of track upon property.

2. **Railroads** ⚷381(1).

One on railroad tracks was bound to use reasonable care for his own safety.

3. **Trial** ⚷296(4, 5).

Instruction on contributory negligence that facts should be viewed from standpoint of workman of plaintiff's class *held* not prejudicial error, in view of other instructions.

> The other instructions were, in effect, that in operating its train defendant owed no greater duty to plaintiff, paper company's watchman, than watchman owed to himself to prevent injury, and that it was his duty, in the exercise of ordinary care, which law requires of those who place themselves upon railroad tracks, to look and listen for purpose of seeing and hearing that which one may, in exercise of ordinary care, see and hear.

4. Appeal and error 🔑882(12).

Defendant could not complain of instruction substantially the same as one it requested.

5. Appeal and error 🔑1004(1).

Where damages were not so exorbitant as to suggest at first blush passion, prejudice, or corruption on jury's part, reviewing court could not interfere.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Hal Chase against the Southern Pacific Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Bertrand J. Wellman and Leland J. Allen, both of Los Angeles, for respondent.

YORK, J.

This is an appeal from a judgment for damages awarded plaintiff, arising out of injuries alleged to have been sustained by him when he was struck by a car of defendant corporation, which was being operated in a switching movement. Plaintiff was employed as a watchman of the property of the Pioneer Paper Company, over whose property a private railroad track and switch were established and maintained for the purpose of receiving and shipping its product. Gates were located at the entrance of the track upon said property, which were secured by two locks, one of which was placed and kept on the gates by the Pioneer Paper Company and the other by the defendant Southern Pacific Company. On December 30, 1927, at the hour of 5:30 o'clock or thereabouts, the plaintiff, together with one Moriarity, was engaged in attaching to the gate the Pioneer Paper Company's lock. While so engaged, appellant switched a box car into the Pioneer Paper Company's yard, striking the plaintiff and injuring him. The car was not accompanied by a trainman or yardman or any light.

The jury brought in a verdict in favor of the plaintiff for the sum of $8,500, whereupon defendant made a motion for a new trial. This motion was denied, provided that the plaintiff should file—within ten days from the date of the order—his written consent to reduce the judgment from $8,500 to $6,000. Plaintiff filed his consent to such reduction in the amount of the judgment, and defendant now appeals to this court from such judgment and the whole thereof.

Respondent alleged, and the jury evidently found, that he was injured through the negligent switching operations of the appellant and its employees, in that he was given no warning of the approach of the switched box car. As a defense to the action appellant alleged contributory negligence on the part of the respondent, and now contends:

First, that the evidence is insufficient to sustain negligence on the part of appellant or its employees;

Second, that the respondent was guilty of contributory negligence as a matter of law;

Third, that the trial court erroneously instructed the jury;

Fourth, that the damages allowed are excessive;

Fifth, that the trial court erred in refusing to grant a new trial.

[1] We have carefully examined the record in this case, and we are of the opinion that there was sufficient evidence to prove that appellant was guilty of negligence, in that its employees shunted or switched the empty box car, across a public street and into the yard of the Pioneer Paper Company, after darkness had fallen, without giving any warning of its approach by means of placing a light thereon or of placing a trainman or yardman on the front thereof, as required by rule 103–A of appellant company. The companion of the injured man, who was facing the direction from which the car came, testified that he did not see the car until it was within eight or ten feet of him and respondent, and that the car was moving at a rate of fifteen miles per hour; too late for his warning to benefit the respondent.

As to contributory negligence, the evidence is sufficient to support the verdict.

[2, 3] In support of its third point, appellant contends that the trial court erroneously instructed the jury as follows (Trans., fol. 429): "In determining whether or not the plaintiff was guilty of contributory negligence, you should endeavor, *as nearly as you can, to view the situation as it appeared to him before he was injured.* After an occurrence, it is often seen how it could have been avoided, *but the facts should be viewed from the standpoint of a workman of the class to which plaintiff belonged, rather than as they might appear to you now who may be unaccustomed to performing similar work or to work in similar places.*" Appellant, in connection with this instruction, claims that the duty is at all times imposed upon the jury to judge and determine the negligence of a person *by that standard of care which would be exercised by reasonable and prudent persons under like or similar circumstances.* The foregoing instruction should not have been given. It had a tendency to obscure the rule which elsewhere in the instructions was clearly stated. that the plaintiff was bound to use reasonable care to provide for his own safety. But

the court also (Trans., fol. 449) instructed the jury that in operating its train, the defendant owed no greater duty to the plaintiff than the plaintiff owed to himself to prevent injury; also (fol. 458) that it was his duty, in the exercise of ordinary care which the law requires of those who place themselves upon railroad tracks, to look and listen for the purpose of seeing and hearing that which one may, in the exercise of ordinary care, see and hear. In view of these and other given instructions of similar tenor, the foregoing quoted instruction, against which counsel for appellant addresses his argument, becomes of slight relative importance. The instructions relating to plaintiff's duty in the premises were, as a whole, expressive of the defendant's own theory of the case. There was no prejudicial error.

[4] Further, appellant takes exception to the italicized portion of the following instruction given by the trial court to the jury (Trans., fol. 432): "In determining whether the plaintiff is guilty of contributory negligence, you will keep in mind that he had a right to assume the defendant would obey the law *and not be guilty of negligence*," contending that it was the province of the jury to determine whether or not appellant was guilty of negligence on the one hand, and whether or not respondent was guilty of contributory negligence on the other. In reply to this criticism it is sufficient to say that appellant should not be heard to object, in view of the fact that, as is pointed out by respondent, appellant itself requested, and the court gave, substantially the same instruction defining the right of appellant's trainmen to assume that respondent would obey the law and take the necessary precautions imposed by it upon him. (Trans., fol. 460.)

[5] Appellant maintains that the damages allowed are excessive. This court is not at all convinced that the damages awarded to the plaintiff are so exorbitant "as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Hale v. San Bernardino, etc., Co., 156 Cal. 715, 106 P. 83, 84, and cited in Nolen v. Engstrum Co., 175 Cal. 464, at page 467, 166 P. 346. It would therefore not be proper for us to interfere, especially in the face of the $2,500 reduction made by the trial court.

The judgment is affirmed.

I concur: CONREY, P. J.

HOUSER, J. (dissenting).

I dissent. My inability to agree with the conclusion reached by my associates depends upon the effect which in all probability resulted from the giving to the jury of the instruction that: "In determining whether or not the plaintiff was guilty of contributory negligence, you should endeavor, as nearly as you can, to view the situation as it appeared to him before he was injured. After an occurrence, it is often seen how it could have been avoided, but the facts should be viewed from the standpoint of a workman of the class to which plaintiff belonged, rather than as they might appear to you now who may be unaccustomed to performing similar work or to work in similar places."

Referring to that part of the foregoing instruction by which the jury was told that in reaching its conclusion as to whether plaintiff was guilty of contributory negligence it should "view the situation as it appeared to *him* (plaintiff)," in numerous cases in substance the law has been declared to be that: "* * * *Plaintiff's best judgment is not the test of ordinary care*, and if his conduct involved a risk of injury which an ordinarily prudent person similarly situated would not incur, *he may be guilty of contributory negligence, even though he believed that he would escape injury.* * * *" 45 Cor. Jur. 953, and authorities there cited.

The same thing is obviously true concerning that part of the instruction by which the jury was directed to determine whether plaintiff was guilty of contributory negligence "from the standpoint of a workman of the class to which plaintiff belonged." As it has been repeatedly held, negligence, whether of the plaintiff or the defendant, may not be tested by any such asserted rule. "The conduct must be compared to that of an assumed person of ordinary prudence, and must be considered with relation to all the circumstances attending the occasion which might reasonably be taken into consideration by a person of ordinary prudence in determining what his conduct should be." Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 606, 93 P. 677, 678.

Although by another instruction given to the jury the term "negligence" was defined and the rule of law therein declared that "the defendant railroad company was required to exercise reasonable care in the operation of the movement of the car in question," nowhere, either in that or in any other instruction, was the jury informed either as to the definition of contributory negligence on the part of plaintiff, or as to what constituted reasonable care either on his part to avoid injury to himself, or on the part of defendant to prevent the happening of the accident. The only direct guide which the jury had in its attempt to determine whether plaintiff was guilty of contributory negligence, or whether he exercised reasonable care to prevent his being injured, was the declaration by the trial court that the jury should "take the view of the situation as it appeared to *him* (plaintiff) before he was injured"; and that "*after* the occurrence * * * the facts should be viewed from the standpoint of a workman of the class to which plaintiff belonged." It is true that the trial court also instructed the jury that "the defendant owed no greater duty to the plaintiff than the plaintiff owed to himself to prevent injury"; but certainly such an instruction in itself conveyed no information as to contributory negligence or as to the particular care which plaintiff was legally bound to exercise in the premises. Nor did the declaration by the trial court that "it was his duty, in the exercise of ordinary care which the law requires of those who place themselves upon railroad tracks, to look and listen for the purpose of seeing and hearing that which one may, in the exercise of ordinary care, see and hear," have the effect of giving to the jury the specific legal information which the defendant was entitled to have the jury receive relative to what constituted "ordinary care" on the part of either plaintiff or the defendant, or as to what was meant by the term "contributory negligence." If all that was necessary was that plaintiff use ordinary care "as it appeared to *him*," it is clear that contributory negligence would have been confined to most narrow and restricted limits, and would not have been regulated by those legal principles which in reality define and circumscribe the condition or situation in question. Furthermore, if in endeavoring to determine whether plaintiff had been guilty of contributory negligence, the jury was legally authorized to view the facts "from the standpoint of a workman of the class to which plaintiff belonged," it is likewise apparent that the well-established rule which recognizes that the conduct of the plaintiff shall be measured by what in similar circumstances a reasonably prudent person would have done, might have been and probably would have been violated. Other than by the bald admonition that "ordinary" care should be exercised by plaintiff "*to look and listen,*" by no instruction was the jury told what was required of him. As an illustration of the effect and the consequence which might ensue from the adoption of a rule such as was given to the jury, "it might have appeared" to *plaintiff*, or to "a workman of the class to which plaintiff belonged," that on beginning his work on the railroad track all the "ordinary" care on his part which the law required was that he casually glance once in the general direction from which a switched car might be expected, and at the same time, or possibly later, that he carelessly listen for such car; and thereafter (in accordance with such rule), on the happening of an accident, he would be immune from the charge of contributory negligence on his part. It is a fact, as shown by the record herein, that in no instruction or instructions other than those to which attention has been directed was the jury given even the slightest direction or rule by which the care to be exercised by plaintiff should be determined or measured; and by reason, as well as by all the authorities, the questioned instruction was clearly erroneous.

It is plain that the most that may be claimed from the situation is that the questioned instruction was at variance or in conflict with, and contradictory of, either the express or the inferential declarations of the law as contained in the other instructions which were given by the trial court to the jury, and to which hereinbefore attention has been directed; and in effect it is urged that the conceded error was cured by such other instructions. In general, it is not doubted that an ordinary error in an instruction may be cured, if, when the entire body of instructions is considered, the law be accurately stated therein. But in that connection, as is succinctly stated in 24 California Jurisprudence, 867, where many authorities are cited in its support, the correct rule is that "an erroneous statement to the jury is not ordinarily cured by contradictory instructions which correctly state the law, for in such case it is impossible to determine which of the conflicting rules was followed by the jury."

Declarations by the Supreme Court of this state in each of the following negligence cases are illustrative of the point, to wit:

In Pierce v. United G. & E. Co., 161 Cal. 176, 185, 118 P. 700, 704, the following language occurs: "* * * It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of the plaintiff."

In Rathbun v. White, 157 Cal. 248, 253, 107 P. 309, 311, it is said: "* * * Nor was the vice of the instruction cured by the general direction that plaintiff must establish every material allegation of the complaint by a preponderance of the testimony. This produced, at most, a hopeless conflict between the various instructions. The different declarations of the court were not capable of being harmonized. In such case it is impossible to determine which of the conflicting rules presented to them was followed by the jury, and the error in any of the instructions must be deemed prejudicial." (Citing authorities.)

The facts in the case of Fogarty v. Southern Pacific Co., 151 Cal. 785, 794, 91 P. 650, 652, like those in the instant case, involved a personal injury received in the course of switching a railroad car. In the cited case it appears that, as stated in one set of instructions given by the trial court to the jury, the law thus declared was in direct conflict with that contained in other instructions likewise given to the jury. Relative thereto, in part the Supreme Court expressed itself as follows: "* * * It does not assist that the trial court in two other instructions charged the jury in direct conflict with the instructions above referred to, and in terms too favorable to defendant. The conflicting statements of the court in this regard were each equally positive and plain, and no one can tell which the jury followed. It follows that a reversal must be had on account of these instructions."

In the case of Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 59, 27 P. 590, 592, wherein it appears that instructions inconsistent one with the other were given to the jury, the Supreme Court declared: "The error in giving the foregoing instruction was not obviated by the instruction subsequently given at the instance of the defendant, wherein the law applicable to the case was properly presented. The jury could not determine which of the two propositions was correct. They were bound to accept all the propositions that the court instructed them upon as a correct statement of the law by which they were to be guided; and, if the several instructions are inconsistent or contradictory, it is impossible to tell which was adopted by them in reaching their verdict." (Citing authorities.)

Many other authorities from the appellate tribunals of this state attest the correctness of the rule to which attention has been directed; but it is deemed unnecessary to quote from them.

To my mind it appears conclusive that the instruction under consideration in the instant case was not only prejudicially erroneous, but that its effect was not cured by either or all of the other instructions which the trial court gave to the jury. It should follow that the judgment should be reversed.

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119 Cal.App. 474

BROCK et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8204.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1931.

Mandamus ⚷154(10).

Petition filed as original petition for mandate writ, but actually amended and supplemental petition, after appellate court denied original petition, was denied.

Proceeding for writ of mandate by Helen Starr Brock and another against the Superior Court in and for Los Angeles County, and Dudley S. Valentine, Judge of Department 10 thereof.

Petition denied.

Leon B. Brown, of Los Angeles, for petitioners.

PER CURIAM.

The petition herein, although filed as an original petition for writ of mandate, is in reality an amended and supplemental petition filed after this court had denied the original petition for the writ. Brock v. Superior Court (Cal. App.) 5 P.(2d) 659. The only difference between the two petitions is that, instead of the original paragraph IV thereof, there has been substituted a new paragraph IV, which sets out a new order of the Superior Court alleged to have been made nunc pro tunc on the 10th day of December, 1931, in place of the order contained in the former petition. There is nothing to show affirmatively, either by way of recital or otherwise, that the nunc pro tunc order of December 10, 1931, was made for the sole purpose of correcting a clerical error in the original order which the court had made.

The petition for writ of mandate is again denied.

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119 Cal.App. 417

In re VENNERS' ESTATE.

VENNERS et al. v. YATES et al.

Civ. 8026.

District Court of Appeal, Second District, Division 1, California.

Dec. 26, 1931.

1. **Wills** ⚷55(1), 166(1).

Evidence *held* insufficient to establish that testatrix was of unsound mind, or that will was obtained by undue influence.

2. **Wills** ⚷260.

Right to contest probate of will is not barred until six months have elapsed after effective date of statutory amendment reducing time to institute contest (Code Civ. Proc. § 1327, as amended by St. 1929, p. 860, § 2).

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Proceedings instituted by Paul Venners, individually, and as administrator of the estate of George F. Venners, deceased, and others against James P. Yates, individually, and as executor of the last will and testament of Carrie See Venners, deceased, and others, to revoke the probate of the will of Carrie See Venners, deceased. From an adverse judgment, contestants appeal.

Affirmed.

Roger Marchetti, Benjamin S. Crow, and Montgomery G. Rice, all of Los Angeles, for appellants.

George L. Greer and S. L. Carpenter, both of Los Angeles, for respondents Thomas Barton, Mary Fee, and Nellie Barton.

Hiram T. Kellogg, of Los Angeles, for respondent Yates.

Tanner, Odell & Taft, of Los Angeles, for respondent C. D. Francis.

YORK, J.

This is an appeal from a judgment entered on a directed verdict in favor of proponents of the last will and testament of Carrie See Venners, deceased.

The contestants, who are the stepchildren of deceased, filed their application to revoke probate of the will of decedent, on the grounds of unsound mind and incapacity to make a valid will, and undue influence. Under the will, George Venners, who was the husband of decedent and who survived her just five days, was devised a life estate in certain property belonging to decedent, with remainder over to relatives of deceased.

[1] There was evidence tending to show that the decedent was a woman of strong likes and dislikes; that she quarreled with and was not on good terms with the members of her family, the proponents, for some years prior to her demise; that she and her husband were devoted to each other, and that he served as her nurse and constant companion during the last weeks of her life; that she suffered from cancer, and that this was the cause of her death; that she and her husband had apartments in the home of her sister for about two months prior to her death, and that the will here involved was drawn while she was living at the home of her sister, and that decedent's husband was present at the time the will was executed.

On the other hand, there is no evidence that decedent did not possess the mental capacity to know and recollect those who had natural claims upon her bounty, the extent of her possessions, and the persons to whom she desired these possessions to be distributed, at the time she executed the will here in question. Neither is there any evidence that her mind was under the domination or control of any person at the time the will was executed. It was admitted by the executor of the will that the decedent had discussed with him at various times the disposition of her property; he being a business acquaintance of years' standing. Contestants claim that it was unnatural for decedent to devise to her devoted husband a life estate only in her property, instead of giving it to him outright; and further, that it was an unnatural act on the part of decedent to devise her property to her relatives toward whom she had shown such ardent dislike during her lifetime. The evidence shows that, in giving her husband a life estate in her property, she sought to protect his interests and to provide care for his old age.

We are of the opinion that there was no error on the part of the trial court in directing a verdict in favor of proponents.

[2] The respondents in their brief make the point that the superior court was without jurisdiction to entertain this proceeding to revoke probate of the will, because of the provisions of section 1327 of the Code of Civil Procedure, which limit the time within which such proceedings may be brought to six months after the will is admitted to probate. The will was admitted in this case on March 18, 1929. At that time section 1327, Code of Civil Procedure, limited the time within which a contest could be instituted to one year. The statute was amended by the Legislature in 1929 (St. 1929, p. 860, § 2), reducing the time to six months. This amendment became effective on August 14, 1929. The original petition to revoke probate of the will was filed on December 2, 1929, a little over eight months after admission of the will to probate, and less than four months after the effective date of the amendment to section 1327, Code of Civil Procedure. Respondents claim that the amendment had the effect of cutting down the time within which a contest could be instituted to six months from the date of the admission of the will to probate. This contention is in error. This point was decided by this court in the Estate of Clark, 3 P.(2d) 330, on September 24, 1931. It was there held that the right to contest the probate of a will is not barred under section 1327, Code of Civil Procedure, until six months have elapsed after the effective date of the amendment, to wit, six months after August 14, 1929. We see nothing in the point made that the amended petition which was filed June 14, 1930, stated a new cause of action, and was therefore barred by said section 1327.

The judgment appealed from is affirmed.

I concur: CONREY, P. J.

HOUSER, J., does not participate.

119 Cal.App. 407

LANGSTAFF et al. v. MITCHELL.

Civ. 4448.

District Court of Appeal, Third District, California.

Dec. 24, 1931.

1. Appeal and error 🔑193(9).

Objection that complaint does not state cause of action is not waived by failure to demur, but may be raised for first time on appeal.

2. Pleading 🔑34(7).

Where objection that complaint does not state cause of action is raised for first time on appeal, complaint will be upheld, if necessary facts appear by implication or as conclusion of law.

3. Appeal and error 🔑1039(1).

Judgment will not be reversed because of defect in pleadings alone, unless error complained of resulted in miscarriage of justice.

4. Pleading 🔑53(2).

Where in action to quiet title plaintiff claimed under lease, but first count did not state date, term of lease, or lessor's name, complaint *held* good where second count alleged such facts.

5. Taxation 🔑759.

Tax deed based on delinquent list and notice of sale containing no statement of amount due on account of penalties *held* void (Pol. Code, § 3764).

6. Quieting title 🔑10(4).

Mere possession, unless it reaches dignity of prescriptive title, cannot support action to quiet title (Civ. Code, § 1006).

7. Quieting title 🔑10(2).

Leasehold interest is sufficient "interest in real property" to maintain action against adverse claim (Code Civ. Proc. § 738).

[Ed. Note.—For other definitions of "Interest (In Property)," see Words and Phrases.]

8. Quieting title 🔑44(4).

Where both parties in action to quiet title claim from common source, it is sufficient to show conveyance from that source without establishing title in such grantor.

9. Taxation 🔑778.

Where party claims under tax deed, whatever title he possesses derives from party to whom taxes were assessed.

10. Taxation 🔑810(3).

Where defendant claimed under tax deed, and delinquent taxes were assessed to person whose title derived from source from which plaintiff's derived, proof of title beyond such source was unnecessary.

Proof was unnecessary, because both plaintiff and defendant claimed from common source.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Goldie B. Langstaff and another against A. R. Mitchell. From judgment for Jameson Petroleum Company, a plaintiff, defendant appeals.

Affirmed.

Frazier McIntosh, of Los Angeles, for appellant.

McAdoo, Neblett, O'Connor & Clagett and Black, Hammack & Black, all of Los Angeles, and Thomas W. Bewley, of Whittier, for respondents.

Mr. Justice pro tem. JAMISON delivered the opinion of the court.

This is an action to quiet title to certain lots upon which plaintiff Jameson Petroleum Company claims to have an oil and gas lease. Defendant denies the existence of said lease, and by way of affirmative defense alleges that he is the owner of said lots under and by virtue of a tax deed executed to him by the tax collector of Los Angeles county.

Goldie Langstaff was joined as a plaintiff in the original complaint, but plaintiff Jameson Petroleum Company filed an amended complaint, in which the said Langstaff did not join as a party plaintiff. Judgment was rendered in favor of Jameson Petroleum Company, and, from this judgment, defendant appeals.

Appellant claims that the amended complaint does not state facts sufficient to constitute a cause of action.

It is true that the first count merely alleges that for more than five years respondent has been in possession of a certain lot, describing it, under a valid lease, and does not set forth the date of the lease, the name of the lessor, or its terms, but in the second count all of these things are specifically stated.

[1, 2] Appellant did not demur to the complaint, made no objection at the trial that the complaint did not state a cause of action, and raises this question for the first time on this appeal. The objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur, but may be raised for the first time on appeal; but if the necessary facts appear by implication only, or as a conclusion of law, it will be upheld. Tietke v. Forrest, 64 Cal. App. 364, 221 P. 681.

[3, 4] Appellant answered, putting in issue the allegations of the amended complaint, and the trial of the issues thus formed were had without objections to the sufficiency of the pleadings. The judgment will not be reversed because of a defect in pleading alone, unless the error complained of is found to have resulted in a miscarriage of justice. City of Los Angeles v. Darms, 92 Cal. App. 501, 268 P. 487; Etienne v. Kendall, 202 Cal. 251, 259 P. 752. While the first count may have been subject to a demurrer for uncertainty, taken as a whole the amended complaint states a cause of action.

It appears that the main question to be determined on this appeal is whether or not the finding of the trial court that the tax deed, under which appellant claims to be the owner of the lot in question, is or is not void.

The trial court found, in substance, that in 1922 the lot in question was assessed for taxation to John Rodriguez and that the taxes were not paid; that on June 30, 1923, the tax collector of Los Angeles county sold said lots to the state of California; and that thereafter, on July 6, 1928, the said lot was sold by the tax collector at public auction to appellant; and that on August 3, 1928, the tax collector made a deed to the lot to appellant. The court further found the delinquent list for the year 1922, the affidavit of the tax collector and of the auditor of said county and the notices and explanations therewith were only published, and thereafter the same were filed for record in the office of the recorder of Los Angeles county. The said tax deed was found by the court to have been executed pursuant to said notices, affidavits, and publication; that the notice and delinquent tax list contained the following statement: "Now, therefore, I, W. O. Welch, tax collector in and for the said county of Los Angeles, by virtue of authority in me vested by law, hereby give public notice that unless the taxes delinquent as appear by said list, together with the costs and penalties, are paid, I, as such tax collector, at the office of the county tax collector in the city of Los Angeles, on Saturday, the 30th day of June, 1923, at the hour of 10 o'clock a. m. will sell all said real estate upon which taxes are a lien, to the State of California."

The notice stated the figures appearing opposite, following last after each description of property in the list, were intended to represent and did represent in dollars or cents, or in dollars and cents, as the case may be, the amount due for taxes and costs in the manner as follows, to wit: When or where two figures appear therein cents were intended to be and are represented; when and where more than two figures thus appear therein, cents were intended to be and are represented by the last two figures, and the figures occupying and appearing at the left of said last two figures and separated therefrom by a space, were intended to be and do represent dollars, so that the amount due for taxes and costs in the respective cases aforesaid are thus expressed in dollars and cents. The delinquent list shows charged against said lot 8, assessed to Jose Rodriguez, taxes for the year 1922 amounting to 14 39 (a space between the 14 and the 39).

Section 3764 of the Political Code provides that the delinquent list to be published by the tax collector must contain the names of the persons, a description of the property, and the amount of the taxes, penalties, and costs due opposite each name and description.

[5] It has been repeatedly held that where the delinquent list and notice of sale thereunder contains no statement of the amount due on account of penalties, tax deeds based thereon are defective and void. Bussenius v. Warden, 71 Cal. App. 717, 722, 236 P. 371; Wyser v. Truitt, 95 Cal. App. 727, 273 P. 147; Gottstein v. Kelly, 206 Cal. 742, 276 P. 347; Snodgrass v. Bell, 86 Cal. 664, 261 P. 497.

In all of these cases, the facts are similar to those of the case under consideration, and in each of them it was held that the tax deed was void because the published notice of the delinquent tax list failed to set forth the amount due for penalties as well as for taxes.

[6] It appears that respondent and the owner of the lot, who executed the lease, have been in possession thereof for many years; but since the amendment to section 1006 of the Civil Code in 1915 mere possession, unless it reaches the dignity of a prescriptive title, cannot support an action to quiet title. City of Burlingame v. Norberg (Cal. Sup.) 290 P. 587. However, in the case under consideration, the respondent does not rely alone upon possession to support the action, but also upon a lease for a term of years, executed by the owner of said lot.

[7] Section 738 of the Code of Civil Procedure provides that "an action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him."

A leasehold interest against an adverse claim is sufficient interest in real property to maintain an action under said last-named section. German-American Savings Bank v. Gollmer, 155 Cal. 683, 102 P. 932, 24 L. R. A. (N. S.) 1066; Pierce v. Felter, 53 Cal. 18.

[8] Appellant contends that respondent should have traced his lessor's title back to the original patent from the government. Where both claim title from a common source, it is sufficient to show a conveyance of title from that source without further establishing that the grantor himself had title. Phillips v. Menotti, 167 Cal. 328, 139 P. 796; Willard George Hotel Co. v. Warden, 99 Cal. App. 401, 278 P. 898; Denning v. Green, 88 Cal. App. 379, 263 P. 819.

[9] When a party claims under a tax deed, whatever title he possesses is derived from the party to whom the taxes were assessed. Willard George Hotel Co. v. Warden, supra; Denning v. Green, supra.

[10] The delinquent taxes were assessed to Jose Rodriguez. Rodriguez derived his title from conveyances deraigning from Lugarda Silves, and respondent acquired its interest in said lot from conveyances deraigning from the same source. Therefore the interest that appellant and respondent claim in the said lot was each acquired from a common source, and therefore proof of the chain of title beyond that common source was unnecessary.

Appellant's tax title being void, he has no claim upon the property, and therefore he is not entitled to a judgment against Goldie Langstaff.

Appellant contends that the evidence is not sufficient to support the finding that the trial court erred in its findings of fact and conclusions of law and in the admission of evidence over his objections. An examination of the record satisfies us that these alleged errors are without merit.

The judgment is affirmed.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

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119 Cal.App. 513

FINN v. LOS ANGELES RAILWAY CORPORATION.

Civ. 6939.

District Court of Appeal, Second District, Division 2, California.

Jan. 4, 1932.

Carriers ⚷333(10).

Passenger alighting from north-bound street car and struck by south-bound car *held* negligent in not properly looking and listening.

> Passenger admitted that his view toward north was obstructed by the departing car, and that he did not listen to see if he could hear the wheels of the street car making a sound; that he just looked, but saw nothing until car hit him.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by Albert E. Finn against the Los Angeles Railway Corporation. Judgment for defendant, and plaintiff appeals.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for respondent.

CRAIG, J.

The appellant commenced an action for damages alleged to have been incurred as a result of being struck by an electric car of the respondent while crossing its private right of way. At the conclusion of his evidence before a jury, the trial court directed a verdict in favor of the defendant, and, judgment having been entered accordingly, and a new trial denied, appeals were taken from said judgment, from the minute order directing a verdict, and from the order denying a new trial. Since there is no appeal from such orders, we are concerned only with the appeal first mentioned.

Alighting from a north-bound car at a cement landing, the appellant looked in a northerly direction, and, seeing no south-bound car approaching, started to cross the lines of track. He admitted that his view toward the north was obstructed by the departing car. As he stepped between the rails of the westerly line of tracks, he was struck by a car traveling with lighted headlight in excess of the legal rate of speed toward the south. He also testified: "I had been in the habit of riding those cars a great deal and had noticed that the wheels make a rumbling sound as they turn over on the steep track beneath them. I did not listen to see if I could hear the wheels of the street car making a sound. I just looked. I saw nothing until it hit me. It seems to me it was almost upon me when I saw it on that east rail, and that is when I was taking a step over the east rail of the south-bound track. I was in full possession of my faculties, my senses of sight and hearing, at the time of the accident."

This case falls within the principles announced in Riney v. Pacific Electric Ry. Co., 45 Cal. App. 145, 187 P. 50, 51. We do not view it as distinguishable to appellant's advantage in the respect suggested in his briefs. As stated in the cited case, the pedestrian was injured while crossing lines of parallel tracks about 21 feet apart, when "the most obvious dictates of common prudence required him to look and listen again before entering on this second track." The accident in the instant case occurred at night, when the headlight could have been seen for a considerable distance, and one witness testified that he heard the rumble of the approaching car. The rules announced in the above-mentioned authority do not absolve one in full possession of his senses and familiar with the existing conditions from negligence in failing to exercise any care in stepping from behind one car into the path of another. Appellant's grounds of appeal are completely answered therein, in the following language: "The rules of caution applicable, therefore, are rather those of the steam railway than of street car traffic. * * * The doctrine of last clear chance is not applicable to this case. * * * There is no evidence here that the motorman discovered, in time to avoid the accident, that plaintiff was in danger from which he could not escape. It is not enough that defendant ought to have known, but it must appear that he actually did know, of plaintiff's position of imminent danger."

The appeals from the orders mentioned are dismissed.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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119 Cal.App. 350

Ex parte DANIELS.

Cr. 2172.

District Court of Appeal, Second District, Division 1, California.

Dec. 21, 1931.

Criminal law ⚿254.

Court's determination of guilt on trial without jury, without mentioning charges as to prior conviction, operated as acquittal of prior conviction (Pen. Code, § 1158).

Application by Jim A. Daniels for writ of habeas corpus to secure release from custody.

Petitioner discharged.

A. H. McConnell, of Long Beach, for petitioner.

Martin DeVries, Chief Deputy City Pros., of Long Beach, for respondent.

CONREY, P. J.

In accordance with decision this day announced from the bench, the petitioner is discharged from custody.

By the complaint filed in the municipal court of the city of Long Beach the petitioner was charged with unlawful possession of intoxicating liquor, with the additional charge that he had theretofore twice been convicted of the like offense. On defendant's plea of not guilty he was tried by the court without a jury. At the close of the trial the court found the defendant guilty as charged, without mention of the charges as to said prior convictions. Two days later when the defendant was brought before the court for sentence, the people moved to reopen the case for the purpose of proving prior convictions. Over defendant's objection the motion was granted, testimony was received, and the allegations of prior convictions were found to be true. Thereupon the court imposed sentence that the defendant be fined in the sum of $500 and be imprisoned in the county jail for the term of two years. The sentence did not impose any alternative of imprisonment for nonpayment of the fine.

The condition of the case at the time of the motion to reopen cause was the same as if the previous decision of the court had been in the form of a verdict by a jury. The effect of said decision was an acquittal of the charges of prior conviction. People v. Eppinger, 109 Cal. 294, 298, 41 P. 1037. "The absence of any finding of prior conviction leaves the principal verdict standing alone as a conviction upon a first offense." In re Hall, 88 Cal. App. 212, 215, 263 P. 295, 296; Pen. Code, § 1158; People v. Dueber, 34 Cal. App. 686, 690, 168 P. 578; People v. Franklin, 36 Cal. App. 23, 171 P. 441.

We concur: HOUSER, J.; YORK, J.

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119 Cal.App. 467

MURPHY et al. v. SHEFTEL et al.

Civ. 8172.

District Court of Appeal, First District, Division 1, California.

Dec. 31, 1931.

1. **Appeal and error** ⚿837(1).

Proposed findings and proposed amendments and additions thereto became valueless after court's findings were settled, signed, and filed, and therefore could not be considered in determination of appeal (Code Civ. Proc. §§ 670, 956a and § 634 as amended; Rule 38 of Supreme and District Courts of Appeal).

2. **Appeal and error** ⚿931(1).

Any ambiguity in findings and conclusions should be resolved in favor of sustaining judgment.

3. **Appeal and error** ⚿891.

Provisions for taking additional evidence on appeal should be resorted to only where new evidence will lead to affirmance or modification and affirmance (Code Civ. Proc. § 956a; Rule 38 of Supreme and District Courts of Appeal).

Action by Cornelius Murphy and another against M. Sheftel and another. From the judgment plaintiffs appeal. On appellants' petition to take additional evidence and motion for order to have certain documents incorporated in record on appeal.

Petition and motion denied.

Frank L. Guerena, of San Francisco, for petitioners.

Jerome H. Bayer and G. C. Ringole, both of San Francisco, for respondents.

PER CURIAM.

Claiming that the findings in the above-entitled cause are ambiguous as to certain matters of fact which are controlling in the determination of the merits of the appeal, appellants seek, by way of petition to take additional evidence (Code Civ. Proc. § 956a and rule XXXVIII of the Supreme and District Courts of Appeal) and a motion for an order in diminution of the record, to have incorporated in the record on appeal, as extrinsic aids in the construction of said findings, the drafts of the proposed findings and proposed amendments and additions thereto, prepared by the respective parties prior to the signing of the findings, and used in the settlement thereof.

[1] We are of the opinion that the documents referred to cannot be utilized for such purpose. They form no part of the judgment roll (Code Civ. Proc. § 670), nor were they of any legal significance whatever after the findings were settled, signed and filed. Weinstock-Nichols Co. v. Courtney, 26 Cal. App. 445, 147 P. 218. As pointed out in the case last cited, the amendment to section 634 of the Code of Civil Procedure, from which the trial court derives its authority to direct the preparation of findings, was intended merely as an aid to the court in the settlement of the findings, by allowing time within which suggestions may be made by the respective parties; and that consequently the trial court is not bound to accept the proposed findings, nor to adopt any of the suggestions made, but may discard the whole and proceed to make up its own findings, as theretofore permitted. Therefore, as indicated, after the findings herein were settled, signed, and filed, the documents referred to possessed no value whatever, either evidentiary or otherwise; and that being so, they cannot be considered for any purpose in the determination of the appeal.

[2, 3] Moreover, the findings of fact and conclusions of law constitute the decision of the trial court, which is the final, deliberate expression of the court (DeCou v. Howell, 190 Cal. 741, 214 P. 444) and any ambiguity therein is to be resolved in favor of sustaining the judgment (24 Cal. Jur. 1009); and it has been definitely held that the provisions of said section 956a and rule XXXVIII may not be invoked for the purpose of bringing about a reversal of a judgment, but may be resorted to only where the new evidence sought to be taken would lead to the rendition of such a judgment in the reviewing court as would affirm, or modify and affirm, the judgment of the trial court, thus terminating the litigation. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970; First National Bank of Findlay v. Terry, 103 Cal. App. 501, 285 P. 336; Estate of Wirt, 207 Cal. 106, 277 P. 118.

For the reasons stated, the petition and the motion are and each of them is denied.

119 Cal.App. 451

DICKER v. ITALO-AMERICAN OIL CORPORATION et al.

Civ. 8068.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1931.

Rehearing Denied Jan. 28, 1932. Hearing Denied by Supreme Court Feb. 25, 1932.

1. Appeal and error ⚿989.

Conflicting evidence and immaterial findings will be disregarded on appeal, in determining sufficiency of evidence.

2. Corporations ⚿426(10).

Corporation retaining benefits of contract entered into by ostensible agent is bound thereby.

3. Contracts ⚿313(2).

One who voluntarily puts it out of his power to perform breaks contract, and may be sued immediately.

4. Corporations ⚿98.

Recovery on corporation's agreement to issue stock *held* not precluded by failure to show that corporation commissioner had authorized issuance, where corporation had disposed of all its assets.

5. Corporations ⚿591.

Corporations sued on contract of defunct corporation to pay plaintiff in shares had burden to show actual value was less than par value.

6. Corporations ⚿428(5).

Knowledge obtained by directors of corporation that transfer of assets to another corporation, which organized and controlled it, was made to defraud creditors, *held* imputed to transferee corporation having same individuals as directors.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Suit by H. M. Dicker against the Italo-American Oil Corporation and others. Judgment for plaintiff, and defendant Italo-American Petroleum Corporation and Italo-American Petroleum Corporation of America appeal.

Affirmed.

Norman T. Mason, J. Karl Lobdell, H. L. Watt, and Charles E. R. Fulcher, all of Los Angeles, for appellants.

Abe Richman and Nathan M. Dicker, both of Los Angeles, for respondent.

NOURSE, P. J.

Plaintiff sued in equity on an express contract for services rendered, charging fraud and concealment of assets. The cause was tried with a jury, and plaintiff had a verdict which the trial court adopted, and made findings in support of a judgment for plaintiff. The defendant Italo-American Petroleum Corporation of America alone appeals on typewritten transcripts.

[1] The appeal is addressed solely to the question whether the evidence is sufficient to support the findings of fact. In this respect, practically every finding is made the subject of attack. In stating the case, we will incorporate the evidence most favorable to the plaintiff because our function as an appellate court is to determine whether the findings material to the judgment are sustained by competent evidence. Hence we will disregard the conflicting evidence as well as the attacks upon those findings which are not material to the judgment. To avoid needless repetition of the evidence, we will make such comments as seem pertinent throughout the statement of facts.

The Italo-American Petroleum Corporation (a California corporation) was incorporated March 15, 1924. The Italo-American Oil Corporation (a Nevada corporation) was incorporated June 22, 1926. The Italo-Petroleum Corporation of America (a Delaware corporation and the appellant herein) was incorporated May 14, 1928. We will hereafter refer to these corporations as the California, Nevada, and Delaware corporations, respectively. In the year 1926 E. P. Zanetti was a director, vice president, and general manager of the California corporation. At the same time J. P. Harper was employed by the California corporation to secure, by purchase and assignment, oil leases for the benefit of that corporation. When the Nevada corporation was formed in June of that year, Zanetti and Harper became directors of that corporation. This corporation was formed by the officers and directors of the California corporation for the purpose of promoting the interests of the California concern. At about the time of the incorporation of the Nevada company, Zanetti and Harper, with the full knowledge and acquiescence of the entire board of directors of the California corporation, entered into a contract with plaintiff's assignor whereby it was agreed to pay him 5,000 shares of the Nevada corporation and 1 per cent. of the gross value of all oil, gas and other hydrocarbon substances produced or saved from a ten-acre tract of oil land in the Signal Hill district known as the Wiley-Tobin lease. In consideration therefor plaintiff's assignor agreed to procure an assignment of said lease to such person or corporation as Zanetti and Harper should designate. These services were performed in full accordance with the contract, and an assignment was taken in the name of Harper at the instance and with the consent of the two corporations. Five thousand dollars was paid by Harper to the owners of the lease, and no part of the agreed compensation was paid to plaintiff's assignor.

The lease was thereafter assigned to the Nevada corporation and accepted by its directors, with full knowledge of the circumstances above outlined. Soon thereafter the lease was turned over to the California corporation without any consideration passing to the Nevada corporation, though the lease at that time was given a value by the parties of $250,000. At that time the California corporation reimbursed Harper for the $5,000 he had paid to the owners of the lease, and assumed all rights and obligations under the lease, continuing to operate it at great profit until the fall of 1928, when all the assets of the California corporation were transferred to the Delaware corporation. Here it should be added that soon after its incorporation the Nevada concern was stripped of all its assets by the California corporation and allowed to die without ceremony.

The trial court found, with ample evidence to support the finding, that the transactions of these three corporations were designed to defraud creditors. The California corporation had seven directors. Five of these joined in the organization of the Nevada corporation, and, with six new men, became the directors of that corporation. The executive officers of the California corporation became the executive officers of the Nevada corporation, and actually controlled its affairs. Both corporations maintained the same office in San Francisco. They met at the same time and at the same place. The business of the two boards was so closely interlocked that those directors who were called as witnesses were frequently unable to distinguish between the transactions. The organization of the Nevada corporation is conceded by appellant to have been effected by the directors of the California corporation for the purpose of working a fraud upon their stockholders. The conduct of its affairs as outlined in the evidence demonstrates that it was organized and operated with the design of defrauding its creditors as well.

Having taken all the assets of the Nevada concern, the directors of the California corporation then organized the Delaware corporation, to which all the assets of the California corporation were transferred. The trial court found that the purpose of these transactions was to defraud the creditors of the Nevada and California corporations, and the soundness of this finding is not open to question. The trial court also found that the Nevada corporation was unable to respond to a judgment in favor of plaintiff, and that the reason for that condition was the fraudulent transfer of its assets in the manner hereinbefore outlined.

[2] The appeal presents no intricate question of law. Plaintiff relies on the well-settled rules of ostensible agency and ratification by the principal. The evidence is undisputed that Zanetti and Harper were the ostensible agents of the California corporation and that they were authorized by the directors of the California corporation to enter into the contract in suit for the use and benefit of the Nevada corporation. They were thus enabled to hold themselves out as the ostensible agents of the Nevada corporation, and this was done with the sanction of the directors of both concerns. The evidence is likewise undisputed that the Nevada corporation accepted and retained the benefits of the contract with full knowledge of its terms. This evidence presents a complete case of ratification by a corporation of the acts of its officers and employees, and it is not necessary to cite authorities upon the corporation's liability under such circumstances.

[3-5] It is argued that the portion of the judgment awarding plaintiff the sum of $5,000 is unsupported because (1) there is no evidence that the corporation commissioner had authorized the Nevada corporation to issue that amount of stock for that purpose, and (2) there is no evidence that the actual value of the stock was $1 a share. Direct evidence was not necessary on either point. If permission was not obtained to issue the stock, it was because the corporation had disposed of all its assets and thus made performance of the contract impossible. But, aside from the question of the manner of proof, the rule is that, when one voluntarily puts it out of his power to do what he has agreed to do, he breaks his contract, and is immediately liable to be sued therefor (Carter v. Rhodes, 135 Cal. 46, 48, 66 P. 985), and it is conceded here that the Nevada corporation did do that.

As to the second point, the rule is that, in the absence of evidence, the par value of corporate stock is prima facie its actual value. Peek v. Steinberg, 163 Cal. 127, 134, 124 P. 834. Hence the burden was on appellant to show the actual value of the Nevada stock if it claimed that the par value was not the true value, and this proof was not made.

[6] Having thus established the liability of the Nevada corporation upon the contract, the respondent offered evidence tending to show that this corporation had been formed at the instance of the California corporation for the purpose of defrauding the creditors of both, and that the subsequent transfer of all the assets of the Nevada corporation to the California corporation without consideration was made for the same purpose and with full knowledge of the liabilities of the former. The trial court found accordingly upon sufficient and competent evidence, and these findings are likewise attacked. But herein the point is not that the evidence of the circumstances surrounding these transactions does not support these findings. The point is that the knowledge of these circumstances must have been obtained while the directors were acting for the Nevada corporation, and hence that such knowledge may not be imputed to the California corporation, though the directors of the latter were the same individuals.

The accepted rule is that the knowledge which an official of one corporation gained as to facts and conditions while a like official of the predecessor of the said corporation is imputable to the latter. Blue Diamond Co. v. Industrial Acc. Comm., 188 Cal. 403, 409, 205 P. 678, and cases cited. We see no difference in principle from such a case and one where, as here, the knowledge was obtained when the corporate official was acting in a like capacity for the corporation which was organized and controlled by another.

With the liability thus transferred to the California corporation, the trial court found that the Delaware corporation was organized for the purpose of taking over the assets and liabilities of the California corporation, and these transactions were completed in the latter part of the year 1928, when the California corporation was dissolved. We have not examined the evidence upon this issue, because the appellant has not attacked the finding in any other way than by the bare statement that the trial court "erred in making" it. Manifestly, if the Delaware corporation was organized by the directors and stockholders of the California corporation for the purpose of taking over the assets and of assuming the liabilities of the California corporation, in which respondent's claim was included, the judgment against the Delaware corporation was proper. Appellants' attack on the judgment is confined to the transactions preceding this transfer, and, as we are satisfied the evidence fully supports the findings covering those transactions, an affirmance of the judgment must follow.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

MILLER v. SOUTHERN CALIFORNIA TELEPHONE CO. et al.*

Civ. 6905.

District Court of Appeal, Second District, Division 1, California.

Dec. 23, 1931.

Rehearing Denied Jan. 22, 1932. Hearing Granted by Supreme Court Feb. 18, 1932.

1. Automobiles 🔑244(6).

Evidence in action by pedestrian standing beside highway injured by motorist swerving off highway to avoid collision *held* insufficient to sustain verdict of motorist's negligence (Deering's Gen. Laws 1923, Act 5128, § 122).

> Facts disclosed that, while pedestrian was standing beside highway waiting to cross, two automobiles approached from same direction, and one contrary to Deering's Gen. Laws 1923, Act 5128, § 122, was passing the other, within 100 yards of defendant's automobile approaching from opposite direction, and that defendant motorist, in order to avoid collision, swerved off the highway, and in so doing struck pedestrian and injured her.

2. Appeal and error 🔑695(1).

Appellate court will not uphold findings unsupported by evidence because bill of exceptions omitted portions of testimony at trial, where bill was complete regarding issue appealed.

> Bill of exceptions was complete regarding issue of motorist's negligence, since at beginning it stated that following proceedings were had, which was followed by witnesses' testimony, with stipulation at end that it correctly stated evidence it purported to set out and followed by judge's certificate that it was true and correct report of proceedings, and since there was nothing tending to show any other evidence was introduced in relation to issue appealed than that in bill.

YORK, J., dissenting in part.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Louise F. Miller against the Southern California Telephone Company and another. From a judgment for plaintiff, defendants appeal.

Reversed. Purported appeal from order denying defendant's motion for new trial dismissed.

Lawler & Degnan, of Los Angeles, for appellants.

Paul Blackwood, of Los Angeles, for respondent.

CONREY, P. J.

At about 7 o'clock in the evening of February 15, 1928, at Del Mar, Cal., on the state highway between Los Angeles and San Diego, the plaintiff was hit by an automobile, with resulting injuries to her person. She brought this action against the defendant telephone company, which was the owner of the automobile, and defendant's employee Adams, who was driving the same at the time of the accident. In accordance with the verdict of a jury, judgment was entered in favor of the plaintiff, and the defendants have appealed therefrom.

[1] We are of the opinion that this judgment should be reversed for want of any evidence of negligence on the part of the defendants. All of the evidence on that question is found in the testimony of the plaintiff and the testimony of the defendant Adams. Plaintiff was standing at the side of the road and off the paved part of the highway, waiting for an opportunity to cross from the west to the east side thereof. The paved portion of the highway at the point of intersection is about twenty feet wide, and on either side is a dirt or graveled strip. The plaintiff was standing on this graveled strip within fifteen feet of the pavement. Two automobiles, described as a limousine and a smaller car, were coming from the south, with the limousine in front. As they approached the intersection where the plaintiff was standing, the smaller car swerved out to the middle of the road and passed the limousine at the point where these cars were passing in front of the plaintiff. This was an unlawful act on the part of the driver of the smaller car, because at that time the defendant's car was approaching from the opposite direction within a distance which was legally prohibitive of such passing of the limousine by the smaller car. Section 122 of the California Vehicle Act, as in force at the time of the accident, permitted a vehicle passing another in the same direction to be driven on the left side of the highway only if said left side was clear and unobstructed for one hundred yards ahead. Deering's Gen. Laws 1923, Act 5128, p. 1889. While the distance of the car of defendant from the point in question at the moment of said passing of the limousine is not given in figures, the evidence clearly shows that said distance must have been much less than one hundred yards. Apparently the limousine and the smaller car passed on to the north and were not identified. The evidence shows that the defendant Adams, who was driving the telephone company's car, found himself suddenly faced by a swiftly approaching automobile in his path on his own side of the road, with the limousine approaching on its own side of the road. His only possible way of avoiding a collision was

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*For subsequent opinion see 14 P.2d 519.

to turn, as he did, to the right and seek to get off the road. As he did this in this sudden emergency, he saw the plaintiff, and thereupon gave his car an additional swerve to the right in order to avoid striking her, but did not completely succeed, and his left rear fender struck the plaintiff and caused the injuries of which she complains. The foregoing facts are without contradiction shown by the evidence, and principally by the testimony of the plaintiff herself. "Where the operator of a motor vehicle is by a sudden emergency placed in a position of imminent peril to himself or to another, without sufficient time in which to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances, and is not liable for injuries caused by his machine or precluded from recovering for injuries to himself or his machine if an accident occurs, even though a course of action other than that which he pursues might be more judicious, provided he exercises ordinary care in the stress of circumstances to avoid an accident." 42 Cor. Jur. p. 890. See, also, 45 Cor. Jur., p. 710. The case at bar is a very strong illustration of the principle above stated.

[2] In respondent's brief, it is contended that, because the bill of exceptions omits a portion of the testimony taken at the trial, this court should not undertake to say that the findings are not supported by the evidence. But it does appear that the bill of exceptions is complete with reference to the issue of negligence of the defendant. The bill of exceptions at the beginning states: "The following proceedings were had." This is followed by a statement of the testimony of witnesses. The first specification of particulars is that the evidence is insufficient to sustain the verdict and is insufficient to sustain the finding of any negligence on the part of the defendants. At the end of the bill of exceptions, there is a stipulation that it correctly states the evidence and proceedings had at said trial which it purports to set up. This is followed by a certificate of the judge reading as follows: "The foregoing is hereby settled and allowed as a bill of exceptions in this cause, and as showing a true and correct report and account of the proceedings had during the trial of said action." There is nothing in the record itself tending to show that there was any evidence produced in relation to the exceptions, other than the evidence given in the record. This fact, together with the judge's certificate as thus written, is sufficient to establish the completeness of the record. In Judson v. Lyford, 84 Cal. 505, 509, 24 P. 286, 288, where the respondents made the same kind of objection as the one now under consideration, the court said: "But the point is properly specified. And it has long ago been settled that the presumption is that the record contains all the evidence which is material to the point specified."

The judgment is reversed. The purported appeal from the order denying defendants' motion for a new trial is dismissed.

I concur: HOUSER, J.

YORK, J.

I dissent from the reversal of the judgment, but I concur in the dismissal of the purported appeal from the order denying defendants' motion for a new trial.

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119 Cal.App. 483

WILLEN v. WILLEN.

Civ. 8313.

District Court of Appeal, First District.
Division 1, California.
Jan. 2, 1932.

1. Divorce ⚷245(1), 286.

Modification of divorce decree in respect to payments to wife is largely within trial court's discretion, which will not be interfered with, in absence of abuse.

2. Divorce ⚷245(1), 309.

Trial court's power to require divorced husband to provide for wife and children and to modify such orders does not depend on reservation thereof in decree (Civ. Code, § 139).

3. Divorce ⚷244.

Court may create lien on divorced husband's property to secure payments for wife's support (Civ. Code, § 146, subd. 1, and § 140).

4. Divorce ⚷267.

Court *held* empowered to authorize receiver to sue for recovery of property in husband's possession, where necessary for wife's support (Civ. Code, § 146, subd. 1, and §§ 139, 140).

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action for divorce by Samuel Willen against Sophie Willen. From an order denying plaintiff's motion to amend the decree of divorce granted to defendant on her cross-complaint, plaintiff appeals.

Affirmed.

Willedd Andrews, of Los Angeles, for appellant.

H. Y. Romayne, of Los Angeles, for respondent.

PER CURIAM.

On December 30, 1929, an interlocutory decree of divorce was granted to Sophie Willen upon her cross-complaint against Samuel Willen, alleging that the latter had been guilty of extreme cruelty. The decree awarded her the custody of the two minor children of the marriage. The court also found that certain property, namely, two policies of insurance on the life of Samuel Willen—one issued by the Metropolitan Life Insurance Company for $5,000, and the other issued by the Western States Insurance Company for $10,000—the household goods in the possession of the cross-complainant, and a Ford automobile were the community property of the marriage. The automobile was awarded to the husband and the furniture to the wife. As to the insurance mentioned the decree provided as follows: "* * * That the plaintiff and cross-defendant (Samuel Willen) will be allowed to receive during his lifetime the indemnity accruing under the aforementioned insurance policies, at the present time in the sum of $150 per month; that out of the amount received by the plaintiff and cross-defendant he shall pay to the defendant and cross-complainant for the support of herself and the minor children of the parties hereto forty dollars per month, payable in two instalments on the 10th and 25th of each and every month, beginning with the 10th day of January, 1930, payments thereof to be made to and through W. H. Holland, trustee of this court. Said policies shall be maintained in their present condition and no change shall be made in the beneficiary thereof, it appearing that said policies are payable to the estate of the plaintiff and cross-defendant at this time; that the plaintiff and cross-defendant shall have no power to alienate said policies, and upon the death of the plaintiff and cross-defendant the benefits of said policies shall go to the defendant and cross-complainant if she be living. In the event that defendant and cross-complainant predeceased plaintiff and cross-defendant said insurance policies are to go to the estate of the plaintiff and cross-defendant, Samuel Willen; and that said insurance policies be deposited immediately with W. H. Holland, trustee of this court, for safe keeping."

No appeal was taken from the decree.

Subsequently the husband filed notice of motion for an order modifying the decree by omitting therefrom the requirement that he pay his wife the monthly sum mentioned; and the latter also moved the court for an amendment, providing that the payments by the insurance companies upon the policies be thereafter made to said W. H. Holland, and authorizing him to give receipts therefor, and to pay therefrom the sum of $40 per month to her and the balance of $110 per month to said Samuel Willen.

It appeared at the hearing, and the court found, that Samuel Willen was $470 in arrears of payments under the decree. His motion was denied and that of his wife granted. The decree was amended so as to provide that payments by the insurance companies be made to said W. H. Holland, who was also to receipt therefor, and who was directed to pay therefrom the sum of $40 per month to Mrs. Willen and the balance of $110 per month to Samuel Willen. Holland was in effect made a receiver for the purpose of enforcing the order of the court, which further provided that the sum allowed Mrs. Willen should constitute a lien upon the policies and the amounts payable thereunder. Samuel Willen has appealed from this order, and claims that the same was not justified by the evidence, and is otherwise erroneous.

It appears that plaintiff received physical injuries which partially incapacitated him, due to which the insurance companies have since paid him under their policies the aggregate sum of $150 per month. He claimed that the whole of this amount was necessary to procure treatment at a hospital and for his living expenses. This was denied by his wife, and, after considering their conflicting claims, the court denied plaintiff's motion.

[1-4] Such matters are largely within the discretion of the trial court, and, before an appellate court will interfere, it must clearly appear that this discretion has been abused. We cannot say that such was the case here.

As stated, the court found that the policies of insurance were community property, and there was no appeal from the interlocutory decree. When a divorce is granted for an offense of the husband, the court may compel him to provide for his wife and children, and may from time to time modify its orders in these respects (Civ. Code, § 139), and this power does not depend upon a reservation thereof in the decree itself. Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902. Where the divorce is granted on the ground of extreme cruelty, the statute provides that community property shall be assigned to respective parties in such proportions as the court from all the facts of the case and the condition of the parties may deem just (Civ. Code, § 146, subd. 1), and the court is empowered to appoint a receiver to enforce its orders for payments for the wife's support (Civ. Code, § 140; McAneny v. Sup. Ct., 150 Cal. 6, 87 P. 1020), and it may create a lien upon the property to secure the same (Estate of Smith, 200 Cal. 654, 254 P. 567). While the court is without jurisdiction to authorize a seizure of property claimed by one in possession who is not a party to the action (Suparich Mfg. Co. v. Sup. Ct., 123 Cal. 290, 55 P. 985), here, so far as appears, no claim is made to the proceeds of the policies by any person except the parties; nor is any objection to making payments to the receiver made by the insurance companies. In any event, the court may authorize its receiver to maintain an action for the recovery of such property. Ex parte Hollis, 59 Cal. 405; Miller v. Sup. Ct., 63 Cal. App. 1, 217 P. 817.

The conclusions of the trial court are sufficiently supported, and the record discloses nothing which would justify a reversal of the order.

The order is affirmed.

ENDICOTT v. SOUTHERN CALIFORNIA CLEANERS AND DYERS et al.

Civ. 4473.

District Court of Appeal, Third District, California.
Dec. 30, 1931.

1. **Appeal and error** ⚷957(2).

Discretion to vacate default, taken because of party's inadvertence, surprise, or excusable neglect, is confined to trial court (Code Civ. Proc. § 473).

2. **Appeal and error** ⚷957(2).

Appellate court will not disturb trial court's discretion respecting vacating default taken because of party's inadvertence, surprise, or excusable neglect.

3. **Appeal and error** ⚷935(2).

On appeal, all presumptions are resolved favorably to trial court's vacation of default judgment taken because of party's inadvertence, surprise, or excusable neglect.

4. **Judgment** ⚷162(4).

Trial court did not abuse discretion in vacating defendants' default and judgment rendered thereon (Code Civ. Proc. § 473).

> Affidavits to open the default showed that after service of summons defendants placed defense in attorneys' charge; that the attorneys were to arrange additional time to answer, the case being similar to a number of others being brought by the same plaintiff; that, as requested, the defendants paid a sum of money to one negotiating a settlement, as their portion thereof; that they had a good defense to the action. The opposing affidavits showed that about a year after the attempted settlement had failed, the attorneys for the defendants sought an extension of time to answer and were informed that they must answer at once. It appeared further that the default was not taken until about six months later, and that judgment was not rendered until about two months thereafter. The defendants were not aware until after the default had been rendered that the settlement had failed.

5. **Judgment** ⚷138(1).

Policy of law is to have a trial on the merits.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Thomas P. Endicott against the Southern California Cleaners and Dyers and another. From an order vacating a default and judgment rendered thereon against the defendants, plaintiff appeals.

Affirmed.

William Schreider, of Los Angeles, for appellant.

Fred Luth and W. H. Gregory, both of Los Angeles, for respondents.

JAMISON Justice pro tem.

This appeal is from an order made on March 22, 1929, vacating and setting aside the default of defendants and the judgment rendered against them upon such default.

The complaint in this action was filed March 16, 1928, and summons served upon defendants on March 21, 1928. The default of the defendants was entered November 27, 1928, and judgment rendered thereon on January 22, 1929. The application to set aside the default was made on February 11, 1929, which was denied, owing to an informality in the motion, and another motion for vacating and setting aside said default and judgment was filed on February 28, 1929, which resulted in setting aside the said default and judgment.

The complaint contains two counts. The first count alleges that respondents are indebted to appellant in the sum of $5,402 for services performed for them by appellant. The second count sets forth that respondents and appellant entered into a contract by which respondents agreed, in consideration of certain services to be performed by appellant for them in their cleaning and dyeing business, to pay him 3 per cent. of their gross wholesale business and 1 per cent. of their gross retail business, which appellant claims is not less than $5,402. He asks that an accounting be had and that he have judgment for said sum of $5,402 or whatever sum shall be found owing to him by respondents under the said contract.

Two affidavits were presented by respondents in support of their said motion, one by Harry Rosenthal, who therein stated that on

March 25, 1928, he took respondent Depper to the law firm of Kronich & Bloom, and requested said attorneys to arrange for additional time to answer the complaint and said attorneys did arrange for additional time, the length of which was unknown to affiant; that many other persons engaged in the cleaning and dyeing business were being sued by plaintiff upon contracts similar to that in the present action, and for the purpose of settling the said actions, including that against these respondents, affiant began negotiations to bring about that result, and to that end affiant collected $350 from respondents to be used for that purpose. Affiant retained said sum until January, 1929, and until said last-named date did not notify respondents of the result of the negotiations.

The other supporting affidavit was made by respondent D. Depper in behalf of himself and his co-respondent. This affiant states that immediately after the summons was served upon him he communicated with said attorneys and instructed them to arrange for additional time to plead, and that an extension of time to plead was thereupon had. In the meantime he was informed by said Rosenthal that many others engaged in the cleaning and dyeing business had been sued by plaintiff, including the said Rosenthal, upon contracts similar to that which is the basis for this suit, and that he was negotiating for a settlement of all the cases, including the one upon which respondents were sued, and requested respondents to pay their portion required to effect such settlement, to wit, the sum of $350, and thereupon respondents paid said sum to said Rosenthal; that affiant did not know that said negotiations had failed until some time in January, 1929, after default had been entered against respondents; that he has fully and fairly stated all of the facts of this case to his attorneys and is informed by them that he has a good and sufficient defense to said action.

In conjunction with their motion to set aside the default, respondents presented to the trial court their answer to appellant's complaint, which set forth a good and sufficient defense.

Appellant filed two counter affidavits, one of them being made by himself, in which he states that he was informed by the said Rosenthal that he was carrying on negotiations for the settlement of some twenty cases in all of which affiant was plaintiff; that on April 12, 1928, said Rosenthal proposed a settlement of said cases for $5,000, which appellant rejected; that a few days thereafter Rosenthal raised the amount to $6,000 for full settlement of the twenty cases; that this offer was rejected by appellant and by his attorney; that these negotiations did not extend over a greater period than two weeks. The other counter affidavit was made by William Schreider, appellant's attorney.

He stated that the summons was served on the 16th day of March, 1928, but no default was taken until November 20, 1928; that during the latter part of March, 1929, one Clare Woolwine called him on the telephone and stated that he expected to represent a number of other cleaners and dyers who had been sued by appellant in similar actions and that he believed a settlement possible, that he requested ten days' time within which to answer the complaint, to which extension affiant agreed. In a personal interview with said Woolwine a few days later the said Woolwine stated to affiant that he thought there was a possibility of reaching a settlement of all of said suits. Affiant then informed him that if no settlement could be made, answers must be filed by April 12, 1928; that on April 25, 1929, the said firm of Kronich & Bloom telephoned affiant stating that they represented respondents and requested an extension of time in which to answer, to which request affiant informed them that they must file an answer at once; that on April 12, 1928, he was approached by said Rosenthal relative to a settlement of all said cases, but no satisfactory offer was made by Rosenthal and said negotiations terminated on April 15, 1928, and were not thereafter renewed.

[1-3] The authority of the trial court to set aside a default taken against a party through his mistake, inadvertence, surprise, or excusable neglect is given by section 473 of the Code of Civil Procedure, and the exercise of this authority is confided to the discretion of said court, and that such discretion will not be disturbed on appeal unless it shall plainly appear that this discretion has been abused, has been so frequently affirmed that citations are unnecessary. Rogers v. Schneider, 205 Cal. 202, 270 P. 451. And all presumptions must be resolved in favor of the court's action in setting aside such default and default judgment. Moore v. Thompson, 138 Cal. 23, 70 P. 930; Hammond Lumber Co. v. Bloodgood, 101 Cal. App. 561, 281 P. 1101.

[4, 5] It appears that respondents were not aware of the fact that negotiations for the settlement of this case had terminated prior to January 31, 1929, when the $350 was returned by Rosenthal and they learned that a default judgment had been rendered against them. From the facts that although appellant's attorney had warned the attorneys for respondents that a default would be immediately taken if no answer was filed by April 26, 1928, he delayed until November 27, 1928, to have the default entered and thereafter waited until January 22, 1929, to have judgment rendered upon such default, the inference would be that negotiations for a settlement were still pending during that delay.

The trial court, in granting the motion to set aside the default, required respondents to file a bond in the sum of $500 in favor of appellant, conditioned that if appellant prevailed in the action respondents would pay said sum to him to cover attorney's fees and other fees.

It is well established that it is the policy of the law to have a trial on the merits, and that any doubts which may exist should be resolved in favor of the application to the end that a trial on the merits may be had. Waite v. Southern Pacific Co., 192 Cal. 467, 221 P. 204; Weck v. Sucher, 96 Cal. App. 422, 274 P. 579; Jergins v. Schenck, 162 Cal. 747, 124 P. 426.

We are of the opinion that the trial court did not abuse its discretion in setting aside the default and judgment rendered thereon. This discretion is best exercised when it tends to bring about a judgment on the merits of the controversy between the parties. Nicoll v. Weldon, 130 Cal. 666, 63 P. 63.

It does not appear that appellant will be materially injured by the delay caused by setting aside the judgment, and he will be compensated, by said bond of $500, for any additional expense thereby incurred by him.

The order is affirmed.

We concur: THOMPSON, J.; PRESTON, P. J.

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119 Cal.App. 447

Application of DUTTON.

Cr. 1183.

District Court of Appeal, Third District, California.

Dec. 29, 1931.

1. Habeas corpus ⚿113(1).

If proceeding, ostensibly for habeas corpus for release from state hospital following acquittal of murder because insane, was in nature of civil proceeding, court *held* without jurisdiction of appeal under penal appeal statute (Pen. Code, §§ 1026, 1026a, 1241, 1506; Code Civ. Proc. § 940, and § 963, subd. 2).

> Court was without jurisdiction, inasmuch as appeal was taken by people strictly in accordance with Pen. Code, § 1241, and not in accordance with Code Civ. Proc. § 940.

2. Appeal and error ⚿782.

If record shows absence of appellate jurisdiction, appeal must be dismissed.

> Appeal must be dismissed, even though motion for dismissal does not cover all grounds therefor.

Appeal from Superior Court, Mendocino County; M. H. Iversen, Judge.

Application by Warren R. Dutton, in the form of a petition for a writ of habeas corpus, to secure his release from the Mendocino State Hospital for the Insane. A writ was issued, and, after a hearing, an order was made discharging the petitioner, from which the People appeal. On motion to dismiss the appeal.

Appeal dismissed.

U. S. Webb, Atty. Gen., J. Charles Jones, Dep. Atty. Gen., and Matthew Brady, Dist. Atty., and William W. Murphy, Dep. Dist. Atty., both of San Francisco, for the People.

Hale McCowen, Jr., of Ukiah, for respondent.

Mr. Justice PLUMMER, delivered the opinion of the court.

This cause is before us upon motion of petitioner to dismiss the appeal attempted to be taken by the people from an order made and entered in the superior court discharging the petitioner from the custody of the officers of the Mendocino State Hospital.

The record shows that the petitioner, after having been arraigned and tried on a charge of murder, was found not guilty by reason of insanity; the verdict being returned on the 28th day of August, 1930. Thereupon, the petitioner was, by the trial court, committed to the state hospital at Napa for the insane, to be held there as an insane person, pursuant to the provisions of section 1026 of the Penal Code; this order being made on the ground that the petitioner had not at the time of the trial recovered his sanity. Thereafter, and after being committed to the state hospital at Napa, the petitioner was transferred to the Mendocino State Hospital for the Insane. After the expiration of one year from the date of his commitment, the petitioner herein applied to the superior court of Mendocino county for release from said state hospital, on the grounds that he had recovered his sanity. The application was in the form of a petition for a writ of habeas corpus. A writ was issued following the filing of the petition just referred to, hearing had, and an order made discharging the petitioner. From this order, the people gave notice of an appeal. As stated, the cause is before us upon motion to dismiss such appeal.

It is admitted by both appellant and petitioner that if the proceeding referred to was in fact a proceeding by way of habeas corpus, no appeal lies. The only provision allowing an appeal in criminal cases, from an order granting a writ of habeas corpus, is found in section 1506 of the Penal Code. That this section does not apply in cases of this char-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

acter is definitely decided in the case of In re Merwin, 108 Cal. App. 31, 290 P. 1076.

On the part of the appellant, it is contended that habeas corpus does not lie under the provisions of sections 1026 and 1026a of the Penal Code, to inquire into the sanity of a person confined in a state hospital for the insane, after acquittal of a criminal charge on the grounds of insanity. It is further insisted that the naming of the petition as one for a writ of habeas corpus, and that calling the proceedings a hearing in the nature of habeas corpus, does not make it such, and that by whatever name known, it is simply a special proceeding, and that the sanity of the petitioner can only be inquired into in the same form and manner as provided by the Political Code for determining the sanity of persons alleged to be insane. In support of this contention, the people cite the case of State ex rel. Colvin v. Superior Court, 159 Wash. 335, 293 P. 986, 73 A. L. R. 555, where it was held by the Supreme Court of Washington, under Code provisions somewhat similar, that habeas corpus would not lie. An examination of that case discloses, however that the Code provisions, relative to the commitment of persons found not guilty by reason of insanity, specify the procedure that shall be followed by any one seeking release from an asylum, on the alleged grounds of recovery of sanity. The holding of the court is that the procedure set forth is exclusive. In a number of cases cited in the annotations appended to the case as reported in 73 A. L. R., supra, it is held that, where the statute points out the procedure, such procedure is exclusive. In a few of the cases it is held that the procedure is cumulative, and that the remedy by habeas corpus still exists. In the case of State ex rel. Colvin v. Superior Court, supra, the matter was before the court upon a petition for writ of prohibition to prevent the superior court from hearing an application of the petitioner involved in that action, for a writ of habeas corpus. The writ of prohibition was granted.

[1] Notwithstanding the very respectable authorities and persuasive reasoning to the effect that habeas corpus will not lie, and that the Legislature intended, by the language of sections 1026 and 1026a of the Penal Code, that the procedure to determine the recovery of the sanity of one who had been committed to an asylum after acquittal, on the grounds of insanity, should be in the nature of a special proceeding, following as near as may be, the sections of the Political Code (section 2168 et seq.), in proceedings to determine the mental condition of one alleged to be insane, by reason of the manner in which this cause is brought before us, we are precluded from expressing any opinion that would be other than mere obiter. The appeal in this case was taken by the people strictly in accordance with section 1241 of the Penal Code, and not in accordance with the provisions of section 940 of the Code of Civil Procedure, which fails to give this court any jurisdiction. In other words, if the proceeding had in the trial court was in substance and in fact a habeas corpus proceeding, no appeal lies. On the other hand, if in the nature of a civil proceeding, then no appeal has been taken such as to give this court jurisdiction. Again, it is questionable if, a civil proceeding, any appeal lies under the wording of section 963, Code of Civil Procedure. The only language therein upon which reliance could be placed is found in subdivision 2 of said section reading as follows: "From any special order made after final judgment."

In Lake v. Harris, 198 Cal. 85, 243 P. 417, it is held that for a special order made after final judgment to be appealable the order must in some way bear some relation to the judgment or affect the judgment either by enforcing it or staying its execution.

[2] While the motion for dismissal does not cover all the grounds considered herein, nevertheless as held in Harpold v. Superior Court, 58 Cal. App. 629, 209 P. 219, if the record shows that no jurisdiction exists to hear the appeal, it must be dismissed.

It necessarily follows from what has been said that the appeal herein should be dismissed; and it is so ordered.

We concur: PRESTON, P. J.; R. L. THOMPSON, J.

EVANS v. LOS ANGELES RY. CORPORATION (CITY OF LOS ANGELES, Intervener).*

Civ. 6606.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1931.

Rehearing Denied Jan. 27, 1932. Hearing Granted by Supreme Court Feb. 25, 1932.

1. Stipulations 🔑14(10).

As regards city's right to damages recovered by injured fireman, parties' stipulation that municipality had paid disabled fireman compensation sustained trial court's finding that payments had been made pursuant to compensation act (St. 1917, p. 831, as amended).

2. Appeal and error 🔑1008(1).

Trial court's finding on question of fact is conclusive.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 14 P.2d 752.

Action by William T. Evans against the Los Angeles Railway Corporation, in which the City of Los Angeles intervened. From a judgment for intervener, plaintiff appeals. Affirmed.

Superseding opinion in 298 P. 536.

George W. Rochester, of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Willis L. Grafton and Arthur W. Nordstrom, Deputy City Attys., all of Los Angeles, for respondent.

FRICKE, Justice pro tem.

The plaintiff, a city fireman, brought this action to recover from the Los Angeles Railway Corporation, damages for personal injuries sustained by him in a collision between a street car and a fire truck on which he was riding in the course of his employment.

The city of Los Angeles filed a complaint in intervention, claiming a lien on the damages recoverable by the plaintiff because of payments by the city to plaintiff under the Workmen's Compensation Act (St. 1917, p. 831, as amended). Plaintiff and appellant did not make any claim nor did he receive any award from the industrial accident commission for compensation under the act, but it does appear that pursuant to an ordinance (No. 32438 [N. S.] § 11) of the city, which provided, "Any officer or member of the said Fire Department injured or contracting sickness in the line of duty shall receive his full salary until such time as a Physician appointed by the City or Fire Commission certifies that he is able to return to duty, or he is granted a pension," appellant continued to receive his full salary of $200 per month while incapacitated for duty, from May 9, 1927, to November 21, 1927.

The basic question here involved is whether, as appellant contends, the moneys so received were paid him solely by reason of said ordinance and that no part thereof was paid pursuant to the Workmen's Compensation Act and that therefore no compensation under the act was ever paid to him, or whether, as contended by the intervener, that the money paid was in satisfaction of and included the amounts due appellant under that act as compensation and that all amounts in excess of such compensation were paid because of the hazardous nature of the work of a fireman. It was stipulated that the city of Los Angeles had furnished to appellant all medical, surgical, and hospital attention and appliances, that the total amount paid by the city "because of and on account of the injuries to the plaintiff had amounted to Nine Hundred Sixty-six and 34/100 Dollars." The trial court found that the intervener had paid the plaintiff $778.14, under and pursuant to the provisions of the Workmen's Compensation, Insurance and Safety Act, and by its judgment ordered that sum to be paid by the clerk of the court (with whom $3,500 paid by the Los Angeles Railway Corporation in settlement for plaintiff's injuries had been deposited) to the intervener, and further adjudged that the intervener was entitled to such further amount out of the sum deposited with the court as such intervener might be required to pay plaintiff for permanent disability and ordered the clerk to hold the balance of the $3,500 for 245 weeks or until the liability of the intervener for such disability should be released or waived. The plaintiff appealed from this judgment.

[1, 2] The problem, did the payment of the salary under the ordinance include the payment of compensation so that the city acquired a right of subrogation? would present most interesting questions of law were the question in this particular case not one of fact. The facts are brought to this court by a "Bill of Exceptions by Way of Facts and Issues of Appellant and Respondent," signed by counsel for both parties, which recites the proceedings in the trial court, declares the issue and sets forth the evidence, including a stipulation presented to the trial court, executed by the plaintiff and his attorney, counsel for the defendant and counsel for the intervener, in which, among other things, it is stipulated: "That since said accident the said City of Los Angeles, a municipal corporation, has paid to the said William T. Evans *compensation* (italics ours) which said The City of Los Angeles claims he has been entitled to under the law to date and furnished all medical, surgical and hospital attention and appliances."

This stipulation is amply sufficient to sustain the finding of the trial court that the plaintiff had received compensation from the city of Los Angeles and the conclusion that the payments under the salary ordinance included the compensation due under the Workmen's Compensation Act. The question before this court is, therefore, not one of law but of fact, and the finding of the trial court is conclusive.

The judgment is affirmed.

I concur: CRAIG, Acting P. J.

IRA F. THOMPSON, J.

I concur in the affirmance of the judgment but think the case of Sacramento v. Central California T. Co., 78 Cal. App. 215, 248 P. 307, is ample authority to justify our conclusion that payments made by reason of an ordinance requiring compensation during total incapacity may be considered, if sufficient or in excess thereof, as being in satisfaction of the requirements of the Workmen's Compensation Act.

TOPLEY v. ZEEMAN et al.*

Civ. 7602.

District Court of Appeal, First District, Division 1, California.

Dec. 23, 1931.

Hearing Granted by Supreme Court Jan. 21, 1932.

Appeal and error 🔑760(1).

Notwithstanding references to typewritten transcript in appellant's brief to evidence involving grounds for reversal, reviewing tribunal will not inspect transcript for such grounds (Code Civ. Proc. § 953c).

> On appeal on typewritten record, appellant omitted to print in brief or supplements thereto any pleadings or testimony to show that directed verdict was not justified; nor did appellant's reply to respondents' brief purport to set forth the evidence supporting the trial court's action.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 5 P.(2d) 455.

Reisner & Deming, of San Francisco, for appellant.

Charles W. Haswell, of San Francisco, for respondents.

PER CURIAM.

The petition for rehearing is denied. As held in Peterkin v. Randolph Marketing Co., 48 Cal. App. 300, 191 P. 947, where an appeal is taken under the alternative method, a rehearing will not be granted to enable a party to present evidence which he did not deem of sufficient importance to print in his briefs, as required by section 953c of the Code of Civil Procedure, and which therefore was not called to the attention of the reviewing court. In the present case the appeal was taken on a typewritten record, the reporter's transcript containing some 225 pages; and, although appellant sought to reverse the judgment upon the ground that the evidence was such as to preclude the court from taking the case from the jury, she failed to comply with the requirements of section 953c of the Code of Civil Procedure by omitting to print in her brief, or in any supplement thereto, any of the pleadings, or any testimony whatever to show that the trial court's action in directing the verdict was not justified. Furthermore, she failed to file a reply to respondents' brief, which purported to set forth those portions of the evidence that supported the action of the trial court. The short statement of facts contained in the opening brief gives five transcript references, but it has been repeatedly held that mere transcript references do not satisfy the requirements of the statute; and that under such conditions the reviewing tribunal will not look to the typewritten transcript to determine whether grounds exist for a reversal. Barker Bros. v. Joos, 36 Cal. App. 311, 171 P. 1085; Sea v. Lorden, 37 Cal. App. 444, 174 P. 85; Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 P. 110; Gustafson v. Wasson, 42 Cal. App. 70, 183 P. 352; Dahlberg v. Dahlberg, 202 Cal. 295, 260 P. 290; 2 Cal. Jur. 650, 651. However, despite the foregoing rule, the court examined the reporter's transcript to ascertain the facts, and the essential ones are correctly set forth in the opinion. Now on petition for rehearing appellant sets forth for the first time certain evidence which it is contended has the effect of taking the case out of the operation of the determinative legal principle adhered to in the opinion, the soundness of which she does not question. We are of the opinion that the evidence referred to has no such effect; but, even assuming that it has, under the ruling of the case above cited, a rehearing should be denied.

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119 Cal.App. 428

SMINIA v. DEPARTMENT OF WATER AND POWER OF LOS ANGELES et al.

Civ. 6929.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1931.

1. Appeal and error 🔑891.

On appeal from nonsuit properly entered, statute authorizing appellate court to take additional evidence *held* inapplicable (Code Civ. Proc. § 956a; Const. art. 6, § 4¾).

2. Mandamus 🔑154(4).

Complaint for mandamus to compel extension and connection of city's water main, not alleging compliance with department's reasonable regulations, failed to state cause of action.

3. Mandamus 🔑173.

Where evidence in action to compel extension and connection of city's water main showed refusal to comply with department's reasonable regulations, nonsuit was proper.

4. Mandamus 🔑167.

Mandamus plaintiff, not alleging or proving bad faith or fraudulent conduct in terms

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*For subsequent opinion see 13 P.2d 666.

imposed for water main extension by bureau, *held* properly nonsuited.

> Nonsuit was proper, since, under provisions of city charter, bureau of water and power commissioners was given discretion as to whether it should make extensions similar to the one requested by plaintiff, and, if it did grant extension, it had right to specify upon what terms and conditions extension should be made. Hence, there being nothing to show that bureau failed to exercise discretion in good faith, court could not grant relief sought.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for mandamus by Carrie A. Sminia against the Department of Water and Power of Los Angeles and others. From a judgment pursuant to an order sustaining defendants' motion for nonsuit, defendants appeal. Affirmed.

Carrie A. Sminia, in pro. per.

Erwin P. Werner, City Atty., W. B. Mathews, Sp. Counsel, and George T. Warren, all of Los Angeles, for respondents.

YORK, J.

This matter comes before this court upon an appeal from a judgment which was rendered pursuant to an order sustaining motion for nonsuit made by defendants.

The complaint prays for a writ of mandate to compel the defendants to extend their water main to the premises of the plaintiff and connect the same with said premises, alleging that the plaintiff had tendered the sum of $15 for a meter connection, and praying that no other bonus or subsidy, or any other sum whatever, except the sum of $15 be required for making such connection. Upon trial the defendants objected to the introduction of any evidence, and later moved to strike all the evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. This motion was denied. At the close of plaintiff's case a motion for nonsuit was made, on the grounds: First, that the evidence failed to show that the plaintiff had complied with all the reasonable rules and regulations of the department of water and power for street main extensions, but that, on the contrary, plaintiff affirmatively showed that she failed to comply with said rules and failed to pay to the said department the sum of $1,480 demanded as a condition precedent to making the extension. Second, that it was not shown that the extension was required by a reasonable demand therefor, or that the income or revenue from the water to be supplied at current rates would compensate the department of water and power for the expenditure required nor justify the department in making the extension; that it was not shown that there is any certainty or assurance that there would be a continuous consumption of water or a continuous payment of rates therefor after the extension was made, or that the extension would not place an additional burden on the rate payers as a whole. Third, that it was not shown that at the time of the plaintiff's demand, to wit, December 26, 1928, or at any time during the fiscal year 1928-29, there were any funds or moneys available to the defendant department to make the extensions demanded, nor was there any proof of any budget appropriation made by said department pursuant to section 83 of the charter for such extension purposes. Fourth, that the plaintiff affirmatively showed that she had a water service connection and a water supply from the defendant city's mains, and therefore the writ is unnecessary.

We think that the lack of evidence introduced compelled the court to grant the motion for nonsuit.

[1] Appellant's brief contains the statement that this court is vested "with absolute power to re-try this case de novo as a trial court of original jurisdiction; and for that purpose may order new or further evidence to be produced; and may make any further order or proceeding necessary to enable the Appellate Court to render a final decision in the case, to the end that no further trial or appeal shall be necessary." Appellant, among other things, says: "As the merits of the case are before this Appellate Court for final hearing, it will not be necessary to occupy the time of this Court in reviewing the action of the lower court on the trial therein."

It was held in Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, that section 956a of the Code of Civil Procedure, giving courts power to take additional evidence, etc., is limited in its usual operation to matters wherein this court takes such action as will result in a means of enabling it to affirm or to modify and affirm the judgment. As was stated in said decision at page 269 of 208 Cal., 280 P. 970, 976: "We therefore conclude, on this branch of the case, that by the adoption of section 4¾ of article 6 of the Constitution and the enactment of section 956a of the Code of Civil Procedure it was not intended to convert the appellate tribunals of the state into triers of fact, nor to abrogate the general rule that findings of the trial court founded on substantial evidence are conclusive on appeal; that the effect of the new law is to create and establish an exception to the general rule; that the primary and principal purpose of this exception is to enable the reviewing courts to make contrary or additional findings on the record presented or on new evidence taken, to the end that the judgment be affirmed or modified and affirmed and the litigation be terminated; that when the judgment appealed from must be reversed and a new trial is ordered, either pursuant to a general order of reversal or a specific remanding of the cause for a new trial, findings of fact by the reviewing court become inappropriate and unauthorized. * * *"

[2, 3] The complaint fails to allege compliance with the reasonable rules and regulations of the department of water and power for the extension of water mains, and therefore fails to state a cause of action. The evidence shows that the plaintiff refused to comply with such rules and regulations of the defendant department, and for that reason, and for the reasons hereinbefore stated, the judgment of nonsuit was proper.

[4] Under the provisions of the charter of the city of Los Angeles, the bureau of water and power commissioners is given the discretion as to whether or not it shall make extensions similar to the one requested here, and if it does grant the extension, then it has the right to specify upon what terms and conditions such extension shall be made. There is nothing to show that it failed to exercise that discretion in good faith, and therefore the court could not grant the relief sought, under the evidence introduced.

As the plaintiff failed in the lower court either to allege or prove bad faith or fraudulent conduct in the terms imposed for such extension, the judgment of nonsuit was proper.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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119 Cal.App. 498

LINCOLN v. WILLIAMS et al.

Civ. 7941.

District Court of Appeal, First District,
Division 2, California.
Jan. 4, 1932.

1. Trial 🔑312(2).

Where correctly instructed jury asked how to frame verdict, court's giving further instructions not confined to jury's question *held* no error.

Further instructions were not error, where question asked by foreman of jury clearly indicated jury had failed to understand previous instructions relating to manner of framing verdict.

2. Trial 🔑312(2).

Judge's reading, at juror's request, allegations relating to amount of damages claimed, but advising jury such allegations were denied, *held* no error.

3. Automobiles 🔑245(72).

Pedestrian's crossing uncongested street after dark with box on shoulder, in position that it might have obstructed vision, would not render pedestrian negligent as matter of law.

It did not appear that pedestrian crossed the street without looking and, under such circumstances, that he could not see in the direction from which traffic might be expected, and the fact, if it was a fact, that he carried a box in such position that it "may have" obstructed his vision to some extent would not in itself conclusively show that he failed to exercise ordinary care under the circumstances.

4. Automobiles 🔑217(1).

It is duty of pedestrian crossing street to use ordinary care to prevent injury from automobile.

5. Automobiles 🔑245(72).

Question of due care of pedestrian injured by automobile while crossing street is ordinarily for jury.

6. Automobiles 🔑217(5).

Pedestrian's continuing duty to use ordinary care in crossing street cannot impose duty upon him to look continuously in all directions at all times.

7. Appeal and error 🔑1002.

Verdict cannot be set aside as contrary to evidence where material evidence is conflicting or reasonable minds may differ in conclusions upon uncontradicted evidence.

8. Automobiles 🔑244(36).

Evidence *held* to sustain verdict that sole proximate cause of injury to pedestrian crossing street was automobile driver's negligence.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Francis B. Lincoln against Nat L. Williams, Jr., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Frederick W. Kant and Laurence I. Dodge, both of San Francisco, for appellants.

Elmer P. Delany, of San Francisco, for respondent.

SPENCE, J.

In this action to recover damages for personal injuries, the jury rendered a verdict in favor of plaintiff and against defendants in the sum of $5,000. From the judgment entered upon the verdict, defendants appeal.

The accident occurred at about 8:45 p. m. on the evening of October 14, 1929, at the intersection of Oxford street and Berkeley way in the city of Berkeley. Plaintiff, a pedestrian, was crossing Oxford street from the easterly to the westerly side thereof, and was struck by an automobile driven by the defendant Nat L. Williams, Jr., when at a point about eight feet from the westerly curb. There was a conflict in the evidence as to whether the plaintiff was walking in the crosswalk or a few feet to the south thereof at the time he was struck. There is a further conflict as to whether plaintiff was carrying a box upon his right shoulder or under his arm. Said defendant was driving in a southerly direction on Oxford street, and there was evidence showing that he was traveling between 35 and 40 miles per hour. When plaintiff was struck, both he and the articles he was carrying were thrown into the air. The automobile stopped after traveling approximately halfway down the block, having carried plaintiff on the fender for part of that distance. The action was brought against said defendant Nat L. Williams, Jr., the driver of the car, and also against his parents, who had signed his application for an operator's license.

[1, 2] On this appeal, it is contended that appellants are entitled to a reversal because of alleged prejudicial misconduct on the part of the trial court, but we find no merit in this contention. This assignment is based on the trial court's action at the time that the jury returned for further instructions. To understand the situation, it may be stated that plaintiff had prayed for damages for the sum of $25,000. The trial court, in its general charge, had correctly instructed the jury upon the issue of damage and had further instructed the jury to the effect that the liability of the parents was limited in any event to $5,000 under the provisions of section 62 of the California Vehicle Act (as amended by St. 1929, p. 522, § 23). The original instructions upon this limitation of liability were brief. Upon the return from the jury room, the foreman asked: "Well, in case the verdict or the award is made under $5,000, if it should be made against the father or the mother or divided." In reply, the trial court reread the section and amplified the previous instructions on the subject, advising the jury upon the proper manner in which to frame their verdict in the event that they awarded the sum of $5,000 or less, and also advising the jury upon the proper manner in which to frame their verdict in the event that they awarded a sum in excess of $5,000. Appellants do not contend that the jury was erroneously instructed either in the original instructions or in the further instructions given upon the return of the jury, but seem to base the charge of misconduct on the fact that the trial court did not confine its further instructions to a direct answer to the foreman's question which related only to the manner of framing a verdict under $5,000. We find no error in the further instructions of the court, and find nothing upon which a charge of misconduct may be predicated. The question asked by the foreman clearly indicated that the jury had failed to understand the previous instructions relating to the manner of framing the verdict. It was entirely proper to give further instructions fully instructing the jury on this subject, and the trial court was not required to confine these further instructions to a direct answer to the question asked. Under the same heading, appellants call attention to the fact that when another juror asked to have the complaint read, in so far as it related to the amount of damages, the trial court read the allegations requested, advising the jury, however, that these allegations were denied. Appellants argue that "it is reversible error for the trial judge to state to the jury the amount of damages claimed by plaintiff in his complaint." Such is not the rule in this state (Lahti v. McMenamin, 204 Cal. 415, 421, 268 P. 644; Johnson v. Pickwick Stages System, 108 Cal. App. 279, 286, 291 P. 611), and there was no error or misconduct in complying with the juror's request.

[3-6] Appellants next contend that the trial court erred in refusing their request to give the following instruction: "I instruct you that if you find that the plaintiff was crossing Oxford Street after dark at a time when that street was not congested with traffic, and if you find that he was carrying a box containing apples and cans, which box was about two feet long, about 14 inches wide, and about 10 inches deep, on his shoulder in such a position that it may have obstructed his vision, then I charge you it was negligence for the plaintiff to attempt to cross the street with his vision obstructed in such a manner." We find no error in the refusal of this instruction, as in our opinion it is not a correct statement of the law. It is well settled that it is the duty of a pedestrian, in crossing a street, to use ordinary care under the circumstances, and that the question of whether a pedestrian does use such care is ordinarily a question of fact for the jury. Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649. The jury was very fully instructed on the subject of contributory negligence, the trial court giving numerous instructions requested by appellants relating to the continuing duty resting upon a pedestrian to make reasonable use of his faculties for his own safety while crossing a street. But, as we have recently pointed out, such continuing duty in the nature of things cannot be said to impose upon the pedestrian the duty to look continuously in all directions at all times. Maggart v. Bell (Cal. App.) 2 P.(2d) 516. The vice of the requested instruction is found in the fact that it attempted to set forth, with great particularity, the facts which would make respondent chargeable with contributory negligence as a matter of law, and that, conceding all of the facts set forth to be true, respondent still may have made reasonable use of his faculties and exercised ordinary care. The presence of the box in the position referred to may have obstructed respondent's vision to the right to some extent, but the mere presence of the box would not make it impossible for respondent to look in either direction by slightly turning his body. The effect of the instruction would be to tell the jury that, even if respondent made reasonable use of his faculties and looked to the right and left before starting to cross the street and frequently thereafter, the mere fact, if they so found, that he carried the box in such position that it "may have obstructed his vision" to some extent would make him guilty of negligence as a matter of law. In support of this instruction, appellants rely upon certain language used by the Supreme Court in denying hearing in Finkle v. Tait, 55 Cal. App. 425, 203 P. 1031, but, as has been frequently stated, the text of a decision is not necessarily sound as an instruction to be given to a jury. Bundy v. Sierra Lumber Co., 149 Cal. 772, 781, 87 P. 622; McGeorge v. Charles Nelson Co., 107 Cal. App. 148, 152, 290 P. 75; People v. Russell, 80 Cal. App. 243, 245, 251 P. 699. The language relied upon must be read in the light of the particular facts as interpreted by the court. In reviewing Finkle v. Tait, supra, the Supreme Court said in Burgesser v. Bullock's, 190 Cal. 673, at page 677, 214 P. 649, 651, "we sustained the conclusion of the District Court of Appeal solely for the reason that the pedestrian was crossing the street without looking and under such circumstances that he could not see in the direction from which traffic might be expected." It did not appear in the present case that respondent crossed the street without looking and, under such circumstances, that he could not see in the direction from which traffic might be expected, and the fact, if it was a fact, that he carried a box in such position that it may have obstructed respondent's vision to some extent would not in itself conclusively show that he failed to exercise ordinary care under the circumstances.

[7, 8] The last contention urged by appellants is that the verdict is contrary to the evidence in that the evidence "definitely established that plaintiff was guilty of contributory negligence both as a matter of fact and as a matter of law." This contention could have merit only in the event that the uncontradicted testimony showed that respondent was guilty of contributory negligence as a matter of law. If there was a conflict in the material portions of the evidence, or if the uncontradicted evidence was such that reasonable minds might differ in the conclusions to be drawn therefrom, the question was one for the jury, and the verdict cannot be set aside as contrary to the evidence. In support of the foregoing contention, appellants call our attention to the manner in which it is claimed that respondent was carrying the box; to the alleged fact that respondent crossed the street immediately behind another automobile proceeding in a northerly direction; and to the alleged fact that respondent was not in the crosswalk at the time of the accident. It is a sufficient answer to state that there was a direct conflict in the evidence on each of the foregoing matters. It is further argued that, under the conditions existing, respondent could have avoided the accident by the use of ordinary care. This is but appellants' conclusion, and it cannot be said as a matter of law that this is the only rational conclusion to be drawn from the evidence. Even conceding that negligence on the part of respondent might be inferred from some of the evidence most favorable to appellants' theory, the question still remained one for the jury. An examination of the record discloses that there was ample evidence to sustain the jury's implied finding that the sole proximate cause of the accident was the negligence of the driver who drove his automobile across the intersection at an excessive rate of speed and admittedly did not see respondent until within three feet of him.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

BAILEY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 8072.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1932.

Rehearing Denied Jan. 30, 1932. Hearing Granted by Supreme Court Feb. 29, 1932.

1. Divorce 🔑269(9).

If one adjudged in contempt is unable to make payments under divorce decree, order requiring commitment until payment exceeds court's jurisdiction (Code Civ. Proc. § 1219).

2. Divorce 🔑269(9).

Person owing $90,000, and having no property except that needed, could not lawfully be imprisoned until he made payments under interlocutory divorce decree (Code Civ. Proc. § 1219).

Such person, even though his credit continued to be good, could not be compelled

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*For subsequent opinion see 11 P.2d 865.

by imprisonment to comply with court's order requiring him to make payments contemplated by interlocutory divorce decree under penalty of being detained in custody until he complied with such order, where only method of compliance was by a sale of property necessary for continued operation of his business being conducted in good faith, or securing of funds by means of a loan which would add to an already existing heavy indebtedness.

Petition by Lansing B. Bailey for a writ of prohibition against the Superior Court of Los Angeles County, Georgia P. Bullock, Judge, to prevent the respondent court, which had adjudged the petitioner guilty of contempt for failure to make payments required by an interlocutory divorce decree, from imposing punishment therefor.

Peremptory writ granted.

W. W. Kaye, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, S. V. O. Prichard, Deputy County Counsel, Frank P. Doherty, and William R. Gallagher, all of Los Angeles, for respondents.

BISHOP, Justice pro tem.

Petitioner, adjudged guilty of contempt of court in having failed to make two monthly payments required by an interlocutory divorce decree, seeks a writ of prohibition to prevent the respondent court from imposing the threatened punishment. We are of the opinion that a peremptory writ should issue, because the order under which the pending penalty would be exacted was beyond the jurisdiction of the court to make.

[1, 2] The order which hangs over petitioner's head, as it is given to us by the respondent court in its answer, recites that petitioner is in contempt in having failed to make two payments as theretofore ordered by the court, due July 1 and August 1, and "that said plaintiff (the petitioner) is fully able to make said payments." On these recitals, the respondent court ordered petitioner to pay part of the sum in arrears within ten days, and all within thirty days, "and for failure to so pay * * * he is ordered to be taken into custody and not released until he has complied with this order and the orders heretofore made by this court." This order of commitment is in the form authorized by section 1219, Code of Civil Procedure: "When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment." Interpretive of, or supplemental to, these provisions of the statute, it has been held that, if it appear that the person adjudged in contempt has not the ability to perform, the order requiring commitment until performance is beyond the power of the court to make. Ex parte Cohen (1856) 6 Cal. 318; Ex parte Overend (1898) 122 Cal. 201, 54 P. 740; Ex parte Silvia (1899) 123 Cal. 293, 55 P. 988, 69 Am. St. Rep. 58; In re McCandless (1911) 17 Cal. App. 222, 119 P. 199; In re Saul (1917) 32 Cal. App. 531, 163 P. 505; Myers v. Superior Court (1920) 46 Cal. App. 206, 189 P. 109. In the pending procedure there is no conflict in the evidence upon which the finding of the trial court must rest. At the time of the hearing, petitioner was about $90,000 in debt, his farming operations on leased property during the year netting a deficit; he had no income, and no property other than an equity in an automobile, required in his farming operations, and a pipe line, also needed in his farming, and which could not be removed from where it was installed. We do not find in this testimony proof of ability to comply with the court's order to make up the two payments which had become delinquent. Nor do we believe that petitioner's present ability is proven by evidence that his credit is still good, and that he can go deeper into debt. We are of the opinion that petitioner may not be compelled, by imprisonment, to comply with an order of the court, where the only method of compliance is a sale of property necessary for the continued operation of his business being conducted in good faith, or the securing of funds by means of a loan which would add to an already existing heavy indebtedness.

This conclusion is in harmony with the authorities, which do not recognize the right of a court in these cases to determine how a man shall carry on his business or control his economic ventures, although insistent that, if he is able, he shall obey the orders of the court. In Ex parte Todd (1897) 119 Cal. 57, 50 P. 1071, the petitioner was found unable to make the payment which had been ordered, and it was also found that he had not tried to get work in order to have the funds. He was ordered into custody until he paid. This, our Supreme Court said, was "clearly in excess of the power of the court, which cannot compel a man to seek employment in order to earn money to pay alimony, and punish him for his failure so to do."

Ex parte Silvia (1899) 123 Cal. 293, 55 P. 988, 69 Am. St. Rep. 58, presented a case where imprisonment until compliance was held unauthorized, although it appeared that the petitioner had a homestead which he might have sold or incumbered. "In a legal sense (he) has not the ability to pay the alimony." See, also, Merritt v. Superior Court (1928) 93 Cal. App. 177, 181, 269 P. 547.

In Crombie v. Crombie (1915) 88 Wash. 520, 153 P. 306, the husband had been found in contempt for failure to make payments, but this finding was reversed, the Supreme Court saying that he had established his inability to make the payments, even though he had some land which he might have sold, as a sale would have been at a sacrifice, harmful to the ultimate interest of both parties. In a later case, Wells v. Wells (1918) 99 Wash. 492, 169 P. 970, L. R. A. 1918C, 291, the same court held that a crab fisherman, who was not meeting with success, could not be compelled to take up a new trade or to pay for his independence by being punished for contempt. Messervy v. Messervy (1910) 85 S. C. 189, 67 S. E. 130, 30 L. R. A. (N. S.) 1001, 137 Am. St. Rep. 873, is much to the same effect. Of some interest, too, is Holcomb v. Holcomb (1909) 53 Wash. 611, 102 P. 653, 654, where a commitment was set aside with the statement: "The fact that the appellant's mother may have heretofore advanced money to pay alimony, or the fact that his brother may have given security to keep him out of prison, affords no sufficient basis for the order appealed from."

In stating our conclusion that the evidence failed to justify the court's finding that petitioner had the present ability to pay, we are not to be understood as holding that the evidence would not have supported a finding that on July 1 and August 1 he had the ability. There is no finding as to those dates, and the question is not before us. The order made was beyond the jurisdiction of the court to make, as the term "jurisdiction" is now used in these proceedings, and it is ordered that a peremptory writ of prohibition issue, restraining the respondents from proceeding further under the order dated September 4, 1931, and filed September 10, 1931.

We concur: CONREY, P. J.; YORK, J.

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119 Cal.App. 367

SULLIVAN v. RICHARDSON et al.

Civ. 562.

District Court of Appeal, Fourth District, California.

Dec. 22, 1931.

Rehearing Denied Jan. 19, 1932. Hearing Denied by Supreme Court Feb. 18, 1932.

1. Appeal and error ⚿1039(2).

In passenger's action for injuries sustained in automobile collision based on negligence, that plaintiff alleged gross negligence *held* harmless.

Allegation was harmless, since "gross negligence" necessarily includes negligence, and, since allegation went further than was needed, it could be treated as surplusage.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

2. Automobiles ⚿244(20).

Evidence sustained finding that plaintiff injured in automobile collision was "passenger" and not "guest," and hence entitled to recover against operator of automobile in which she was riding without proving willful misconduct or gross negligence (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

Evidence disclosed that automobile in which plaintiff was riding was used to conduct prospective purchasers to real estate development, that plaintiff was invited to take the trip by some person allegedly a representative of the real estate syndicate, that she paid no compensation for the trip, and that the syndicate had an agreement with the driver of the automobile providing for his reimbursement for operating expenses of the automobile in making trips with prospective purchasers to the real estate development.

[Ed. Note.—For other definitions of "Guest" and "Passenger," see Words and Phrases.]

3. Automobiles ⚿244(36).

In passenger's action for injuries, evidence sustained finding that driver of plaintiff's car was guilty of negligence which, jointly with negligence of driver of other colliding automobile, was proximate cause of injury.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Kathryn Sullivan against G. L. Richardson and others. From judgment for plaintiff, defendants W. A. McCord, S. H. Woodruff, and Dana Point Syndicate appeal.

Affirmed.

Kenneth J. Murphy and Lasher B. Gallagher, both of Los Angeles, for appellant W. A. McCord.

J. McCroskey, of Los Angeles, for appellants S. H. Woodruff and Dana Point Syndicate.

Head, Wellington & Jacobs, of Santa Ana, for respondent.

FREEMAN, Justice pro tem.

Plaintiff brought this action to recover damages for injuries she sustained by reason of a collision between two automobiles, one operated by the defendant G. L. Richardson, and the other by defendant W. A. McCord on Tustin and Fairhaven avenues, in Orange county on the 30th day of January, 1930. The plaintiff recovered a judgment for $6,075 damages and $109.20 costs, against defendants G. L. Richardson, W. A. McCord, S. H. Woodruff, and Dana Point Syndicate a common-law trust. The trial was had by the court without a jury. There are two appeals from the judgment; one by defendant W. A. McCord, and the other by defendants S. H. Woodruff and Dana Point Syndicate. Defendant G. L. Richardson does not appeal.

Plaintiff alleges that she was a passenger in the automobile operated by defendant McCord at the time of the accident, and was injured. Defendants McCord, S. H. Woodruff, and Dana Point Syndicate appeared by joint answer, and defendant Richardson appeared by separate answer. The defendants Woodruff and Dana Point Syndicate, after the trial had been progressing for several days but before plaintiff rested her case, applied to the court to amend their answer by denying that defendant McCord was the agent of Woodruff and Dana Point Syndicate. The answer of the defendants was verified March 30, 1930. The trial began July 10, 1930, and the application to amend was made July 16, 1930. The amendment from its nature would indicate that plaintiff would have to present additional evidence to establish agency, if possible. The record shows that the attorney for the defendants who asked for the amendment had from June 10th to July 10th to learn the issues. The record does not show that the proposed answer was filed or served. It has been held that the court does not abuse its discretion in denying an amendment when "it does not appear from the transcript that any proposed amendment [to the answer] was served or presented, or that the notice of motion pointed out the precise amendment which plaintiff would ask leave to make or file." Martin v. Thompson, 62 Cal. 618, at page 622, 45 Am. Rep. 663. From the record here, we do not believe the court was in error in denying this proposed amendment, or that it was an abuse of discretion. The court sustained the motion for nonsuit as to plaintiff's second cause of action wherein defendants McCord and Richardson were alleged to have been "negligent." No allegation of willful misconduct or gross negligence was made.

Appellant McCord contends that respondent, according to the evidence, was his "guest" as defined by section 141¾ of the California Vehicle Act (as added by St. 1929, p. 1580) as it existed in 1929, which act was in effect at the time of the accident in question, and that the trial court erred in not expressly finding as a fact and expressly concluding as a matter of law that respondent was a "guest" in the automobile of McCord. The court found that she was riding as a passenger, and that the plaintiff gave no compensation to McCord, Woodruff, or Dana Point Syndicate for riding in McCord's automobile; that defendant McCord was paid compensation by the defendants Woodruff and Dana Point Syndicate for transporting the plaintiff in his automobile. Her relationship to appellants from a legal standpoint was raised by the pleadings and found by the court in its findings. The plaintiff alleged she was a "passenger," and defendant McCord alleges she was a "guest." This was a question of fact to be submitted to the court from the evidence. The evidence discloses the following:

Plaintiff Kathryn Sullivan testified:

"Just state how you happened to get into the automobile. A. This woman approached me and invited me to take this trip; she said she was a representative of—I don't recall what the name was, now, but I suppose it is this Dana Point Syndicate—and I took the trip on her invitation. She said that we would start at nine o'clock the next morning; to be down in the lobby; and I was there and entered this car and we drove out of Los Angeles. * * *

"Q. Did you agree to pay this lady or Col. McCord or anybody else for the ride? A. No. * * *"

Defendant McCord testified as follows:

"Q. You have testified that Mrs. Sullivan was riding in your automobile on the date of the accident, is that correct? A. Yes, sir. * * *

"Mr. Gallagher: No; where was it she got in?

"The Court: She may answer.

"A. San Carlos hotel, the corner of Fifth street and Olive, Los Angeles.

"Q. Did you know her before that time? A. No, sir.

"Q. Did you know her at that time as Mrs. Sullivan? A. At the time she was—of the accident, you mean?

"Q. At the time she got in your automobile? A. Only by introduction, that she had been introduced as 'Mrs. Sullivan.'

"Q. Did you personally invite her to get into your automobile? A. No, sir—

"Col. Wellington: That is objected to as incompetent, immaterial and irrelevant whether he 'personally invited her to get into the automobile.'

"The Court: Overruled.

"A. No, sir.

"Q. What was your destination? A. Dana Point.

"Q. And were you to bring Mrs. Sullivan back to that hotel that same day? A. Yes, sir. * * *

"Q. With whom did you have the arrangement to bring her back to that particular hotel? A. It has always been the custom to bring them back.

"Q. You were simply following out a custom, is that it? A. Yes, sir.

"Q. And no understanding with Mrs. Sullivan? A. I had no personal understanding; it was the assumption that we would bring them back; in case we took them down we would bring them back. * * *"

James W. Bennett, auditor for Dana Point Syndicate, testified as follows:

"Q. Is there any oral contract between the Dana Point Syndicate and S. H. Woodruff, and Mr. McCord, by which he is to be paid for the transporting of individuals from Pasadena and vicinity to Dana Point? A. No, because he wasn't paid for transporting individuals. There is an oral contract between the employer and Col. McCord calling for his reimbursement for gasoline and oil expense in making trips with prospective purchasers to Dana Point.

"Q. Is he paid a rate per passenger? A. No.

"Q. He has no payment of so much per passenger? A. No; simply the repayment of gasoline.

"Q. And automobile expense? A. A fixed allowance.

"Q. Is that based on the number of passengers he carries? A. No, sir, the number of the trips.

"Mr. Gallagher: Did the witness say 'a fixed allowance?' Witness: Yes, sir.

"Mr. Gallagher: Of so much per trip? Witness: Yes, sir.

"Col. Wellington: You say that it is so much per trip, is that right? A. Yes, sir.

"Q. It is based on the number of trips he makes? A. Yes, sir.

"Q. Irrespective of the number of passengers he carries? A. Yes.

"Q. What is that agreement? A. He is allowed three dollars for every trip he makes with prospective purchasers to the property and he takes them back.

"Q. That covers the taking of the person from their hotel or place where they are picked up to Dana Point and return,—is that true? A. Yes.

"Q. And it is three dollars irrespective of the number he carries? A. Yes, sir. I think that is not the only consideration.

"Q. Is he paid other consideration than that for transporting them? A. If a sale results.

"Q. If a sale results? A. Yes.

"Q. And that it is contingent upon a sale result, is that right? A. Yes; yes."

Appellant McCord contends that he was entitled as a matter of law from the evidence to a finding that respondent was a guest within the meaning of the law. The court found she was a "passenger." This is an express finding from which Mrs. Sullivan's legal relation to defendants Woodruff, McCord, and the Dana Point Syndicate was established. Her relationship of "passenger" would be different from that of a mere "guest." Under the law, she could not be held to occupy both relationships of "guest" and "passenger" at the same time and under the same circumstances. To be a passenger does not necessarily imply that there should be payment in money for transportation. Champagne v. A. Hamburger & Sons, 169 Cal. 683, 692, 147 P. 954. It may be by contract, either express or implied, and the contract need not be between the carrier and passenger, but may be between the carrier and a third person for the passenger. Orr & Lanning v. Boockholdt, 10 Ala. App. 331, 65 So. 430, 431. "It is enough that there is any consideration for the carriage. The person admitted to his vehicle by a common carrier for the purpose of carriage for any compensation is a passenger." Walther v. So. Pac. Co., 159 Cal. 769, 772, 116 P. 51, 53, 37 L. R. A. (N. S.) 235; Champagne v. A. Hamburger & Sons, supra; Crawford v. Foster (Cal. App.) 293 P. 841. The foregoing evidence is sufficient for the trial court to find that respondent was a passenger.

Respondent here was not a licensee or trespasser, as contended by appellants. She was in the automobile by the consent of the driver, McCord, and for a compensation paid by defendants Woodruff and Dana Point Syndicate. McCord and defendants Woodruff and Dana Point Syndicate were private carriers for hire. In the case of The New World v. King, 16 How. (57 U. S.) 469, 474, 14 L. Ed. 1019, it was held that when persons undertake to convey others as passengers for pay by automobile, "'public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross.' * * *

"The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. * * *

"'How much care will, in a given case, relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending on a great variety of circumstances which the law cannot exactly define.'"

In the case at bar, the question as to the degree of negligence was a fact to be determined by the court, and, it having found that "the defendant W. A. McCord operated his said automobile in which plaintiff was then and there riding, carelessly and negligently and with willful misconduct and gross negligence while then and there approaching and in said intersection," it follows that this must stand if supported by the evidence. A review of the testimony establishes negligence in that McCord was greatly exceeding the speed limit in a 15-mile intersection when he was traveling 50 miles per hour and a little to his left of the center of the highway; and, if he was not guilty of gross negligence or wanton or willful neglect, he was, under the evidence and findings, at least guilty of negligence. In Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915, 917, it was said: "But the question whether or not the common carrier was guilty of gross negligence was in the first instance one for the jury to pass upon, under proper instructions from the court; and this court may not be asked to usurp this function of the jury, and thus decide a question which has never been submitted to them."

It is contended by appellant that the court erred in finding, as above quoted, that McCord was guilty of "willful misconduct," for the reason that there was no evidence to show there was an element of knowledge, willfulness, or wantonness. McCord testified he had been traveling this road on an average of "three and four times a week, for two years," and "knew this intersection." This would imply knowledge on his part, of this intersection and its condition sufficient to warn him of possible danger at this corner. But as we have found that the plaintiff was a "passenger," under sufficient evidence, it was only necessary for her to prove that defendants McCord and Richardson did not use ordinary care, or were negligent, and that such negligence on their part was the proximate cause of the accident and resulting injuries complained of by plaintiff, in order for her to recover. Gross negligence includes other degrees of negligence. The evidence discloses that McCord was traveling south on Tustin avenue with respondent as a passenger; defendant Richardson was traveling west on Fairhaven avenue. At the intersection of Tustin and Fairhaven avenues, there is an orange grove with large trees and a windbreak on and along both avenues. On the northeast corner of the intersection were trees which extended about 25 feet toward the pavement and approximately 10 feet from the easterly edge of the pavement on Tustin avenue, and were 15 or 16 feet from the gutter. One witness stated that the windbreak came flush with the highway. There was a stop sign about 30 feet from the center of the paved roads on the north side of Fairhaven avenue. Defendant Richardson testified that he could not see the traffic on Tustin to his left or right from the point where he stopped, due to these obstructions. This would make this point what is commonly known as a "blind intersection" to persons driving south on Tustin and west on Fairhaven avenues. An intersection is deemed to be "blind" when at any time during the last 100 feet of his approach to such intersection the driver of a vehicle does not have a clear and uninterrupted view of such intersection and of the traffic upon all of the highways entering such intersection for a distance of 200 feet from such intersection. This being an intersection at which the speed would be limited to fifteen miles per hour, under the statute an excessive speed of 50 miles per hour, as found by the court, was negligence per se, as a matter of law.

In the case of Skaggs v. Wiley, 108 Cal. App. 429, at page 433, 292 P. 132, 133, the court has held that "where the view is thus obstructed, a failure to observe the statutory requirement as to speed will, if the same proximately causes or contributes to the injury complained of, constitute negligence as a matter of law; the principle that a violation of the statute is negligence per se being subject to the limitation that the act or omission must proximately cause or contribute to the injury."

There was evidence by witness Bronson, who was riding with defendant McCord at the time of the accident as follows:

"Q. And what was the approximate speed of this car as it came to this intersection on that date? * * * A. Well, I should think it was between forty and fifty miles an hour.

"Q. Did the car slow up at or before the accident? A. I didn't notice it slow up."

Whether or not this was negligence or willful misconduct and gross negligence on the part of McCord was a question of fact for the determination of the trial court, from the evidence. The evidence before the court, together with the fact that McCord knew this corner and its condition, was sufficient for the court to determine the degree of negligence. The car in which defendant Richardson was riding and driving west on Fairview avenue came in contact with the McCord car about the center of Tustin avenue and a little to the left of the center line thereof. Defendant Richardson testified that he looked to the left as he entered the intersection, but did not look to his right; that while he was looking to his left his car was struck by the McCord car. On cross-examination he stated:

"Q. Now, is it not a fact that in that written statement which was presented to you at that time in court there appeared the statement: 'I didn't stop at the boulevard stop sign, but I was rolling very slowly in my car in neutral.' A. I believe that is correct.

"Q. Yes. In other words, from the time your car entered the intersection, the main highway, up until the time the collision occurred you had your face pointed towards the south and your eyes in that direction looking for traffic, didn't you? A. Yes.

"Q. You weren't looking down at the surface of the pavement in front of your car, were you? A. No.

"Q. Now you stated on direct examination that you had driven out on to the main highway about fifteen feet, according to your recollection, at the time the accident happened? A. That is correct.

"Q. You knew that that was the main highway, didn't you? A. Yes.

"Q. You intended to turn to the right, you say? A. Absolutely. * * *

"Q. Well, disregarding that, now, for a moment, you were fully fifteen feet from the easterly edge of Tustin avenue, out into the intersection, weren't you, when the accident occurred? A. As near as I can figure it, yes.

"Q. At no time did you look to the right? A. I had no opportunity.

"Q. I didn't ask what your opportunities were; I asked you what you did. At no time did you look to the right? A. No. * * *

"Q. Had your car progressed out beyond the center of Tustin avenue. A. It hadn't.

"Q. How far east of the center had your —what point east of the center had your car reached,—about how many feet from the center line? A. Within two or three feet.

"Q. Now at the time of the impact was your car traveling or standing still? A. Well, you might say it just was barely moving; I kind of pulled up to a stop,—barely moving, I think at the time of the impact, just kind of rocked there a little. * * * A. The right front portion of my car was damaged, the fender, the wheel and the axle, the radiator shell, and one lamp."

It will be noted that defendant Richardson also knew the condition of this intersection: that he had partly crossed the street and was within two feet of the center line of Tustin avenue, and had not up to that time looked to his right. This was sufficient for the court to find that he was guilty of neglect to use proper care, because he had traveled nearly to the center without looking to see if there were any automobiles coming south on Tustin avenue. He had a clear view up Tustin avenue from the time he passed the windbreak or trees along Tustin and Fairhaven avenues. If he was going as slow as he stated, he had ample time to look both ways and could have avoided the collision; and if McCord had traveled on his right side of the road at a lesser rate of speed, and with proper care, the accident would not have happened.

The case of Royal Finance Co. of California v. Miller (C. C. A.) 47 F.(2d) 24, 26, is very similar to the case at bar. There a real estate firm was carrying prospective purchasers to and from its tract in San Diego county by automobile. The driver of the automobile was employed by the real estate firm. He took two ladies to the tract in his automobile, and an accident occurred. He was paid $50 a week to give lectures at the tract, and at times carried customers, when requested to do so by the real estate firm. He received no pay from the customers. The finance company denied that the driver was its agent. There were objections to certain instructions. The court, in commenting on them, stated in part: "But if they took her out in the regular course of business in carrying prospects to that place, and accepted her as such, and she reciprocally had in her mind the idea that she might become an investor as a result of this transportation and observation, then the company undertook to get her out there and return her safely. She relinquished none of her rights to a safe conveyance whatever, took none of the responsibility in her own hands, and under those circumstances it requires, it seems to the court, a rather higher degree of care in transportation than it would if she were going with a friend in some pleasure ride, as a guest of the friend. Undoubtedly it must be the law, we think, under circumstances as peculiar as this, that one who rides in the interest of another and as a result of the solicitation of the transporter, is something more than a mere guest." The court cited the case of Champagne v. A. Hamburger & Sons, supra, on the point of common carrier and degree of care. But the court, in the finance company case, supra, states: "By analogy it would seem clear that where a real estate firm was engaged in a selling campaign, and as a part of the sales scheme was engaged in transporting customers or prospects to and from the real estate it was endeavoring to sell, it was a carrier for reward within the meaning of the sections of the California Code. * * *"

The sections of the Civil Code applicable hereto are as follows:

"2096. A carrier of persons without reward must use ordinary care and diligence for their safe carriage."

"2100. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

"2104. A carrier of persons for reward must travel at a reasonable rate of speed, and without any unreasonable delay, or deviation from his proper route."

The court, in the finance company case, supra, further stated: "* * * as the undisputed facts indicate, that she was a passenger for hire, for it is undoubtedly true that a higher degree of care was required in such case than the case of a guest, and that that higher degree of care was greater than the care denominated as reasonable or ordinary care."

In the case at bar, the evidence discloses that there was a consideration for the plaintiff's ride in McCord's automobile. She was therefore a passenger in McCord's automobile for hire, and for which compensation was given. The object of the trip to Dana Point was a business enterprise conducted by defendants Woodruff and Dana Point Syndicate, by which they and McCord received an indirect benefit. McCord was receiving pay for his expense, and, in case of the sale of property to a passenger, he was to obtain a further consideration from defendants Woodruff and Dana Point Syndicate. He was acting for Woodruff and Dana Point Syndicate and within the scope of his employment at the time of the accident. He was engaged in a business enterprise for the benefit of McCord, Woodruff, and the syndicate. Upon the evidence, the court had the right to determine the degree of care and negligence; and, as held by the trial court, McCord was guilty of willful misconduct and gross negligence, and defendant Richardson was also guilty of negligence. The accident was proximately caused by the joint negligence of both these defendants, and they are liable for the injuries sustained by plaintiff, as set forth in the findings.

We therefore hold that there was evidence upon which the trial court could determine the degree of negligence and the degree of care, and that it was sufficient to support the findings in that regard. We further hold: That McCord was the agent of Woodruff and Dana Point Syndicate; that respondent was a passenger for hire; that her injuries were the result of their joint negligence; and that such negligence was the proximate cause of the injuries sustained. Such negligence, whether gross or otherwise, as disclosed by the evidence, was sufficient to support the findings and judgment.

The judgment is affirmed.

BARNARD, J. (concurring).

In the first cause of action set up in the complaint, the plaintiff alleged, among other things, that she was a passenger in an automobile driven by the defendant McCord, and that she suffered injuries through the gross negligence and willful misconduct of this defendant. In a second cause of action, she alleged that she was so riding as a passenger, and that she suffered injuries through the negligence of McCord. At the close of the plaintiff's evidence, the court granted a motion for a nonsuit as to the second cause of action.

[1] While the order of nonsuit as to the second cause of action was erroneously entered, no appeal has been taken from the same and the error is immaterial, since the first cause of action sufficiently alleged that the plaintiff was a passenger, and that she suffered the injuries complained of through the negligence of the defendant McCord. Gross negligence necessarily includes negligence, and the fact that the allegation went further than was needed and alleged gross negligence resulted in no harm, and may be treated as surplusage.

[2-3] As shown in the preceding opinion, the evidence is ample to sustain the finding that the plaintiff was a passenger and not a guest in the automobile in which she was riding. Crawford v. Foster (Cal. App.) 293 P. 841; Smith v. Fall River, etc., District et al. (Cal. App.) 5 P.(2d) 930. The evidence is also ample to sustain the finding that the driver of the car in which the plaintiff was riding was guilty of negligence, and that this negligence was, jointly with the negligence of another defendant, the proximate cause of the injuries complained of. We concur in the conclusion reached in the preceding opinion.

The judgment appealed from is affirmed.

I concur: MARKS, J.

In re LANCES' ESTATE.*

BROWN v. BAKER.

Civ. 4521.

District Court of Appeal, Third District, California.

Dec. 30, 1931.

Rehearing Denied Jan. 29, 1932. Hearing Granted by Supreme Court Feb. 25, 1932.

1. Trial ⟹143.

Trial court can direct verdict for defendant notwithstanding evidence is conflicting, where no substantial evidence tends to prove all essential facts controverted.

2. Wills ⟹163(5).

Proof showing confidential relation between testator and beneficiary and that beneficiary helped prepare will raises presumption of undue influence.

3. Wills ⟹327.

Evidence justified directing verdict for proponent on issue of undue influence, even if proof showed confidential relation between

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 14 P.2d 768.

testator and sole beneficiary, who prepared will.

Evidence, although it disclosed that beneficiary under the direction of testator, performed the physical labor of writing the will, further disclosed that testator importuned beneficiary to prepare the will, first telling beneficiary that he desired to leave the property to beneficiary's daughter, and that beneficiary asked him not to do this, and that finally testator stated to beneficiary that he desired beneficiary to write the will in beneficiary's favor, which beneficiary did, so that the presumption of undue influence, if applicable, was fully dispelled, and there was no substantial conflict in the evidence.

Appeal from Superior Court, Mariposa County; J. J. Trabucco, Judge.

Contest of the will of William Lances, also known as Billy Lances, deceased. From an order of the trial court directing the jury to answer certain interrogatories favorable to Abner B. Baker, proponent, and from a decree and judgment admitting the will to probate, John Brown, contestant, appeals.

Affirmed.

C. A. Degnan, of Fresno, Vincent S. Brown, of San Francisco, and S. P. Galvin, of Merced, for appellant.

H. H. Carleton, of Mariposa, Andrew R. Schottky, of Merced, and Marshall Nuckolls, of San Francisco, for respondent.

PRESTON, P. J.

This is a contest of the will of William Lances, also known as Billy Lances, deceased. John Brown, the contestant, appeals from an order of the trial court directing the jury to answer certain interrogatories favorable to proponent, Abner B. Baker, and also appeals from the decree and judgment admitting said will to probate.

The grounds of contest are as follows: (1) Unsoundness of mind; (2) that said will was procured by the undue influence of Abner B. Baker; (3) that said will was procured by fraud of Abner B. Baker; (4) that said will was not executed in the manner and form required by law.

Abner B. Baker, the executor and beneficiary under the will, filed an answer to the contest denying all the allegations thereof. The case went to trial before a jury. When the evidence on both sides was fully concluded, the proponent Baker made a motion for a directed verdict on all four grounds of contest. The motion was based upon the contention that contestant had failed to offer any evidence to support any of the grounds of contest. The learned trial court granted the motion in its entirety.

The will was subsequently admitted to probate and Abner B. Baker was appointed executor thereof, and this appeal followed.

Appellant contends that the court erred in directing a verdict in favor of the proponent Abner B. Baker and especially on the issue of undue influence.

[1] The limits within which the trial court may exercise its power to direct a verdict have been definitely fixed and determined by many decisions of both the Supreme and Appellate Courts of this state, some of them of very recent rendition. In Re Estate of Caspar, 172 Cal. 147, page 149, 155 P. 631, 632, it was held that: "The right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given." To the same effect is In re Estate of Sharon, 179 Cal. 447, page 459, 177 P. 283, 288, where the rule is stated in the following language: "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

This rule has also been adhered to in the following cases: Card v. Boms, 210 Cal. 200, 291 P. 190; Bannister v. L. A. Ry. Corp., 203 Cal. 427, 264 P. 756; Duggan v. Forderer, 79 Cal. App. 339–343, 249 P. 533; Wayland v. Latham, 89 Cal. App. 55–59, 264 P. 766; Maberto v. Wolfe, 106 Cal. App. 202, 289 P. 218; Perera v. Panama-Pac. Int. Exp. Co., 179 Cal. 63, 175 P. 454; Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184; Rapp v. S. S. Co. (Cal. App.) 298 P. 67; In re Estate of Bryson, 191 Cal. 521, 217 P. 525; In re Estate of Unger, 188 Cal. 714, 206 P. 1003; In re Estate of Wall, 187 Cal. 50, 200 P. 929; In re Estate of Chevallier, 159 Cal. 161, 113 P. 130; In re Estate of Morey, 147 Cal. 495, 82 P. 57; In re Estate of Haupt, 200 Cal. 147, 252 P. 597; In re Estate of Casassa, 98 Cal. App. 97, 276 P. 366.

The facts disclosed by the record are briefly these: William Lances was an illiterate American Indian, but was possessed of considerable native ability and reasonably good business judgment. At the time of his death, he owned property in Mariposa county, where he lived, of approximately $25,000 in value, was unmarried, and had no children or other near relatives. John Brown, the contestant, is also an Indian, who claims to be an uncle of Lances, and one of his heirs at law.

Abner B. Baker is a white man and a duly licensed attorney at law, but had not been actively engaged in the practice of his profession for more than 20 years immediately prior to the trial of this case. He is listed by the State Bar of California as an "inactive member." He had been a close friend, neighbor, and adviser of Lances in business matters continuously for more than 20 years prior to Lances' death. He had, however, made no charges against Lances for any service he performed for him, but they exchanged work around their respective homes. Neither did Mr. Baker represent Lances in any litigation or other matters requiring special skill or learning in the law. The record shows that Lances had one action to quiet title in the superior court and, also, an important lease to be drawn. In both of these matters he was by Baker advised to and did have another attorney to represent him. In fact, for the last two years of his life, which included the time the will was made, the district attorney in that county was his legal adviser in all important legal matters.

We think, however, it is fair to conclude from all the evidence that Mr. Baker was Lances' confidential adviser in all ordinary business matters. Such advice was given to Lances more as a friend than as his attorney.

Several conversations occurred between Baker and Lances relative to the disposition by Lances of his property. Lances first suggested to Baker that he wanted to give his property to Baker's daughter, a girl of about ten years of age. Baker strongly discouraged this idea. Some months later, Lances suggested to Baker that he would give his property to him (Baker). After some further conversation and some days later Baker wrote the will in question in longhand and it was signed by Lances in Baker's home on December 19, 1929, in the presence of the two subscribing witnesses, and Baker and his wife. The will was then given into the possession of Lances and was found among his personal effects in his cabin after his death, which occurred on April 1, 1930—nearly four months after the will was made. The two subscribing witnesses testified that Lances asked them to witness his will and that Lances was in every respect competent to make a will and, also, testified to facts which show clearly that no fraud or undue influence of any kind had been practiced upon Lances by Baker, but, on the contrary, would establish the fact that said will was the free and voluntary act and deed of William Lances.

The testimony on the part of contestant goes no further than to present a case where a man, who, although admitted to the bar, had not practiced law for twenty years, draws a will for a close friend and neighbor who lived alone and had no near relatives, in which the retired attorney is the sole beneficiary under the will.

[2] We will concede for the purposes of this decision that contestant has, at least, made a prima facie showing that a confidential relation existed between Baker and Lances when the will was made. It is true that a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and the beneficiary "coupled with activity on the part of the latter in the preparation of the will." In re Estate of Higgins, 156 Cal. 257, 104 P. 6, 8; In re Estate of Baird, 176 Cal. 381, 168 P. 561; In re Estate of Nutt, 181 Cal. 522, 185 P. 393; In re Estate of Witt, 198 Cal. 407, 245 P. 197; In re Estate of Novotny, 94 Cal. App. 782, 271 P. 923, 273 P. 58.

[3] But the evidence in the case merely shows that Baker, under the direction of Lances, performed the physical labor of writing the will. This is the extent of Baker's "activity in the preparation of the will." There is no evidence showing, or tending to show, that Baker in any way "actively participated in procuring the will to be made." On the contrary, the evidence shows that Lances importuned Baker to prepare the will, first telling Baker that he desired to leave his property to Baker's daughter, and Baker asked him not to do this, and finally Lances stated to Baker that he desired Baker to write the will in Baker's favor, which Baker did.

We, therefore, have a mere disputable presumption of undue influence on the one hand, and the uncontradicted evidence of Baker and the two subscribing witnesses to the will, opposed to it on the other. Does this present a substantial conflict in the evidence? We think not.

There is nothing in contestant's case which amounts to more than conjecture, surmise, or suspicion that Baker might have unduly influenced Lances to make a will in his favor. In Re Estate of Donovan (Cal. App.) 299 P. 816, 817, in which the Supreme Court denied a hearing on July 16, 1931, the court said:

"The sole question here presented is whether or not there is evidence in the record, viewed in the light most favorable to contestants, which would warrant the jury in concluding that the contested instrument was the product of the uncontrolled mind of the testator. As the correctness of the ruling of the court depends upon the evidence offered by the contestants, it becomes necessary to review the same.

"Preliminarily it may be stated that, in determining whether or not in a proceeding to consider a will the evidence is sufficient to require its submission to the jury, the same rules apply as in civil cases. Every possible inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts in favor of the contestants. All of the evidence must be taken as true, and, if contradictory evidence has been received, it must be disregarded. Estate of Arnold, 147 Cal. 583, 586, 82 P. 252. It is equally well established, however, that a motion for a nonsuit should be granted whenever it would be the duty of the trial court to set aside the verdict of a jury against the validity of the will. A finding of undue influence cannot be based upon mere surmise or conjecture. In the absence, therefore, of substantial proof, the issue must be withdrawn from the jury, and under such circumstances failure of the court to grant a nonsuit will constitute reversible error. Estate of Luckenbach, 205 Cal. 292, 301, 270 P. 961; Estate of Haupt, 200 Cal. 147, 252 P. 597; Estate of Casassa, 98 Cal. App. 97, 276 P. 366."

In Re Estate of Luckenbach, supra, we find this language, which is particularly appropriate: "To justify the submission of any question of fact to a court or jury there must be proof of a substantial character that the fact is as alleged." See, also, In re Estate of Graves, 202 Cal. 258, 259 P. 935; In re Estate of Relph, 192 Cal. 451, 221 P. 361.

That is the exact situation in the case at bar. Contestant's evidence merely raises, as we have said, a disputable presumption of undue influence and does not create a substantial conflict in the evidence, and a verdict based thereon would have to be set aside as being unsupported by the evidence. Therefore, a directed verdict was proper.

Certainly a verdict holding the will invalid would not be permitted to stand, based, as it would have to be in this case, solely and alone upon this technical presumption of undue influence, in the face of all the undisputed evidence, surrounding facts and circumstances appearing in the record, which taken together, absolutely negatives any presumption, inference, or surmise that the will was, in the slightest degree, tainted by the influence of Baker.

We think the facts and circumstances adduced on behalf of contestant are fully sufficient to dispel, even under the rigid rule laid down in Smellie v. S. P. Co. (Cal. Sup.) 299 P. 529, the presumption of undue influence on the part of Baker. For example, the witness James Colvin Rust, produced on behalf of contestant, referring to a time in the middle of January, 1930, stated "that Lances claimed that Baker wanted him to sign some papers, but did not see what they were; Lances stated that somebody else did that business for him." Again, the evidence of Edward C. Hern, a witness for contestant, quotes Lances as stating to him in January, 1930, "that Baker was no friend of his; that he was always seeking to borrow money". Again the evidence of Alvis and Chris Brown, also witnesses for the contestant, referring to a time in the month of October, 1928, was to the effect that "Baker was attempting to borrow money from him but that he (Lances) refused to loan the money to him." The witness Grace Lebrado, produced by contestant, testified to the effect that Lances stated that "Baker wanted to live on his place but he did not want him to live there and secured a Mr. Anchor to take care of the place; that Baker was bothering him to sign something; that he hated Baker and did not like to have him around."

Lances, although uneducated, was by no means unintelligent, was in middle life when the will was made, and was not feeble either mentally or physically. He had the will in his possession for nearly four months after its execution and had ample opportunity to destroy it, if procured by coercion or undue influence of Baker. All these facts and circumstances and testimony on behalf of contestant are wholly inconsistent with the presumption sought to be established by contestant, and, in our opinion, fully dispel any presumption of undue influence.

We have given this case most careful consideration and diligently studied the able briefs filed on both sides, and we are of the opinion that the learned trial court was fully warranted in directing a verdict in favor of Baker upon all the grounds of contest.

There is no evidence whatever and no facts, inference or presumption to support the other three grounds of contest. Therefore, the order and decree and judgment should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

119 Cal.App. 404

In re MOSSMAN'S ESTATE.

ROBB v. HEATHERLY et al.

Civ. 8027.

District Court of Appeal, Second District, Division 1, California.

Dec. 24, 1931.

1. Wills 🔑324(2).

In will contest, evidence of testatrix' unsoundness of mind and mental incapacity *held* insufficient for jury.

2. Wills 🔑324(3).

In will contest, evidence of fraud, restraint, and undue influence *held* insufficient for jury.

3. Witnesses 🔑208(3).

In will contest, admission in evidence of confidential statements made by testatrix to Christian Science practitioners *held* proper, such unlicensed practitioners not being "licensed physicians or surgeons," in statutory sense (Code Civ. Proc. § 1881, subd. 4).

[Ed. Note.—For other definitions of "Physician," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

In the matter of the estate of Phebe J. Mossman, deceased. Will contest by Dorothy A. Robb, opposed by Fred W. Heatherly, as executor, and another, proponents. From a judgment admitting the will to probate and from an order denying contestant's motion for a new trial, contestant appeals.

Judgment affirmed, and appeal from order dismissed.

C. F. Culver, Charles J. Orbison, and Don S. Irwin, all of Los Angeles, for appellant.

H. R. Collins, of Los Angeles, for respondents.

YORK, J.

This is an appeal from a judgment in favor of the proponents of the last will and testament of Phebe J. Mossman, deceased. The proponents of the will are the former attorney of decedent and executor named in her will, and a daughter of decedent by her first marriage; the contestant being a daughter by a subsequent marriage. "The contest of will is based upon two grounds: to-wit, (1) Unsoundness of mind and mental incapacity and (2) fraud, restraint and undue influence."

At the close of contestant's case, a motion for nonsuit made by proponents was granted as to the first ground of contest. Thereafter, when all evidence was introduced, a verdict was directed in favor of proponents as to the second ground of contest. From the judgment entered pursuant thereto, and from the order denying contestant's motion for a new trial, this appeal is prosecuted. Appellant maintains that there was sufficient evidence to warrant submission of the issues to the jury; that the court committed error in that (1) it granted proponents' motion for nonsuit, (2) directed the verdict, and (3) admitted in evidence the confidential statements made by decedent to two Christian Science practitioners.

[1, 2] At the time the will in question was drawn, decedent was of the age of seventy years, was suffering from goiter, but was not confined to her bed, or even to the house. In fact, the evidence shows that she was physically active—did her own housework, worked in her garden, etc. Upon cross-examination, contestant testified: "Well she was up and down. She would have these bad spells and be in bed for a few days and get right up and drive over the Ridge Route to San Francisco, or some active thing like that." All those who knew her were of the opinion that she was of sound mind and that she "had a very strong will," the only evidence of any mental weakness being a slight lapse of memory on one occasion. We are therefore of the opinion that the evidence was insufficient to warrant submission to the jury of the issue as to "unsoundness of mind and mental incapacity," and that the court properly granted the motion for nonsuit as to that issue. No error was made by the court in directing the verdict in favor of proponents on the issue of "fraud, restraint and undue influence." At the date the will was drawn, both the proponent, Mrs. Early, and the contestant, Mrs. Robb, were living at the home of decedent. Proponent—according to her own testimony, which is corroborated by the contestant—had come to make her home with decedent on or about September 24, 1928, just a few days before the will was executed. Contestant remained at the home of her mother until about the 13th or 14th of October, 1928, when she removed to her own house, which was three doors away, and she continued to visit her mother "every day until the 24th day of January, 1930." While it is true that there is evidence of some unpleasantness existing between the contestant and proponent, there is no evidence that the decedent was influenced in any way by the proponent, Mrs. Early, in the making of her will, or that she was under the domination or control of said proponent at the time the will was executed. The strongest bit of evidence in support of this issue was the fact that Mrs. Early accompanied her mother to the office of the attorney on the day the will was drawn.

Contestant also testified that her mother had requested her (the contestant), in the late fall of 1928, to release her interest in the home place, but that after consulting with an attorney, she had declined to grant the request.

[3] As to the admission in evidence of the confidential statements made by decedent to the Christian Science practitioners, we are convinced that this ruling was proper. As we view it, such an unlicensed practitioner is neither a licensed physician nor surgeon in the sense that that term is used by the statute (Code Civ. Proc. § 1881, subd. 4).

The judgment admitting the will to probate is affirmed, and the purported appeal from the order denying contestant's motion for a new trial is dismissed.

We concur: CONREY, P. J.; HOUSER, J.

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119 Cal.App. 432

Ex parte CHASE et al.

Cr. 2121.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1931.

1. Criminal law 🔑99.

Where complaint fails to state public offense, court is without jurisdiction.

2. Habeas corpus 🔑27.

Where court was without jurisdiction to try accused, habeas corpus is the appropriate remedy.

3. Gaming 🔑77.

To visit place where gambling is carried on is crime only by virtue of statute.

4. Statutes 🔑224.

Statutes prohibiting gambling houses and houses of prostitution must be construed together (Pen. Code, §§ 315–318).

5. Criminal law 🔑45.

Under statute against "prevailing" on another to visit place kept for gambling or prostitution, offense is not complete until, as result of invitation, actual visit is made (Pen. Code, §§ 315–318).

[Ed. Note.—For other definitions of "Prevailing," see Words and Phrases.]

6. Criminal law 🔑45.

Statute prohibiting "prevailing" on another to visit place kept for gambling was not intended to extend state's laws beyond territorial limits (Pen. Code, § 318).

7. Indictment and information 🔑86(2).

Complaint charging that accused prevailed on persons to visit gambling ship "anchored off the coast" of Long Beach *held* to state public offense, although not alleging that ship was within three-mile limit (Pen. Code, § 318).

Complaint stated a public offense because failure to allege that ship was within three-mile limit was only an uncertainty in the form of the allegation, and not a total failure to state facts sufficient to constitute an offense against the state law. The phrase "anchored off the coast" implies a local relationship, is capable of being understood as referring to a place within territorial jurisdiction of the state, and ordinarily would be so understood.

Application by Clarence R. Chase and another for a writ of habeas corpus to secure release from custody on the ground of illegal detention.

Writ discharged, and petitioners remanded to custody.

Cooper & Collings and N. J. Kendall, all of Los Angeles, for petitioners.

John K. Hull, City Prosecutor, of Long Beach, for respondents.

CONREY, P. J.

By complaint filed in the municipal court of the city of Long Beach it was charged that on the 29th day of November, 1930, in the city of Long Beach, county of Los Angeles, state of California, a misdemeanor was committed by Clarence R. Chase, Clifford Casey, and other persons named, who "then and there wilfully and unlawfully, by invitation and/or device, did prevail upon persons to visit a place kept for the purpose of gambling, to-wit, the 'Johanna Smith,' a ship anchored off the coast of the city of Long Beach, in violation of section 318 of the Penal Code of the State of California." In due course of procedure, Chase and Casey were convicted. Each of the defendants was fined in the sum of $100, with an alternative of imprisonment. At the time of filing their application for writ of habeas corpus in this court, and until their release upon bail pending this proceeding, petitioners were imprisoned for nonpayment of said fine.

It is contended by petitioners that the commitment, under which they are held in custody, is void, by reason of the fact that the municipal court was without jurisdiction to try them under said complaint or to render any judgment of conviction thereon. Petitioners contend that, for stated reasons, the complaint against them did not state facts sufficient to constitute a public offense or cause of action against them or either of

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

them. Section 318 of the Penal Code reads as follows: "Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of gambling or prostitution, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not exceeding six months, or fined not exceeding five hundred dollars, or be punished by both such fine and imprisonment."

[1, 2] It appears to be conceded that, if the complaint in the action fails to state a public offense, the court was without jurisdiction, and habeas corpus is the appropriate remedy. Ex parte Greenall, 153 Cal. 767, 96 P. 804; Ex parte Wilson, 30 Cal. App. 567, 158 P. 1050.

[3-5] The principal question in this case arises from the contention of petitioners that the complaint fails to allege the commission of any crime within the state of California. To visit a place where gambling is carried on becomes a crime against the state only by virtue of such statutory prohibition as the state may choose to enact. In some countries and states adjacent to California, as well as on the high seas, there are no anti-gambling laws; but in California there are statutes designed for the prohibition within this state of gambling houses and houses of prostitution. Pen. Code, §§ 315–318, 330–331, 337, 337a. According to a well-approved rule of construction, these sections, in so far as they relate to the same subject, should be construed together. Section 318 of the Penal Code does not attempt to make it a crime for one person within this state to advise or invite or seek to persuade another to go into Mexico or to some ship on the high seas for the purpose of gambling. The offense consists in "prevailing" upon some person or persons "to visit any room, building, or other places kept for the purpose of gambling." Thus it is clear that the offense is not complete until, as a result of the invitation or device of the defendant, some person actually visits the gambling place.

[6, 7] We think it not reasonable to impute to the Legislature of California an intention to extend, or attempt to extend, beyond the legislative jurisdiction of the state, the operation of the criminal laws of this state. If the Legislature had such extraordinary intention or purpose, it should have been so expressed as to leave no room for doubt. Referring back to the complaint on which petitioners were convicted, we find therein no direct statement that the ship Johanna Smith, anchored off the coast of the city of Long Beach, was within the state of California. The stated fact was that "The Johanna Smith" was a ship anchored off the coast of the city of Long Beach. There is a great difference between a ship sailing on the high seas and a ship anchored "off the coast" of a particular state or city. The phrase "anchored off the coast" implies a local relationship to the land, although perhaps of a temporary character. The phrase is capable of being understood as referring to a place within the territorial jurisdiction of the state, and ordinarily would be so understood. It follows that the defect in the complaint, in its failure to directly declare that the ship was located within the "three mile limit" (assuming now that such was the necessary limit), was only an uncertainty in the form of the allegation, but was not a total failure to state facts sufficient to constitute an offense against the state law.

For the foregoing reasons, we are of the opinion that the facts alleged in the complaint were sufficient to state a public offense, of which the municipal court had jurisdiction.

The writ is discharged, and the petitioners are remanded to custody.

We concur: HOUSER, J.; YORK, J.

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119 Cal.App. 439

HARTKE v. ABBOTT.

Civ. 6928.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1931.

1. Pleading ⚷417.

Defendant amending answer waived right to object to order sustaining demurrer to original answer.

2. Bills and notes ⚷103(1).

Representations that plaintiff would use note as collateral security, would make further advances, and would return note before maturity, *held* not representations of fact supporting defense of fraud.

3. Bills and notes ⚷103(1).

Statement of plaintiff in securing note that he was short of money is not representation of fact.

4. Bills and notes ⚷477.

Defense of fraud *held* not shown in action on note, where there was no allegation of causal connection between plaintiff's representations and giving of note.

5. Pleading ⚷225(2).

Court may sustain demurrer without leave to amend answer where no meritorious defense appears, and there is no showing that objections raised could be met.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. Bills and notes 🔑534.

Fact that one suing on note was attorney, and that members of his law firm were attorneys of record, did not prevent recovery of attorney's fees provided for by note.

7. Judgment 🔑253(2).

In action on note, allowance of attorney's fees in amount exceeding demand of complaint *held* erroneous (Code Civ. Proc. § 580).

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by C. H. Hartke against F. C. Abbott. Judgment for plaintiff, and defendant appeals.

Modified and affirmed.

See, also, 289 P. 206, 106 Cal. App. 388.

Patrick F. Kirby, of Los Angeles, for appellant.

Woodruff, Musick & Hartke, of Los Angeles, for respondent.

FRICKE, Justice pro tem.

Plaintiff brought action upon a promissory note. A demurrer was sustained to the answer, and an amended answer having been filed, a demurrer to the latter pleading was sustained without leave to amend. From the judgment consequent to this ruling, the defendant appeals.

[1] Having elected to amend his answer, appellant waived his right to object to the order sustaining the demurrer to the original answer. It would be anomalous for a defendant to join issue by an amended answer, go to trial on the merits on issues chosen by himself, and then, when the cause was decided against him, assign error because of a ruling on an answer not involved in the trial and judgment.

[2, 3] The question is therefore as to the sufficiency of the amended answer. This pleading sought to set forth that the note had been obtained by fraudulent and false representations; to wit, that the plaintiff was "short of money" and that unless the defendant would execute to the plaintiff the note set forth in plaintiff's complaint he would be unable to advance any more money, and that if defendant would execute the note plaintiff would be enabled to use it as collateral security, and that plaintiff would advance further money to the defendant, and would return the note before maturity. The statements that the plaintiff would, if he received it, be enabled to use the note as collateral security, and that he would be unable to advance any further money, cannot be considered as, and are not representations of, facts which could be material or relevant to the giving of the note. The alleged promises are not statements of fact and are not supported by any alleged consideration. The allegation that the note would be returned fails to allege any condition for its return, and is inconsistent with the allegation that it might be used as collateral security. Finally, the nearest approach to a representation is that contained in the allegation that plaintiff represented he was "short of money." Such a statement is entirely too indefinite to be considered as a statement of fact which could be relied upon as the inducing cause of a financial transaction, and, indeed, may be a mere platitudinous statement of a chronic condition of most mortals.

[4, 5] While the answer alleges that defendant relied upon the alleged representations and believed them, there is absent the necessary allegation of a causal connection between the representations and the giving of the note. Furthermore, there is no allegation that the defendant did not receive the amount of the face of the note as a consideration therefor. Appellant argues that he was a mere accommodation maker, but the argument finds no basis in any allegation in the amended answer filed. The same may be said of the claim that the plaintiff was the "mere agent" of the defendant. The trial court properly sustained the demurrer, and in view of the fact that no meritorious defense appeared to be urged, and that there is no evidence of any showing to the trial court that the objection raised could be met, it was proper for the court to sustain the demurrer without leave to amend.

[6] Appellant contends that the court erred in allowing any attorney's fees as a part of the judgment. This argument is based on the contention that, though the note provides for attorney's fees, the respondent is an attorney at law, that the law firm of which he is a member are his attorneys of record, and that in fact respondent was appearing in propria persona. This contention is without merit.

[7] Appellant assigns as error the allowance by the court of the sum of $301 as attorney's fees while, though the note provided for 10 per cent. attorney's fees if collected by suit, the complaint demanded only $200 as attorney's fees. "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." Code Civ. Proc. § 580. The allowance of an excess over $200 for attorney's fees was therefore erroneous.

The judgment is modified by reducing the amount allowed for attorney's fees to $200, and, as so modified, is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

119 Cal.App. 412

DEAN et al. v. BROWER et al.

Civ. 4463.

District Court of Appeal, Third District, California.

Dec. 24, 1931.

1. Appeal and error 🔑907(2).

Where there was no testimony before appellate court to show whether finding was supported, it must be accepted as true upon appeal.

2. Landlord and tenant 🔑20.

"Lease" is conveyance of estate in real property for limited term, with conditions attached, in consideration of rent.

[Ed. Note.—For other definitions of "Lease," see Words and Phrases.]

3. Specific performance 🔑68.

Equity will sometimes decree specific performance of contract for sale of personal property, where justice so requires, and compensation and damages are uncertain or cannot be adequately determined.

4. Specific performance 🔑64.

Where contract concerns land, jurisdiction to enforce specific performance is undisputed, and does not depend upon inadequacy of legal remedy.

5. Specific performance 🔑64.

Equity has jurisdiction to decree specific performance of assignment of lease (Civ. Code, § 1215).

6. Appeal and error 🔑1178(6).

Where judgment decreeing specific performance of assignment of lease made no provision for payment of amount due by plaintiff, cause must be remanded for further proceedings to ascertain such amount.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by Harry Ellis Dean and another against Mrs. A. Brower and another. From a judgment for plaintiffs, defendants appeal.

Affirmed in part, and in part reversed and remanded.

McGee & Sumner, of Los Angeles, for appellants.

Walters & Mauk, of Los Angeles, for respondents.

PLUMMER, J.

The plaintiffs had judgment in an action for specific performance, from which judgment the defendants appeal. The cause is before us upon the judgment roll alone.

The court found that the plaintiffs and defendants, on or about the 16th day of August, 1921, entered into an agreement of purchase and sale, whereby the defendants agreed to sell and deliver to the plaintiffs a certain government lease No. 87, and a furnished cottage on the leased premises, then used and occupied by the defendants, for the sum of $1,500 with certain payments made at the time of the execution and delivery of the agreement, and the remainder thereof to be made in partial payments; that at the time of the beginning of this action there remained but one payment to be made upon the contract in the sum of $75. The court further found that the plaintiffs, at all times, had been ready, willing, and able to make final payment, and that the defendants had refused to execute and deliver an assignment of the lease referred to, although they were able to make a good and valid assignment thereof. The finding of the court in this particular is as follows: That the plaintiffs, by said agreement, were to pay to the defendants the sum of $1,500; that said plaintiffs have paid on account of said contract price $1,405.98, and have been always ready, able, and willing to pay the balance due thereon, according to the terms and conditions of said contract; and that plaintiffs have duly performed all the conditions and covenants of said agreement on their part to be performed, and have demanded of the defendants that they deliver a good and sufficient assignment, etc., of the lease referred to.

The court further found that the agreement of sale between the parties was just and equitable, and that the price agreed to be paid was the reasonable value of the premises. The court further found that the plaintiffs had tendered to the defendants the balance due upon the contract.

The defendants based their appeal upon the contention that the plaintiffs had not complied with the contract, and that on December 27, 1922, the defendants gave notice to the plaintiffs that they were in default in making payments, and that while payments had been accepted at a later date than specified in the contract, unless the final payment was made within ten days the defendants would declare a forfeiture thereof. In response to this notice it appears in the findings that the plaintiffs deposited in the office of the Western Union Telegraph Company in Los Angeles a sum of money to cover the final payment and whatever interest was due thereon, for the uses and purposes of the defendants; that the defendant Mrs. A. Brower was notified by the telegraph company of the money being there in the office, but was not told by whom it had been deposited; that the defendant Mrs. A. Brower did not go to the office after the money, and had not received the same at the time of the trial of this action.

[1] The answer of the defendants further alleged that the plaintiffs were in default on the 27th day of December, 1922, at the time of giving the notice just referred to. The finding of the court in this particular, however, is contrary to the allegations set forth in the defendants' answer. We set forth that portion of the finding necessary to show that the plaintiffs were not in default at the time the notice was given, to wit: "The court further finds in the answer of paragraph II of defendants, that it is not true that demand was not made by the plaintiffs on either of said defendants to deliver the title to said lease showing title vested in the plaintiffs or either of them as buyers, by delivering or executing to said plaintiffs as buyers a good and sufficient, or any assignment of said lease, or at all; that it is true that the defendants have refused to execute said assignment, necessary to carry out the terms or agreement on their part to be performed; that it is not true that on December 27, 1922, plaintiffs were in default under the terms of the contract mentioned in plaintiffs' complaint, as Exhibit A." (Exhibit A is the contract or agreement of purchase and sale to which we have referred.) As the testimony is not before us, and consequently no showing as to whether this finding is or is not supported, it must be accepted as true upon this appeal, and therefore eliminates consideration of all questions relating to the notice and the sufficiency of the alleged tender of the assignment of the lease, and, likewise, all questions as to the sufficiency of the plaintiffs' tender of the unpaid portion of the purchase price.

[2, 3] On the part of the appellants it is contended that specific performance will not be decreed requiring the assignment of the lease. This contention is based upon the assumption that specific performance will not be decreed where personal property only is involved, and that the leasehold interest involved in this action is only a chattel real, and is governed by the law relating to personal property.

A "lease" is thus defined in 35 C. J. 1140: "A lease is generally regarded as a conveyance or grant of an estate in real property for a limited term, with conditions attached, and in this connection has been defined as a conveyance to a person for life or years or at will, in consideration of a return of rent or other recompense, and as a conveyance of any lands or tenements, usually in consideration of rents or other annual recompense," etc. Section 1215, Civil Code, reads: "The term 'conveyance,' as used in sections 1213 and 1214, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills." The sections referred to in section 1215, supra, specified what instruments must be recorded to give notice. That specific performance will lie to compel the renewal of a lease was held by this court in the case of Penilla v. Gerstenkorn, 86 Cal. App. 668, 261 P. 488, 489. In the opinion in that case the following language was quoted with approval: "The right of renewal constitutes a part of the tenant's interest in the land, and, in the absence of a covenant to the contrary, may be sold and assigned by him, and the benefits of this right may be enforced by the assignee." Citing Taylor's Landlord & Tenant, § 332; Standard Oil Co. v. Slye, 164 Cal. 435, 129 P. 589. Even though personal property only is involved, equity will sometimes decree specific performance of a contract of sale where justice so requires and compensation and damages are uncertain or cannot be adequately determined. Wait v. Kern River Mining, etc., Co., 157 Cal. 16, 106 P. 98, 101. The court there used the following language: "The right of a court of equity to decree specific performance 'does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages.'" Citing Senter v. Davis, 38 Cal. 450; Fleishman v. Woods, 135 Cal. 261, 67 P. 276.

[4, 5] It is also held in this state that a lease of real property containing a covenant to renew, is a conveyance of real property within the meaning of section 1215 of the Civil Code. See, also, section 9, Pomeroy on Specific Performance, where this language is used: "Where the contract involved concerns land, or in general, where land or any estate or interest is the subject of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy of the case." Other cases might be cited, but the foregoing are sufficient to show that equity has jurisdiction to decree specific performance of an assignment of a lease. No distinction can be drawn between cases holding that equity will decree the execution of a lease, the renewal of a lease, and one where the question involves an assignment of a lease.

[6] As contended for by the appellants, the court failed to find the amount which should be paid by the plaintiffs to the defendants upon delivery of the assignment of the lease referred to, and in the judgment entered failed to make any provision for such payment or making the delivery of the assignment contingent thereupon. The record shows that the defendants have gone into the possession of the premises, but there is no showing as to the value of the use and occupation thereof, or of the rental value of the premises which might be allowed as an offset.

It therefore follows that the cause must be remanded for further proceedings to ascertain what amount, if any, is due from the plaintiffs to the defendants, and what amount, if any, should be paid upon receipt of the assignment of the lease in controversy.

The judgment of the trial court, in so far as it decrees specific performance, is affirmed. As to all other particulars the judgment is reversed and the cause remanded for the sole purpose of ascertaining the amount, if any, due from the plaintiffs to the defendants, to be paid upon receiving the assignment of the lease heretofore mentioned in the agreement entered into between the plaintiffs and the defendants. Neither party will be allowed costs.

We concur: PRESTON, P. J.; THOMPSON, J.

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119 Cal.App. 509

BARD v. STANDARD MORTGAGE CORPORATION et al.

Civ. 8154.

District Court of Appeal, First District, Division 2, California.

Jan. 4, 1932.

1. Appeal and error 🔑671(3).

No evidence respecting issue being printed, sole question on appeal was legal soundness of conclusion based on fact findings, determinable as appeal on judgment roll.

2. Marshaling assets and securities 🔑10.

Doctrine of marshaling assets was inapplicable where parties were not creditors of same debtor, and there were not two funds of common debtor to which one creditor alone could resort.

3. Marshaling assets and securities 🔑10.

Plaintiff who constructed building for lessees in consideration of notes secured by trust deed covering leasehold *held* not entitled to marshaling of assets on foreclosure of prior trust deeds executed by owner not obligated to plaintiff.

4. Appeal and error 🔑901.

Appellant must establish error claimed.

5. Appeal and error 🔑931(1).

Appellate court must assume trial court properly exercised discretion to deny declaratory relief (Code Civ. Proc. § 1060 et seq.; § 1061).

6. Marshaling assets and securities 🔑4.

Fee owner's unsecured obligation to plaintiff constructing building for lessees could not be considered on question of marshaling assets sought by plaintiff on foreclosure of trust deeds.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Samuel F. Bard against the Standard Mortgage Corporation and others. From an adverse judgment, plaintiff appeals. Affirmed.

Samuel W. Newman, of Los Angeles, for appellant.

Woodruff, Musick & Hartke, of Los Angeles, for respondents Standard Mortgage Corporation, California United States Bond & Mortgage Corporation, Title Insurance & Trust Co., Flossy M. Coverley, Charles E. Coverley, Harvey M. Coverley, and Charles E. Coverley and Harvey M. Coverley, administrators of the estate of John H. Coverley.

Clyde R. Burr, of Los Angeles, for respondent W. J. Wright.

Clyde H. Morrill, of Los Angeles, for respondent H. I. Armstrong.

NOURSE, P. J.

Plaintiff sued in equity to restrain the sale of real property under foreclosure of a trust deed, and to compel the marshaling of assets held by defendant California United States Bond & Mortgage Corporation. Plaintiff also asked for declaratory relief. From a judgment for defendants, the plaintiff appeals on typewritten transcripts.

[1] The conclusion of the trial court that plaintiff was not entitled to a marshaling of the assets was based upon findings of fact which are not attacked upon this appeal. No part of the evidence touching this issue is printed; hence the question on this appeal becomes solely a question of the legal soundness of this conclusion based upon facts as found, and is to be determined in the same manner as if the appeal were taken upon the judgment roll.

Upon this issue, the trial court found:

That on July 25, 1927, the record title to the property was in defendant Leroy Montgomery; that prior to that time he had executed a deed conveying the property to John H. Coverley; that this deed had been delivered but was not recorded until December 4, 1928; that prior to July 25, 1927, Coverley had negotiated with Armstrong and Wright, and, as a result thereof, the premises were lease by Montgomery to Armstrong and Wright for a period of twenty-five years at a total rental of $425,000; that Armstrong and Wright agreed to erect an apartment house on the premises, and, for that purpose, obtained a loan of $315,000 from the Mortgage Guarantee Company secured by a deed of trust covering both the fee and the leasehold interest; that thereafter a second loan in the sum of $105,000 was made by Coverley, secured in the same manner, and Wright entered into a contract with appellant whereby the latter agreed to construct an apartment house on the premises for the sum of $545,000; that thereafter Wright executed a series of promissory notes in the total sum of $125,000 in favor of appellant, all of which were secured by a deed of trust covering the leasehold interest alone, and all of which were made subordinate to the liens of the $315,000 and $105,000 loans which covered both the fee and the leasehold; that as a part of the arrangement for the $105,000 loan to Wright and Armstrong, they paid to Coverley $43,000 to apply as rent for the first, twenty-fourth and twenty-fifth years of the term; that, in order to raise the funds to make the $105,000 loan to Wright and Armstrong, Coverley, on July 29, 1927, executed his promissory note in that amount in favor of Standard Mortgage Corporation, and, to indemnify the mortgage company against loss upon this and other obligations of Coverley to that company, Coverley took out certain policies of life insurance in which the mortgage company was named as beneficiary; that these obligations of Coverley were assigned to the California United States Bond & Mortgage Company; that Coverley died on December 6, 1928, and the proceeds of these policies amounting to $69,509.40 were paid to that company; that the lessees defaulted in the payment of the rent on the premises and the lease was duly terminated on October 26, 1928; that, prior to the death of Coverley, but subsequent to the termination of the lease, default occurred on the $105,000 obligation and proceedings were duly instituted to foreclose the trust deed covering that obligation. Before a sale was had under said proceedings this action was commenced to restrain the sale.

[2] Manifestly, upon these facts, the only proper conclusion is that made by the trial court because the parties are not creditors of the same debtor and because there are not two funds belonging to a common debtor to which funds one of the creditors alone may resort. The application of the doctrine of marshaling of assets is fully considered in McCarthy v. Kurkjian, 65 Cal. App. 569, 574, 224 P. 1016, 1019, where the court say: "That before a court of equity will marshal securities between two persons it must appear: (1) That they are creditors of the same debtor; (2) that there are two funds belonging to that debtor; (3) that one of them alone has the right to resort to both funds. These principles are sustained by the following authorities: Quinnipiac Brewing Co. v. Fitzgibbons, 73 Conn. 191, 47 A. 128, 130; Robinson v. Lehman, 72 Ala. 401, 404; Stevens v. Church, 41 Conn. 369; Brooks v. Rice, 56 Cal. 428; Kent v. Williams, 114 Cal. 537, 46 P. 462; Blair v. Ward, 10 N. J. Eq. 125."

[3] The application of this doctrine to the present case is plain. Coverley was the debtor of the mortgage company upon two promissory notes, one of which was secured by a deed of trust upon the fee and the leasehold interest; the other was partially secured by collateral. Wright, the lessee, was the debtor of the appellant upon a note secured by the leasehold alone. Coverley was in no way obligated to the appellant upon this obligation.

[4, 5] It is argued that the trial court erred in failing to declare all the rights of the parties as prayed in the complaint. In this connection, it is said that it might have been possible that the leasehold estate had been terminated through some fault of the lessor, and, if so, the lessee would have been entitled to a refund of prepaid rentals, and hence the appellant would have become a creditor of Coverley. But we have no evidence that would have justified such a finding, and it needs no citation of authority to the point that, when an appellant claims error, he must show it. His right to sue for declaratory relief is covered by section 1060 et seq., Code of Civil Procedure. Section 1061 authorizes the court to deny the relief when its declaration "is not necessary or proper at the time under all the circumstances." In the absence of a showing to the contrary, we must assume that the trial court properly exercised its discretion in this respect.

[6] Criticism is also made of the failure to find that Coverley was indebted to appellant in the sum of $35,000 for money loaned. It is not suggested that this obligation was secured in any way, or that it had any connection with any of the securities upon which the parties rely. If this obligation was not secured, we cannot see how it has any bearing upon the issue of marshaling of assets as it is presented under the facts of this case which is confined to a case where the creditors have successive liens upon the same property; the one prior in right having other securities. Story on Equity, §§ 853 et seq. Furthermore, the appellant did not plead that Coverley was indebted to him in this amount, and any testimony relating to the so-called loan was outside the issues.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

119 Cal.App. 504

NEISWENDER v. CAMPBELL et al.

Civ. 8147.

District Court of Appeal, First District, Division 2, California.

Jan. 4, 1932.

1. Appeal and error 🔑1010(1).

Trial court's finding, supported by substantial evidence, cannot be disturbed on appeal.

2. Brokers 🔑53.

As respects broker's commission, "proximate cause" is the setting in motion of series of events operating on minds of prospective contracting parties starting them, without break in chain of events, toward ultimate agreement.

[Ed. Note.—For other definitions of "Proximate Cause," see Words and Phrases.]

3. Brokers 🔑53.

Broker cannot recover commission by merely indirectly or incidentally contributing to success of venture, but must be predominating effective cause thereof.

4. Brokers 🔑53.

If broker's efforts are primary, but not effective, cause, they are not proximate procuring cause.

5. Brokers 🔑40.

Brokerage contract to procure financing of oil well on certain lot *held* not to entitle broker to commission on contract relating to financing of another lot.

The facts were that proposition for financing the lot involved in brokerage contract was rejected by the oil company which broker introduced to principal, and thereafter, without broker's participation or knowledge, representatives of the oil company solicited from principal the opportunity to finance other property.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by C. B. Neiswender against E. B. Campbell and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Edward A. Adams and Newlin & Ashburn, all of Los Angeles (A. W. Ashburn, of Los Angeles, of counsel), for appellant.

Andrews & Andrews, Mortimer A. Kline, and Jerry H. Powell, all of Los Angeles (I. Henry Harris, of Los Angeles, of counsel), for respondents Reidy.

WARD, Justice pro tem.

The complaint in this action alleged an agreement under the terms of which plaintiff was to procure for defendants the necessary finances to drill an oil well or to procure a responsible party or parties so to do. In May, 1927, defendant E. B. Campbell was the owner in fee simple of a lot situated on State street in Los Angeles county which will be referred to as lot No. 1. Among other properties, Campbell had a half interest as lessee in the property designated as lot No. 8, several blocks away on Obispo street. The other half interest as lessee belonged to defendant P. M. Reidy. At the time mentioned in the complaint, the Obispo well on lot No. 8 had been drilled to the depth of about 3,500 feet. In May, 1927, through a mutual friend, Campbell met appellant and authorized him to secure financing to the extent of 50 per cent. of the money required to drill a well on State street lot, No. 1. Campbell was to furnish steam, pipe, etc. Appellant was to be paid an amount equal to one-sixth of the 20 per cent. of the so-called landowner's royalty reserved by Campbell. Appellant introduced Campbell to representatives of the Richfield Consolidated Oil Company. After several conversations relative to lot No. 1, further negotiations were dropped as to that particular parcel of land, and the Richfield Company entered into a contract with all of the defendants to finance to the extent of $15,000 the drilling on lot No. 8. This contract is claimed to have been the proximate result of appellant's efforts, but the trial court upon this issue held with the defendants.

[1] Appellant contends that the evidence shows that during the pendency of the negotiations inaugurated by appellant that defendant Campbell revamped the deal by skillfully guiding the Richfield representative from State street to the Obispo property and by substituting one lot for the other; that, while the original agreement between appellant and Campbell was relative to lot No. 1, Campbell really intended to interest the Richfield Company in lot No. 8 and thereby defraud appellant. This contention can only be based upon suspicion and surmise. Campbell exhibited the Obispo and other property to the Richfield representatives, but the first notification that Richfield was not interested in lot No. 1 came from the Richfield representatives, and likewise the suggestion to deal with Campbell in an agreement to finance lot No. 8. There is some evidence that, if the Richfield representatives did not like lot No. 1, perhaps they would be interested in going in on some other location, and that the same commission arrangement would apply on other locations. The circumstances surrounding the transaction do not bear out the last-mentioned contention. The trial court's finding upon this

subject cannot be disturbed, in view of substantial evidence supporting it.

[2-5] It is conceded that the contract for financing with a commission of 3⅓ per cent. was expressly directed toward lot No. 1, but appellant contends that the ultimate financing of another lot did not break the causal chain, and that his efforts resulted in the consummated deal; that the proximate cause of the execution of the Obispo contract was the introduction of Campbell by appellant to the Richfield representatives. In the branch of law applicable to brokers' commissions, proximate cause is the setting in motion of a series of events operating upon the minds of the prospective contracting parties starting and procuring them, without a break in the chain of events toward an ultimate agreement. In Smith v. Preiss, 117 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 820, quoted in Roth v. Thomson, 40 Cal. App. 208, 215, 180 P. 656, 659, the court said: "In order for the broker to recover, the evidence must show that his efforts were the procuring cause, and not merely one in a chain of causes." A broker may not indirectly or incidentally contribute to the success of a venture and recover a fee, but, to enable him to recover, his efforts must be the predominating effective cause. Sessions v. Pacific Improvement Co., 57 Cal. App. 17, 206 P. 653. If the efforts of the broker are the primary cause, but the primary cause is not the effective cause, then such efforts cannot be classified as the proximate procuring cause. Bail v. Glantz, 78 Cal. App. 49, 54, 248 P. 258. In this case a mere introduction of the prospective contracting parties was the sum total of the efforts of the broker. If this introduction was the effective cause of the particular executed contract, then appellant is entitled to recover. Appellant was authorized to negotiate a well-drilling contract on lot No. 1 on State street. The actual contract was relative to lot No. 8 on Obispo street. The State street proposition was rejected, and, without participation or knowledge by appellant, the Richfield representatives solicited from Campbell the opportunity to finance the Obispo property. Appellant's contract with Campbell was special and not general. This special undertaking failed. The mere introduction of the contracting parties is not sufficient to recover. Backman v. Guadalupe Realty Co., 78 Cal. App. 347, 352, 248 P. 296; Naylor v. Ashton, 20 Cal. App. 544, 130 P. 181; Holland v. Flash, 20 Cal. App. 686, 130 P. 32; Lichtig & Rothwell, Inc., v. Ruggles, 67 Cal. App. 414, 227 P. 781; French v. McKay, 181 Mass. 485, 63 N. E. 1068; Brown v. Mason, 155 Cal. 155, 99 P. 867, 21 L. R. A. (N. S.) 328. This was not a written contract, but the oral contract was specific in the designation of the State street lot as the property to be financed.

The finding of the trial court that the agreement pleaded was not made is borne out by an examination of the conditions relative to the two parcels of land. Campbell was the sole owner of the State street lot, and no well had been started thereon. Campbell was to reserve a 20 per cent. landowner's royalty, and the financers were to obtain a 50 per cent. partnership. Campbell was not the owner of the Obispo property, but, jointly with defendant Reidy, held a lease thereon under which a well was then being drilled. In the contract consummated, the Richfield Company purchased approximately one-eighth interest in the lease; the landowner's royalty remaining with one Charles F. Martin, not a party to this action.

Twogood v. Monnette, 191 Cal. 103, 215 P. 542; Sessions v. Pacific Improvement Co., supra, and Moore v. Borgfeldt, 96 Cal. App. 306, 273 P. 1114, cited by appellant, reflect the law relative to a change in terms of a general authorization. This statement is likewise true of the citations from other jurisdictions. The case of W. Ross Campbell Co. v. Herbert's of Los Angeles (Cal. App.) 293 P. 805, is more in point, but there is some difference between the facts of that case and the one under consideration. In W. Ross Campbell Co. v. Herbert's of Los Angeles, the court held there was an implied contract between the broker and the lessor. In the instant case there was an express contract between the broker and the owner. In the cited case the broker's client substituted one lease interest for another. In the case at bar the switch in lots was, upon the suggestion of the prospective contracting party, produced by the broker and not upon the suggestion of the broker's client. In the Campbell Case the law was applied upon the facts as found with particular reference to the conduct of the parties. In the present case, appellant forcibly contends that one proposition was imperceptibly blended with the other, but the trial court found otherwise upon evidence sufficient to support the court's views.

Having sustained herein the finding that appellant's services were not the procuring cause of the consummated contract, and that the agreement between appellant and respondent was an express contract relative to lot No. 1 on State street, it is unnecessary to consider the contention that appellant is entitled to recover in quantum meruit.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

119 Cal.App. 226

VINOLE et ux. v. CASO.

Civ. 4384.

District Court of Appeal, Third District, California.

Dec. 15, 1931.

Rehearing Denied Jan. 14, 1932.

1. Witnesses 🔑379(4), 397.

Plaintiff's written statement to insurance adjuster contradicting plaintiff's testimony *held* competent only for determining credibility, and not controlling on contributory negligence issue.

2. Witnesses 🔑397.

In determining probative value of plaintiff's statement to insurance adjuster contradictory to testimony, court could consider circumstances under which statement was obtained.

3. Appeal and error 🔑1068(1).

Where both plaintiffs were found free from contributory negligence, any error because of conflicting instructions respecting contributory negligence *held* cured by verdict.

In several instructions given at request of plaintiff, jury were told that, to sustain defense of contributory negligence, it was necessary for defendant to establish plaintiffs' negligence by preponderance of evidence. At defendant's request, court instructed that, as plaintiffs were husband and wife, if they found husband negligent, neither plaintiff could recover. Even if jury were misled and confused to defendant's prejudice by such instructions on theory that they placed on defendant burden of proving that both plaintiffs were contributorily negligent, verdict fixing separate damages for husband and wife impliedly found that neither plaintiff was contributorily negligent.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by George Vinole and wife against D. Caso. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

Devine & Devine and Valentine C. Hammack, all of San Francisco, for respondents.

Mr. Justice pro tem. TUTTLE delivered the opinion of the court.

This is an action brought by George Vinole and Nan Vinole, his wife, to recover damages for personal injuries alleged to have resulted from an automobile collision.

The case was tried before a jury and a verdict rendered, which fixed the damages to the husband at $1,500 and those to the wife at $7,500. This appeal is prosecuted from the judgment entered upon the verdict.

On the evening of July 5, 1929, one of defendant's employees parked a truck on N street in the town of Newman. The street was dark, and the truck was parked at an angle of ninety degrees to the curb, about halfway down the block. It had a large "box-car" body and extended out 18 feet and 10 inches into the street. There was no taillight burning on the truck, as required by the California Vehicle Act (St. 1923, p. 551, § 106). Plaintiffs were riding in their automobile, and had turned the corner into N street. The husband was driving, and their lights were on. As they drove down N street, the right side of their car struck the corner of the truck which extended furthest into the highway, resulting in personal injuries to both plaintiffs.

A reversal is sought upon the grounds, first, that the court erred in refusing to grant a nonsuit; and, second, that the court erred in instructing the jury.

[1, 2] The negligence of appellant's employee in leaving the truck upon the highway at night without lights is conceded by appellant, but it is earnestly contended that contributory negligence upon the part of Mr. Vinole bars a recovery. This contention arises out of the following evidence: Upon his examination in chief, plaintiff George Vinole testified that, when he was proceeding down N street, he was looking ahead. When he was cross-examined, he was shown his signed statement, made some time previous to the trial, wherein he stated that he was not looking ahead, and for this reason did not see the truck. This statement was secured by a representative of a casualty company which was evidently interested in the matter. At the outset of the cross-examination, Vinole testified: "I was looking ahead." By means of an ingenious method of elimination, and upon a recross-examination, the following testimony was extracted by appellant: "Q. Well, you don't state anything about the time—yes you do, you state about 8:45. Outside of that, though, and outside of the distance on the street, down from the corner and the width of the street, the statement you made at that time is true, is it? A. Yes."

From the foregoing, appellant contends that the jury could have arrived at one conclusion only; namely, that Vinole was not looking ahead, and that such finding would constitute contributory negligence. There is no merit in the contention. The statement was used for the purpose of impeachment. The jury decided that the attempt at impeachment was unsuccessful and a failure, and there the matter ends. This situation is fully covered by the case of Miller v. Geary, 298 P. 843, 844, where this court, speaking through Mr. Justice Thompson, said: "The contradictory statement was competent only for the purpose of determining the credibility of the witness. It is not necessarily controlling. The court had a right to consider the circumstances under which it was obtained and the interest of the insurance adjuster who prepared and procured it. The evidence that the passing machine was really traveling on its proper side of the highway is quite convincing. At least this court is bound by the conclusion of the trial court in that regard."

The motion for nonsuit was properly denied. For like reasons the court did not err in refusing to direct a verdict for appellant.

[3] Conflicting instructions are also urged as a ground for reversal. In several instructions, given at request of plaintiff, the jury were told that, to sustain the defense of contributory negligence, it was necessary for defendants to establish the fact, by a preponderance of the evidence, that plaintiffs were negligent. At the request of defendant the court instructed the jury that, as plaintiffs were husband and wife, if they found the husband negligent, neither party could recover. The court also instructed the jury that the negligence of the husband would bar the right of recovery for both husband and wife, and this subject was covered several times in other instructions. Appellant argues that the instructions given at the request of plaintiff place upon him the burden of proving that both plaintiffs were negligent, while defendant's instructions only require that they prove one plaintiff (the husband) negligent, to bar a recovery by either. He thus concludes that the jury were misled and confused to his prejudice. But, assuming that appellant is correct, was he prejudiced? By separate findings, the jury awarded damages to each plaintiff. This verdict carries with it the implied finding that neither plaintiff was guilty of contributory negligence. Since both plaintiffs were found free from negligence, it is a futility to argue the question as to the effect of the negligence of one of them upon the other, and any alleged confusion resulting from instructions covering these questions. It is a plain case (if we concede the error), where such error is cured by the verdict. Power v. Crown Stage Co., 82 Cal. App. 660, 256 P. 457. Furthermore, considering the charge as a whole, it would seem that the use of the plural was without prejudice. Apparently it was an inadvertence which did not destroy the general effects of the charge. The jury were especially admonished to consider the charge as a whole.

The judgment is affirmed.

We concur: PRESTON, P. J.; PLUMMER, J.

214 Cal. 558

HOLT v. MILLER et al.

L. A. 11399.

Supreme Court of California.

Jan. 14, 1932.

1. Mechanics' liens 🔑**284.**

Court had discretion to dismiss action to foreclose mechanic's lien for want of prosecution after two years; judgment for plaintiff having been set aside (Code Civ. Proc. § 1190).

On the day set for trial, no appearance was made by either of defendants, and, after waiting reasonable time, trial court proceeded to hear case and enter judgment for plaintiff. Thereafter defendant filed notice of motion for order vacating and setting aside such judgment on ground that defendant's absence was due to mistake, inadvertence, and excusable neglect. This motion was granted, and no further steps were taken until about a year thereafter when defendants filed and served notice of motion to dismiss action for want of prosecution on ground that such action had not been brought to trial within two years from the commencement thereof, under Code Civ. Proc. § 1190.

2. Mechanics' liens 🔑**284.**

Court *held* not to have abused discretion in dismissing action to foreclose mechanic's lien for want of prosecution after judgment in defendant's absence was set aside (Code Civ. Proc. § 1190).

3. Mechanics' liens 🔑**284.**

Owner of realty is entitled to move dismissal of action to foreclose mechanic's lien.

If either legal or equitable owner, such person has such an interest in the real property as would entitle him to move the dismissal of foreclosure action for the purpose of clearing the title to the real property of the cloud thereon resulting from the filing of lien of record and institution of foreclosure suit.

In Bank.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action to foreclose mechanic's lien brought by Lee Holt, H. G. Holt, assignee, against Clinton E. Miller and another. From judgment of dismissal, plaintiff appeals.

Affirmed.

J. A. Coleman, of Los Angeles, for appellant.

Marion P. Betty and Newby & Palmer, all of Los Angeles, for respondents.

CURTIS, J.

Appeal from a judgment of dismissal for want of prosecution of the above-entitled action on the ground that said action had not been brought to trial within two years after the commencement thereof. The action was one for the foreclosure of a mechanic's lien, and was commenced on September 14, 1926. On January 7, 1929, the court, upon motion of defendant, Howard G. Thompson, Inc., dismissed said action on the ground above stated.

[1, 2] The portion of section 1190 of the Code of Civil Procedure material to this appeal reads as follows: "No lien provided for in this chapter binds any property for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; * * * and in case such proceedings be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution." Two years having intervened between the commencement of said action and the order dismissing the same, the trial court was empowered by said section of the Code in its discretion to dismiss said action for want of prosecution. The order or judgment of dismissal was therefore valid unless the following additional facts take the case out of the statute and deprive the trial court of authority to make said order. These facts, briefly stated, are as follows: After the case was at issue, it was set for trial for December 5, 1927. On said day the plaintiff appeared ready for trial. No appearance was made by either of the defendants. After waiting a reasonable time for the defendants and neither of them appearing, the trial court proceeded to hear the case, and at the conclusion of said hearing entered judgment in favor of the plaintiff. Thereafter the defendants filed a notice of motion and served the same on the plaintiff for an order vacating and setting aside said judgment in favor of the plaintiff on the ground that the same had been entered in the absence of the defendants and their counsel, and that their absence from said trial was due to their mistake, inadvertence, and excusable neglect. This motion was granted by the court apparently on the 19th day of December, 1927. No further steps appear to have been taken in said action until about a year thereafter when the defendants filed and served their notice of motion to dismiss said action for want of prosecution on the ground that said action had not been brought to trial within two years from the commencement of the same.

In his opening brief the plaintiff relies solely upon the case of Mazitelli v. Crane, 35 Cal. App. 264, 266, 169 P. 721, 722, which, in con-

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struing section 583 of the Code of Civil Procedure, holds that, where a motion was made to dismiss an action under said section on the ground that it had not been brought to trial within five years after it was at issue, "the plaintiff has fully performed his duty to the court when he has moved the case upon the calendar and caused it to be set for trial, and is in court and ready to proceed to trial at the appointed time; and thereafter he is not in default if the case is not actually tried within the five years after issue joined." That case, as pointed out by the respondents in their brief, has been expressly overruled by the more recent decisions of Ravn v. Planz, 37 Cal. App. 735, 174 P. 690, and Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006, 1008. In the latter case this court expressed itself as follows: "And the case of Mazitelli v. Crane, 35 Cal. App. 264, 169 P. 721, which had attempted to relax the rigor of the rule that a dismissal is mandatory, upon the ground that the 'plaintiff has fully performed his duty * * * when he * * * caused it (the case) to be set for trial and is in court and ready to proceed to trial * * *' was expressly overruled. Ravn v. Planz, supra." These authorities fully refute the contention of appellant that the plaintiff had performed his full duty when he caused the case to be set for trial and was in court ready to proceed to trial. It is true that in those cases the order of dismissal was made mandatory under section 583 of the Code of Civil Procedure, while in the present action the court acted under section 1190 of the Code of Civil Procedure which provided that the court may in its discretion dismiss the action. But under these authorities the plaintiff did not prosecute the case to trial within the two-year period. The court was therefore authorized in its discretion to dismiss the action. Whether it abused its discretion in ordering a dismissal depended upon all the facts and circumstances then before the court. It is admitted that almost a year elapsed after the first judgment was set aside before the defendant made its motion to dismiss, during which time plaintiff had taken no steps to bring the case on for trial. No attempt was made by the plaintiff on the hearing of said motion to dismiss to show the reason, if any existed, for this delay and inactivity on his part. Under these circumstances, we cannot say that the trial court abused its discretion in ordering the action dismissed.

[3] There is no merit in the contention that defendant Howard G. Thompson, Inc., was not entitled under the Code section to move the dismissal of this action for the failure of the plaintiff to have the same brought to trial within said period of two years. It is claimed by plaintiff that Howard G. Thompson, Inc., had no interest in the real property involved herein, and was simply the contractor, who under contract with the owner, Clinton E. Miller, constructed the buildings, and as such contractor purchased the materials upon which the claim of lien in this action was based. There is nothing in the record supporting this claim. On the contrary, it may reasonably be inferred from the pleadings, including the contract for the construction of the buildings for which said materials were furnished and the claim of lien, which were attached to plaintiff's complaint and made parts thereof, that plaintiff's assignee was the contractor and constructed said buildings upon said real property for the said Howard G. Thompson, Inc., who was either the legal or equitable owner of said real property. In either case, Howard G. Thompson, Inc., had such an interest in said real property as would entitle it to move the dismissal of said action for the purpose of clearing the title to said real property of the cloud thereon resulting from the filing of said lien of record and the institution of said foreclosure suit.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

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214 Cal. 523

MIDDLETON v. FINNEY, Superior Judge.

L. A. 12901.

Supreme Court of California.

Dec. 29, 1931.

1. Judgment 🔑203.

There can only be one final judgment in an action.

2. New trial 🔑117(2).

Premature motion for new trial is ineffectual, and order denying or granting it is void and may be ignored or set aside by court.

3. Appeal and error 🔑2.

New trial 🔑½.

Litigants are entitled to strict and certain interpretation of statute governing appeals and new trials.

> This construction is necessary so that there will be no danger of losing statutory rights by failure to take proper steps as result of confusion as to meaning of final judgment.

4. New trial 🔑117(2).

Where judgment is interlocutory, motion for new trial is premature and void, and may be set aside by trial court.

In Bank.

Application by Charles O. Middleton against Hon. Albert C. Finney, Superior Judge in and for Imperial County, and another for certiorari to review orders of the Superior Court of Los Angeles County vacating judgments and granting motions for new trial.

Orders affirmed.

Superseding opinion 295 P. 527.

Call & Murphey and Anderson & Anderson & Sheehan, all of Los Angeles, for petitioner.

Everts, Ewing, Wild & Everts, of Fresno, and McAdoo, Neblett & Clagett and W. H. Neblett, all of Los Angeles, for respondents.

LANGDON, J.

This is a petition for a writ of certiorari to review orders of the superior court of Los Angeles county vacating judgments previously entered by it and granting a new trial to defendants. Petitioner originally brought an action as plaintiff against T. L. Dudley, F. P. Newport, and Security Trust & Savings Bank, a corporation, defendants, seeking the dissolution of a partnership and an accounting. The court, on July 19, 1929, made findings of fact and conclusions of law and rendered a judgment dissolving the partnership, determining the respective interests of the parties in certain property, and directing that an accounting be had for which defendant Newport should bear the cost. It was provided in said judgment that upon the completion of said accounting the court would decree the amount of money due from the parties. Subsequently the accountant's report was filed and the court adopted the same, made findings of fact and conclusions of law, which included substantially all of those previously made, and decreed the sums due.

Following the entry of the first judgment, defendants Newport and Dudley moved for a new trial, and after argument the motion was denied. Following the entry of the second judgment, they moved to vacate both judgments, which motion was argued and a new trial granted on August 8, 1930. Said defendants also took appeals from each of the judgments.

Petitioner seeks to annul the order of the court setting aside both judgments and granting a new trial. As to the second judgment, of course, there can be no question of the power of the court. He contends, however, that, in so far as this order affects the first judgment, it is void because the trial court had previously exhausted its jurisdiction over that judgment by hearing and denying the first motion for a new trial. Whether this contention is sound is the important question on this appeal.

[1] There is undoubtedly some confusion existing as to what constitutes a final judgment which is appealable and which is subject to a motion for new trial. This confusion was probably greater at the time of the trial of this action than now, for subsequent to said trial this court has passed upon the question in Gunder v. Gunder, 208 Cal. 559, 282 P. 794. Both parties now concede that the first judgment was interlocutory and not final. This concession is inevitable, for there can only be one final judgment in an action. Colton L. & W. Co. v. Swartz, 99 Cal. 278, 33 P. 878; Doudell v. Shoo, 159 Cal. 448, 114 P. 579. If the first judgment were final, and the second were appealable, there would then be two final judgments in this case. As a matter of fact, the second judgment here was essential to determine finally the rights of the parties. It is true that certain issues of fact and of law were declared to be settled in the first decree; and it may well be that these were all the "substantial" or "material" issues in the case. There remained only the necessity of ascertaining the amounts of money to be paid pursuant to the decree determining the proportional interest of each party. But this had to be done, and, until done, the case before the court was not concluded. It involved, to be sure, a mere matter of arithmetic, but the computations were subject to the approval of the court and were to be incorporated, if approved, in a further judgment. A judicial act remained to be done. Under these circumstances, the case comes clearly within the language of Gunder v. Gunder, 208 Cal. 559, 561, 282 P. 794, 795: "While there is a conflict of authority on the question whether a decree which settles the basic issues between the parties, adjudges the complainant's right to an accounting and refers the items of the account to be found by a master, etc., is an appealable judgment (see Wells v. Shriver, 81 Okl. 108, 197 P. 460), we are persuaded from an examination of the authorities that the rule adopted by the courts of this state and applicable to the present case is based on the desirability of subjecting the parties to but one appeal at the determination of the entire controversy between them (see Doudell v. Shoo, 159 Cal. 448, 454, 114 P. 579; Gianelli v. Briscoe, 40 Cal. App. 532, 536, 181 P. 105; Bancroft's Code Practice and Remedies, p. 8329), and is stated in Pomper v. Superior Court, 191 Cal. 494, at page 496, 216 P. 577, as follows: 'The general rule is that where a decree is made fixing the liability and rights of the parties which refers the case to a master or subordinate tribunal for a judicial purpose, such, for instance, as the statement of an account, upon which a further decree is to be entered, the decree is not final. 2 Cal. Jur. §§ 19, 20, p. 142; California Nat. Bank v. Stateler, 171 U. S. 447, 43 L. Ed. 233, 19 S. Ct. 6. See, also, Rose's U. S. Notes; Clement v. Duncan, 191 Cal. 209, 215 P. 1025; Doudell v. Shoo, 159 Cal. 448, 453, 114 P. 579.'" See, also, Di Blasi v. Di Blasi, 209 Cal. 753, 290 P. 7.

Such cases as Zappettini v. Buckles, 167 Cal. 27, 138 P. 696, and Clark v. Dunnam, 46 Cal. 204, are distinguished in Gunder v. Gunder, supra, as follows: "In neither of those cases did the decree involve a reference for an accounting, but in each case it ordered a sale of property and specified the distribution to be made of the proceeds. There was, therefore, in those cases no further judicial action required on the part of the court to adjudicate finally the rights of the parties."

[2] Petitioner does not dispute the proposition that the first judgment was not final. Instead, he contends that, while interlocutory, it was something over which the trial court had jurisdiction, and that, when the court heard and denied the first motion for a new trial, its jurisdiction was exhausted, and at no future time could it by any order affect that judgment. This is so, petitioner contends, even though it be conceded that the court was in error in hearing the first motion; the judgment not being final. The theory is that the court's action and order with respect to the first judgment was erroneous, but not void, and that therefore the error could only be corrected on appeal. Here, of course, the trial court attempted to correct its own error.

The position thus taken, if approved, would lead to further confusion in situations where certainty is essential. The instant case aptly illustrates this point. The first judgment was rendered upon findings of fact and conclusions of law. The defendants, not having any definite rule to determine its effect, and fearful that some expressions of the courts might lead to the conclusion that it was a final judgment, made their motion and thereafter gave notice of appeal. This was an exercise of caution, the object being to prevent loss of their right to attack the judgment if it should be held to be final. The trial court, doubtless acting under the same confusion, considered the motion and decided it, thus inferentially deeming its first judgment to be final. Petitioner declares that the error of the court was invited by defendants, and that they may not now complain of it. But it seems quite unreasonable to say that counsel must lose their right to make a valid and complete attack on the final judgment by reason of such a mistake, shared apparently with the court and the other side, which participated in the argument. Practically, therefore, we think that such an erroneous action of the trial court should not be given any validity, and that the trial court should not be deemed lacking in power to correct it.

This is, indeed, the rule set forth in many prior decisions of this court. A premature motion for a new trial is ineffectual; and the order of the court in denying or granting it is void and may be ignored or set aside by the court. Root v. Daugherty, 201 Cal. 12, 255 P. 181; Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Odd Fellows' Saving Bank v. Deuprey, 66 Cal. 168, 4 P. 1173. Petitioner asserts that in none of these cases were findings and conclusions of law already signed, as here. But this fact does not constitute a proper ground for distinction. The first judgment here was interlocutory; the findings and conclusions which were to constitute the final judgment had not yet been drafted. Consequently the motion was made before any findings or conclusions had been made in support of the final judgment.

Petitioner points to certain language in Pomper v. Superior Court, 191 Cal. 494, 216 P. 577, in support of his view. The court there said (page 496 of 191 Cal., 216 P. 577, 578): "The very fact that the judgment in question was interlocutory left the whole case before the court for final adjudication, and even if it be conceded that the order vacating the interlocutory judgment and granting a new trial was erroneous, it was but an order in the exercise of its jurisdiction over the cause and the parties, to be corrected, if need be, upon an appeal from the final judgment in the action." The facts of the case, however, are quite different from those involved herein. The trial court there entered a judgment which was actually interlocutory and then granted a new trial. Petitioner sought to have this erroneous order annulled on certiorari. This court refused to issue the writ because there was, as yet, no final judgment in the action. In the instant case, the trial court made its error, and later corrected it. The petitioner here seeks by certiorari to reinstate the erroneous order and to annul the order correcting the error. Nothing in the Pomper Case suggests the propriety of issuing the writ in such a situation.

[3, 4] In our opinion, litigants are entitled to a strict and certain interpretation of the statute governing appeals and new trials, so that there will be no danger of losing the statutory rights by failure to take the proper steps as a result of confusion as to the meaning of a final judgment. We further hold that, where a judgment is interlocutory, and is not made subject to appeal and motion for new trial by express statutory provision, a motion for a new trial is premature and void, and may be set aside by the trial court. An erroneous premature order cannot deprive the trial court of the power to make the correct order at the proper time.

The orders of the trial court are affirmed.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.

214 Cal. 535

PARRA et al. v. TRAEGER, Sheriff, et al.

L. A. 11530.

Supreme Court of California.

Dec. 31, 1931.

1. Judgment 🔑720.

Judgment in personal injury action against taxicab owner and affirmance on appeal conclusively determined issue whether cab was used as taxicab at time of accident (Civ. Code, § 2778).

Judgment in such action, and its affirmance, determines such issue conclusively, both as against taxicab owner and his employee, and as against his insurer, which, in conformity with terms of policy, had undertaken defense. For this reason, the insurer was not entitled to relitigate such question on appeal from judgment restraining it from having certain property of taxicab owner sold under execution.

2. Insurance 🔑616½.

Where indemnity insurer undertakes defense on behalf of insured, judgment against insured is binding against insurer.

In Bank.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit by Joe Parra and another against William I. Traeger, Sheriff of Los Angeles County, and others, to enjoin the selling of certain property under writ of execution. Judgment for plaintiff, and defendant California Highway Indemnity Exchange appeals.

Affirmed.

B. P. Gibbs, Walter W. Little, and Minor L. Blythe, in pro. per., all of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for defendant Traeger.

Albert Sidney Brown, of Los Angeles, for respondents.

RICHARDS, J.

This action was instituted by the plaintiffs and respondents herein against the defendant William I. Traeger, as sheriff of Los Angeles county, Cal., and the other named defendants, wherein the said plaintiffs sought the issuance of an injunction restraining the defendant sheriff and, incidentally, the other defendants, from selling or attempting to sell certain real property of the plaintiff Parra under a writ of execution issued upon a judgment in another action wherein one Ella Reed was plaintiff and the plaintiffs herein were defendants.

The facts involved in both of these actions, and which are upon this appeal practically undisputed, are these:

In the month of September, 1924, the plaintiff herein Joe Parra was engaged in the taxicab business in the city of Los Angeles. Prior to said date he had obtained and on said date was holding a policy of insurance issued to him by the defendant California Highway Indemnity Exchange and whereby he was indemnified against loss from common law or statutory liability for damages on account of bodily injuries or property damages accidentally suffered by a person not in the employ of the assured, resulting directly from the ownership, use, or maintenance of any automobile of the class described in the policy, while such automobile was actually engaged in the taxicab business and service of the assured.

On the 4th day of September, 1924, and while said policy was in full force and effect, a pedestrian named Mrs. Ella Reed was struck and seriously injured by one of the automobiles described in said policy and while the same was being driven by one Frank Fernandez, as an employee of Parra and in the taxicab business. Mrs. Reed brought suit against both Parra and his said employee and recovered judgment against both for the damages which she had thus sustained, in the sum of $2,000. Immediately upon the institution of said action, the defendant Parra therein, acting in pursuance of the express terms and provisions of said policy of indemnity, forwarded to the office of the California Highway Indemnity Exchange, his insurer, the summons and process which had been served upon him.

The terms of the policy, which prescribed such a course of action upon his part, provided that "* * * the Exchange will, at its own cost, defend such suit in the name and on behalf of the subscriber or settle the same."

Upon receipt of the process in said action, the exchange immediately undertook, on behalf of its insured, the defense thereof, appearing, at its own cost and with its own attorneys, and filing and presenting on the part of said defendants every defense which they possessed against the success of the plaintiff in said action.

Upon the entry of judgment in favor of the plaintiff, the exchange, still acting on behalf of said defendants, undertook to prosecute an appeal and, in the course thereof, obtained from the National Surety Company of New York a stay bond and, in so doing, entered into a written indemnity agreement with the National Surety Company of New York, agreeing to hold them harmless upon said stay bond.

The judgment in said action was thereafter affirmed by this court upon said appeal. Reed v. Parra, 203 Cal. 430, 264 P. 757.

Upon the going down of the remittitur therein, the plaintiff, Mrs. Ella Reed, was about to procure a writ of execution against the National Surety Company of New York to enforce its liability under its stay bond upon said appeal, whereupon the exchange, apparently in order to protect itself on its aforesaid indemnity agreement, undertook to purchase said judgment from the judgment creditor Reed and to take an assignment thereof in the name of one Minor L. Blythe, who, however, according to the record herein, was acting on behalf of and as the agent of said exchange. Thereafter, said Blythe, as the purported assignee of said judgment, obtained a writ of execution thereon and placed it in the hands of the sheriff of the county of Los Angeles for service, and the latter thereupon made a levy upon certain real property of the plaintiff in this action, Joe Parra, and was about to sell the same, after due notice and publication, when the present action was instituted. Upon a trial thereof before the court, without a jury, a judgment was rendered in favor of the plaintiffs herein, perpetually restraining the sheriff and the other defendants, including both Minor L. Blythe and California Highway Indemnity Exchange, from selling or attempting to sell the property of the plaintiff Parra, and ordering that said defendants Minor L. Blythe and California Highway Indemnity Exchange should satisfy of record the judgment in the case of Reed v. Parra.

It is from such judgment that California Highway Indemnity Exchange has undertaken to prosecute this appeal.

[1] It is the first contention of the said appellant that it is entitled to relitigate upon this appeal the issue as to whether or not the taxicab, which, while being driven by Frank Fernandez, struck and injured Mrs. Ella Reed, the plaintiff in the former action, was being used as a taxicab at the time of said accident.

An examination of the record in the former action (Reed v. Parra, supra) discloses not only that the appellant herein, in conformity with the terms and provisions of its indemnity policy, undertook on behalf of its insured (Parra) to conduct in its entirety his defense to said action, but also that, in so doing, the exchange therein caused to be presented the precise question as to whether or not the taxicab in question was being used as such at the time of the accident to Mrs. Reed and was being driven by Parra's codefendant Fernandez, as his agent and employee.

The judgment in said action, and its affirmance by this court upon appeal, determined that issue conclusively, both as against said Parra and his employee Fernandez, the defendants therein, and as against Parra's insurer, which, in conformity with the terms of its policy, had undertaken the defense of said action and had maintained the same until the final conclusion thereof upon said appeal.

Section 2778 of the Civil Code, subdivision 5, in dealing with indemnity insurance policies of the character of that involved herein, provides that, "If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith is conclusive in his favor against the former." If, under this provision of the Code, the appellant herein had refused or neglected to appear on behalf of its insured, to defend him in said former action, the judgment therein would have been conclusive as against said insurer. It is even more conclusive where the insurer, instead of refusing or neglecting to defend said action, undertakes, on behalf of the insured, the entire defense thereof and prosecutes such defense to the final decision of the cause upon appeal.

[2] This court has uniformly held that where the insurer, upon such indemnifying policy and under its express agreement therein so to do, undertakes, on behalf of its insured, his defense in an action covered by the terms of its said policy, whatever judgment is rendered and entered therein against the assured is binding and conclusive against the insurer. Riddle v. Baker, 13 Cal. 295–305; Pico v. Webster, 14 Cal. 202–204, 73 Am. Dec. 647; Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 P. 602.

The foregoing constitutes the main and practically the only question presented by the appellant upon this appeal. We are not, therefore, required to discuss herein the doubtful propriety of the action of the California Highway Indemnity Exchange in seeking to void its direct liability under its aforesaid policy to pay and discharge the judgment rendered in said former action against its insured, Parra, after the affirmance thereof upon said former appeal, by the subterfuge of taking an assignment of said judgment in the name of another and having such other attempt to enforce the same as against Parra, through the process of an execution.

We are satisfied that the trial court was correct in its judgment herein, enjoining the enforcement of the execution thus sought and obtained, and commanding the defendants herein, Minor L. Blythe and California Highway Indemnity Exchange, to satisfy the aforesaid judgment against Parra.

We are further satisfied that the aforesaid position of the appellant herein is without justification and its appeal herein without merit.

It is therefore ordered that the judgment herein be and the same is hereby affirmed, and that a penalty of $250 be and the same is hereby imposed upon the said appellant for the taking and prosecution of this frivolous appeal, to be assessed as costs.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

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214 Cal. 529

BACHMAN v. INDEPENDENCE INDEMNITY CO.

L. A. 12981.

Supreme Court of California.

Dec. 29, 1931.

Rehearing Denied Jan. 28, 1932.

1. Insurance 🔑435.

Person driving at automobile owner's request was within liability policy insuring "any person * * * operating" automobile, notwithstanding owner was in control.

Policy provided that if, during its term, by reason of the ownership or use of the automobile, it should cause bodily injuries by accident, whether resulting fatally or otherwise, to any person or persons, and for which bodily injury the insured and/or others, as provided in the policy, were liable for damages, the company would insure against loss arising out of such liability "the named insured, and/or any person or persons while riding in or legally operating any of the automobiles * * * with the permission of the named insured. * * *"

2. Insurance 🔑435.

Under automobile liability policy insuring against loss from operator's liability to any person, children of automobile owner, killed through negligence of one driving at her request could recover, since driver was liable to children (Code Civ. Proc. § 377; St. 1919, p. 776).

3. Insurance 🔑146(3).

Ambiguities in policy must be construed against insurer.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Henry Bachman, as the administrator of the estate of Katie Bachman, deceased, against the Independence Indemnity Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Superseding opinion in 297 P. 119.

Willis I. Morrison, of Los Angeles, and Ray W. Hays, of Fresno, for appellant.

B. M. Benson and W. H. Stammer, both of Fresno, for respondent.

PER CURIAM.

This is an action to recover on a policy of indemnity insurance. On June 19, 1927, Mrs. Katie Bachman requested Forest Bayliss, her son-in-law, to drive her automobile for her on a trip. He consented, and on the highway negligently drove it over an embankment. She was killed and other passengers were injured.

[1, 2] Mrs. Bachman had previously secured a policy of indemnity insurance from defendant company covering her automobile, which provided in part as follows: "* * * If, during the term of this policy * * * by reason of its ownership, maintenance or use at any location within the United States of America and Canada, shall cause bodily injuries by accident, whether resulting fatally or otherwise, to any person or persons, and for which bodily injuries the Insured and/or others as herein provided are liable for damages, then the company will insure against loss arising out of such liability * * * the named Insured, and/or any person or persons while riding in or legally operating any of the automobiles * * * with the permission of the named Insured. * * *"

Plaintiff, the administrator of Mrs. Bachman's estate, filed suit against Bayliss for wrongful death, on behalf of her children. A default judgment was entered in the sum of $7,507, which was never paid. Plaintiff then demanded payment from defendant insurance company, and upon its refusal, brought this action and recovered judgment in the lower court. Defendant appealed.

The question presented to us is whether the language of the policy covers the liability sought to be enforced here. The terms of the policy are very broad, and perhaps somewhat unusual. It insures *any person operating* the automobile with the permission of the insured. Bayliss, the driver, was unquestionably operating the machine, and the court so found, even though it also found that Mrs. Bachman was "in control" of the automobile. The policy insures for loss arising out of liability of the person operating the automobile to *any person or persons*. Are the children of Mrs. Bachman included within the meaning of this provision? This depends upon whether Bayliss is liable to them, and it is difficult to discover any reason why he is not. His negligence caused the death of their mother, and the wrongful death statute (Cal. Code Civ. Proc. § 377) gives them a right of action against the person thus responsible.

It is contended by defendant that the proper test to apply is whether the deceased would have had a right of action against Bayliss had she lived, on the theory that the heirs cannot recover for a death unless the deceased would have been able to recover for the injury. Whether this test has any merit in determining the liability of Bayliss to the heirs need not be considered, for the fact is that plaintiff did sue and did recover a judgment against Bayliss, which judgment is final, and is a liability of a person who operated the car with the permission of the insured. The law permits the party who recovered this judgment to sue the insurance company. St. 1919, p. 776, c. 367. The theoretical rights of Mrs. Bachman are not involved.

[3] The peculiar circumstances of this case tend somewhat to obscure the issue. The problem, as hereinbefore pointed out, is simply one of construction of the policy. The construction we have adopted to uphold the judgment of the trial court is both possible and reasonable. Broader language could hardly have been used in the policy. If the insurer desired to place any limitations upon its liability to cover this situation, it had the opportunity to do so. Having prepared its policy, any ambiguity, if one exists, must be construed against the company. Kautz v. Zurich Gen. Acc., etc., Co. (Cal. Sup.) 300 P. 34; Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123.

The judgment is affirmed.

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214 Cal. 562

CADENASSO et al. v. BANK OF ITALY et al.

S. F. 13579.

Supreme Court of California.

Jan. 14, 1932.

1. Judgment 🔑385.

That defendants, discovering trial judge's disqualification, promptly but erroneously moved in Supreme Court rather than trial court to vacate judgment, did not show waiver (Code Civ. Proc. § 170).

> Fact that defendants mistook the forum in which to initiate proceedings to vacate judgment on ground that trial judge was disqualified because he was stockholder of plaintiff bank, although rendering proceedings ineffectual, would not in any sense indicate that defendants intended to waive right to vacation of judgment, but in fact showed the contrary.

2. Judgment 🔑448.

That defendants, discovering trial judge's disqualification, petitioned Supreme Court for rehearing, did not constitute waiver of right to vacate judgment (Code Civ. Proc § 170).

> It appeared that defendants, when petitioning Supreme Court for rehearing of that court's decision affirming judgment against defendants, also filed their motion to vacate judgment below on ground that trial judge was disqualified by reason of being stockholder of plaintiff bank.

3. Judgment 🔑448.

In action to vacate judgment because of trial judge's disqualification, in determining whether defendants waived right to vacation, their acts in both actions must be considered (Code Civ. Proc. § 170).

4. Judgment 🔑456(1).

Action to vacate judgment four months after discovering trial judge's disqualification *held* diligently begun, where, within several days after such discovery, defendants erroneously began proceedings in Supreme Court rather than trial court (Code Civ. Proc. § 170).

5. Judgment 🔑460(6).

Defendants, suing to vacate judgment because of trial judge's to disqualification, need not allege good defense, or that different judgment would result from new trial (Code Civ. Proc. § 170).

6. Judgment 🔑9.

Judge who is stockholder of plaintiff bank is disqualified, and has no jurisdiction to render judgment which, if rendered, is void (Code Civ. Proc. § 170).

7. Judges 🔑51(2).

Objection of trial judge's disqualification because of interest in subject-matter may be made any time before judgment becomes final (Code Civ. Proc. § 170).

8. Judgment 🔑456(2).

Limitation statute affecting actions on liability created by statute *held* inapplicable to action to vacate judgment because of trial judge's disqualification (Code Civ. Proc. § 170, and § 338, subd. 1).

9. Judgment 🔑456(2).

Limitation statute is inapplicable to action to vacate judgment because of trial judge's disqualification (Code Civ. Proc. § 170).

10. Judges 🔑51(2).

Statute requiring that objection of trial judge's disqualification be made before trial *held* not to preclude objection, where disqualification is discovered later (Code Civ. Proc. § 170).

11. Judgment ⚷455.

Proper forum for vacation of judgment because of trial judge's disqualification is trial court, or court of like jurisdiction (Code Civ. Proc. § 170).

In Bank.

Appeal from Superior **Court**, City and County of San Francisco; **Louis** H. Ward, Judge.

Action by E. N. Cadenasso and another against the Bank of Italy, a corporation, and another. Judgment for defendants, and plaintiffs appeal.

Reversed, with directions.

F. J. Solinsky, Edw. R. Solinsky, and Robert E. Hatch, all of San Francisco, for appellants.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondents.

CURTIS, J.

Appeal from judgment in favor of defendants after order sustaining demurrer to plaintiffs' complaint without leave to amend.

The complaint in substance states that on September 7, 1923, the Bank of Italy brought suit in the Superior Court of the city and county of San Francisco against the plaintiffs in this action to recover certain sums of money claimed by said bank to have been received by the plaintiffs in this action for and on behalf of said bank. The action was tried by the court without a jury, and resulted in a judgment in favor of the bank and against the plaintiffs herein in the sum of $5,000. From this judgment the plaintiffs in this action appealed to the Supreme Court, where the judgment was affirmed on October 18, 1928, by Department 1 of said court. On the same day the plaintiffs herein learned for the first time that at all times during the pendency of said action in the trial court the judge thereof who tried said action and rendered said judgment was a stockholder of the plaintiff in said action, the Bank of Italy, and by reason thereof was disqualified from acting as a judge in said action. Within a few days after acquiring knowledge of the disqualification of said judge, the plaintiffs herein filed their petition to the Supreme Court asking for a hearing in bank of said cause, and at the same time filed a motion in the Supreme Court to vacate said judgment upon the ground of the disqualification of the trial judge. This court granted said petition for a hearing in bank and set the case for hearing on its merits and the motion to vacate said judgment down for argument. After argument, this court affirmed the judgment of the trial court and denied the motion to vacate the judgment. Bank of Italy v. Cadenasso, 206 Cal. 428, 270 P. 931, 274 P. 536; Id., 206 Cal. 436, 274 P. 534. The opinion in each of these matters was rendered on February 6, 1929. The plaintiffs herein filed no petition in this court for a rehearing of either of said matters, but on February 21, 1929, instituted in the Superior Court of the city and county of San Francisco this action to vacate said judgment on the ground of the disqualification of the trial judge to act in the action in which said judgment was rendered. A copy of the opinion of this court denying the motion of the plaintiffs herein to vacate said judgment was attached to and made a part of the complaint filed in this action. In that opinion this court, in passing upon the motion to vacate the judgment in the former suit, said: "The proper forum for the determination of the issues sought to be raised by the motion herein is the superior court, where the action was brought or another court of like jurisdiction and not an appellate court which performed its function within its jurisdiction by passing upon questions presented to it upon the appeal." The defendants appeared in the present action and filed a general demurrer to said complaint, which demurrer the trial court sustained without leave to amend, and thereupon entered judgment in favor of the defendants. From the judgment so entered this appeal is prosecuted.

On this appeal the plaintiffs contend that they have followed the procedure suggested by the court in its opinion denying the motion to vacate the judgment made in the Supreme Court, and that the complaint filed by them in the Superior Court states a good cause of action against the defendants, entitling them to a judgment vacating the judgment in the former action.

In support of the sufficiency of their complaint herein, they contend that the judgment in the former action is void for the reason that the judge rendering it was disqualified from acting in said action by reason of the fact that he was a stockholder of the Bank of Italy, the plaintiff in said former action. They rely upon the following decisions of this court: Lindsay-Strathmore Irrigation District v. Superior Court, 182 Cal. 315, 187 P. 1056, 1063; City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084. Undoubtedly these decisions tend to support the contention of the plaintiffs.

[1-4] While not admitting the contention of the plaintiffs just stated, the defendants seek to support the judgment of the trial court upon various grounds. The first of these which we will consider is that the plaintiffs in this action have waived their right to have the judgment in the prior action vacated. According to the complaint, the plaintiffs first knew of the disqualification of the trial judge on October 18, 1928, the date of the first deci-

sion of this court affirming said prior judgment. They did not commence this action for over four months thereafter, but filed a petition and obtained a rehearing in the former action, and, after the rehearing was granted, they argued the case in this court and endeavored to secure a reversal of said former judgment. As already noted, plaintiffs, at the time they filed their petition for a rehearing, also filed their motion to vacate the former judgment upon the ground of the disqualification of the trial judge. Upon the rehearing being granted, this court considered at the same time the appeal upon its merits and plaintiffs' motion to vacate said judgment, and thereafter affirmed the judgment and denied plaintiffs' motion to vacate the same. These facts show that plaintiffs at the very first opportunity, and within a few days after receiving knowledge of the trial judge's disqualification, took steps to have the judgment vacated. The fact that they mistook the forum in which to initiate said proceedings, while rendering said proceedings ineffectual, would not in any sense indicate that they intended to waive their right to have said judgment vacated. In fact, it shows directly to the contrary. Neither would the further fact, in our opinion, that they asked for a rehearing of our decision affirming said judgment, constitute a waiver of their right to have said judgment vacated. We must, in passing upon this question, take into consideration all the acts of plaintiffs taken in this and the former action to determine whether they waived their right to have said judgment vacated, and, when we do so, we are convinced that they are not sufficient to show any waiver. It is true that this action was not commenced until four months after the plaintiffs gained knowledge of the disqualification of the trial judge, but, when we take into consideration the other steps taken by plaintiffs to vacate said judgment, we cannot say that plaintiffs have not acted with due diligence in the institution of this action. The only authorities cited by the defendants tending to show that the plaintiffs have not acted with due diligence in this matter are Rudy v. Slotwinsky, 73 Cal. App. 459, 238 P. 783, and People v. Davis, 143 Cal. 673, 77 P. 651. These cases hold generally that in actions to vacate a judgment the moving party must exercise due diligence in invoking the aid of a court of equity for relief from the judgment. In the first of these two actions, the plaintiffs therein waited over two years and three months after their default before taking any action to have the same set aside. In the other action eight years elapsed between the default of the defendant and the motion of his successor in interest to have the same set aside. In each case the court held that the moving party had failed to exercise due diligence in invoking the aid of the court. These cases should not control the decision in the present action, in view of the facts and circumstances related above.

Furthermore, it is expressly held in the Lindsay-Strathmore Case, quoting with approval from the case of Johnson v. German, etc., Co., 150 Cal. 336, 339, 88 P. 985, "any act of the disqualified judge in violation of the provisions of the statute [section 170, Code Civ. Proc.] is absolutely void wherever brought in question." It is further held in the same case (Lindsay-Strathmore Case, page 333 of 182 Cal., 187 P. 1056, 1064): "It is also the uniform rule, under these statutes, that where such disqualification exists, consent of the parties cannot impart validity to the proceedings, and that a party to the action who desires to attack them is not estopped from doing so by the fact that he attended during the trial without raising the objection. [Citing authorities.]" In the case of City of Vallejo v. Superior Court, supra, this court on page 418 of the opinion in 199 Cal., 249 P. 1084, 1088 said: "In the face of these authorities we are constrained to hold that the interest of the respondent judge herein [ownership of stock in a bank interested in the litigation] in these actions arising out of his relation to said bank was at all times during the pendency thereof and still is such as to bring him within the disqualification to sit or act therein defined in section 170, subdivision 1, of the Code of Civil Procedure. It follows necessarily that whatever action, orders, or judgments have been taken, made, given, or entered by said judge in said actions, or either of them, during the existence of such disqualification, the same and each of them were, are and continue to be wholly void. Lindsay-Strathmore Irrigation District v. Superior Court, supra." These authorities are a conclusive answer to the contention of the defendants herein that the plaintiffs have waived their right to attack the judgment in the former action by asking for a rehearing and, after securing the same, rearguing the case before this court. The effect of the holding in these cases is that said judgment is wholly void, and that no estoppel or waiver may be imputed to plaintiffs by reason of their efforts to secure a reversal of said judgment after knowledge of the disqualification of the trial judge.

[5, 6] Defendants further contend in support of the judgment in the present action that the complaint herein fails to state a cause of action, in that it contains no allegation that the plaintiffs in the present action have any substantial defense to the cause of action set up in the complaint in the former action, and, furthermore, that the complaint fails to show that a like judgment would not result from a new trial of the former action. In support of this contention, the defendants rely upon Lee v. Colquhoun, 175 Cal. 16, 164 P. 894, and kindred cases.

These actions involved judgments that were merely voidable and not void. A different rule prevails where the judgment is void. Quoting again from the case of Lindsay-Strathmore Irrigation District v. Superior Court, supra, page 332 of 182 Cal., 187 P. 1056, 1063, the rule is stated as follows: "In Estate of White, 37 Cal. 190, the court said that it was no answer to the disqualification arising from interest in the proceedings to say that the decision in the cause was correct, and that—'The statute does not say that the judge is disqualified to decide erroneously, but that he shall not decide at all.'" Section 170, Code of Civil Procedure, in emphatic language says that no judge disqualified by reason of his interest therein shall "sit or act as such in any action or proceeding." He has no jurisdiction to render a judgment in such an action. Lindsay-Strathmore Irrigation District v. Superior Court, supra, page 334 of 182 Cal., 187 P. 1056. If, therefore, the judge rendering the judgment was without jurisdiction in the proceeding, his action was a nullity. It was just as much a nullity if he decided the case correctly as if he had rendered an erroneous judgment. It was, therefore, unnecessary for the plaintiffs herein to show in this action to set aside a void judgment that they had a good defense to the prior action or that a different judgment would result from a new trial in said action.

The contentions of the defendants that plaintiffs were guilty of laches and that the action is barred by the statute of limitations are also without merit. We have already held that the plaintiffs acted with due diligence in the commencement of this action after the discovery of the disqualification of the trial judge rendering the judgment in the former action. In fact, they took steps within a few days by motion in the former action to have the judgment vacated, and instituted this action in about four months after the discovery of the disqualification of the trial judge. On the other hand, the defendants herein must have known at all times that the trial judge was one of its stockholders. By calling the court's attention to that fact, they could have easily and effectively avoided any further proceeding before the trial judge. The defendants are hardly in a position to set up any defense based upon laches on the plaintiffs' part.

[7-9] As to the plea of the statute of limitations, this action was brought before the judgment in the former action had become final. Whether it might have been brought after said judgment became final, we express no opinion. We think, however, that the plain inference from the decision of the court in the case of Lindsay-Strathmore Irrigation District v. Superior Court, page 332 of 182 Cal., 187 P. 1056, is that objection to the disqualification of the trial judge by reason of his interest in the subject-matter of the suit may be made at any time before the judgment becomes final. Defendants cite subdivision 1 of section 338 of the Code of Civil Procedure as providing that an action based upon a liability created by statute must be commenced within three years. This provision of the Code has no application to the present action. It is not an action based upon a liability created by statute. The action is one in equity to set aside a void judgment, and the statute of limitations has no application to such an action. 15 Cal. Jur. p. 57; Estate of Pusey, 180 Cal. 368, 374, 181 P. 648.

[10, 11] The amendment to section 170. Code of Civil Procedure, enacted in 1927 (St. 1927, p. 1403) and subsequent to the date of the judgment in the former action, requiring an objection to a trial judge by reason of his disqualification to be made at the earliest opportunity after discovery, and in any event before the commencement of the trial before said judge, did not deprive the Superior Court in which this action was instituted of jurisdiction to hear and determine the same. The respondents rely upon the case of First National Bank v. Henderson, 101 Cal. 307, 35 P. 899, and Hall v. Superior Court, 198 Cal. 373, 245 P. 814, in support of their contention that the effect of the said amendment was to deprive said Superior Court of jurisdiction to entertain an action of the character of the present one. A casual reading of these cases, we think, will be sufficient to show that they have no direct application to the present controversy. Whatever may be the effect of section 170, Code of Civil Procedure, as amended in 1927, we do not think it was the intention of its framers to deprive a litigant of the right to object to the disqualification of a trial judge, by reason of his interest in the action when the litigant did not discover the facts constituting the ground of the judge's disqualification until after the commencement of the action. "It is an ancient maxim applicable in all cases, civil or criminal, where judicial functions are to be exercised, whether in proceedings of inferior tribunals or in courts of last resort, that no man ought to be a judge in his own cause, a maxim which appeals with such force to one's sense of justice that it is said by Lord Coke to be a natural right so inflexible that an act of parliament seeking to subvert it would be declared void." 15 R. C. L. p. 526. While not intimating that the Legislature is without the power to deprive a litigant of this right, we are certain it would not do so except in express and unequivocal language evincing a clear and definite purpose as to its intent in that respect. No such language is to be found in section 170, Code of Civil Procedure, as amended in 1927. The plaintiffs, therefore, having discovered after the trial of the former action that the trial judge was disqualified, could raise this point at any time before the judgment became final (Lindsay-

Strathmore Irrigation District v. Superior Court, supra, page 331 of 182 Cal., 187 P. 1056), and the proper forum for the determination of the issue thus raised was the Superior Court, where the former action was brought, or another court of like jurisdiction (Bank of Italy v. Cadenasso, 206 Cal. 436, 438, 274 P. 534).

For the reasons set forth above, the judgment is reversed, with directions to the trial court to overrule said demurrer.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.

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214 Cal. 531

BARR LUMBER CO. et al. v. PERKINS et al.

L. A. 10590.

Supreme Court of California.

Dec. 31, 1931.

Rehearing Denied Jan. 28, 1932.

1. Mechanics' liens ⟹78.

Owner's notice of nonresponsibility for improvements contracted for by lessee's assignee on oil lease *held* sufficient (Code Civ. Proc. § 1192).

Such notice referring expressly to both lots and covering any work or improvement upon the land or any part thereof was sufficient under Code Civ. Proc. § 1192, to absolve the owner from liability, where both derricks for use in drilling for oil and constituting the improvement were erected as part of the same development on a parcel of land treated as a unit by the lease, and it being unreasonable to require a separate notice for each derrick or other structure placed upon the land as part of a single plant for extraction of oil from the land.

2. Mechanics' liens ⟹72.

Principal and agent relationship *held* not to exist between lessor of oil lease and lessee's assignee so as to prevent lessor's availing himself of notice of nonresponsibility for improvements (Code Civ. Proc. §§ 1183, 1192).

3. Mines and minerals ⟹73.

Oil lease creates estate for years and present interest in land.

In Bank.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by the Barr Lumber Company and another against Roy W. Perkins, Lawrence G. Brubaker, and others. From a judgment for plaintiffs, last-named defendant appeals.

Reversed.

Superseding 297 P. 922, which modified opinion in 295 P. 552.

Ray W. Bruce, of Los Angeles, for appellant.

Anderson & Anderson and A. G. Ritter, all of Los Angeles, for Julian Petroleum Corporation.

Robert M. Pease and Roy P. Dolley, both of Los Angeles, for R. T. Colter, Daisy E. Coulter, and A. J. Delaney.

Taylor & Forgy and E. W. Forgy, all of Los Angeles, for Roland C. Casad, Julia L. Casad, Joseph Hummel, and Marie Helen Hummel.

Frank G. Swain, of Whittier, for respondents.

LANGDON, J.

This is an action to foreclose two mechanic's liens. Defendant Lawrence C. Brubaker, on August 16, 1924, executed a written lease covering two lots, numbered 22 and 23, in the city of Los Angeles, to R. T. Colter, for a period of twenty years. The instrument gave the lessee the exclusive right to explore, mine, excavate, and obtain oil, asphaltum, petroleum, natural gas, and any other hydrocarbon substances contained in the premises. On or about January 27, 1925, and before any work was done, Colter assigned the lease to defendant Roy W. Perkins. On February 3, 1925, this defendant commenced to erect an oil derrick on lot No. 23. On February 4, 1925, defendant Brubaker posted a notice of nonresponsibility, and filed a verified copy thereof in the office of the county recorder of Los Angeles county. On September 10, 1925, defendant Perkins started to erect another derrick on lot No. 22. On September 16, 1925, defendant Brubaker posted and filed another notice of nonresponsibility. Plaintiff Barr Lumber Company furnished materials and plaintiff De Priest furnished labor in the construction of the derrick on said lot No. 22. Being unpaid, they filed liens which were later foreclosed. Judgment was rendered in their favor by the lower court. In support of its decision, the court found that the notice of nonresponsibility given by the owner was defective.

[1] The statute (Cal. Code Civ. Proc. § 1192) which permits a noncontracting owner of land to give such notice, provides in part: "Said notice shall contain a description of the property affected thereby sufficient for identification, with the name, and the nature of the title or interest of the person giving the same, name of purchaser under contract, if any, or lessee if known. * * *" The requirement that the name of the lessee be specified,

if known, was added in 1925. The second notice of nonresponsibility, given subsequent to the amendment, failed to include such name. The first notice was given prior to the amendment, and was in full compliance with the statute as it then stood. This notice was general in its terms. It referred expressly to both lots and covered "any work or improvement" upon said land "or any part thereof." In our opinion, it was sufficient to absolve the owner. The second notice was unnecessary and may be disregarded. Both derricks were erected as part of the same development on a parcel of land treated as a unit by the lease. It would be utterly unreasonable to require a separate notice for each derrick or other structure placed upon the land as part of a single plant for the extraction of oil from such a parcel of land. Like a mining claim, all the land may be considered as a unit for the purpose of filing the lien. Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 84 P. 47, 113 Am. St. Rep. 308; Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 22 P. 217; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 P. 702, 36 P. 388. The same is necessarily true as to the notice of nonresponsibility.

[2, 3] It is contended, however, that the owner of land who executes an oil lease cannot avail himself of the benefits of the statute permitting the filing of notices of this nature. This contention is based upon section 1183 of the Code of Civil Procedure, which provides that "every contractor, subcontractor, superintendent or other person having charge of any mining or work or labor performed in and about such mining claim or claims or real property worked as a mine, either as lessee or under a working bond or contract thereon shall be held to be the agent of the owner for the purposes of this chapter." A principal, of course, cannot evade responsibility for such an act done by his agent in his behalf. But there is in our opinion no sound basis for a construction of this statute which would make the present lessor a principal and the lessee's assignee an agent. In Berentz v. Belmont Oil Mining Co., 148 Cal. 577, 84 P. 47, 113 Am. St. Rep. 308, principally relied upon, the court concluded that an oil location should be deemed a mining claim, in order to permit a lien against the entire area of the land instead of against the particular structure upon which the lien claimants had worked. There was no question of notice of nonresponsibility in that case, and, as a matter of fact, the lessee alone was held. The authorities are somewhat conflicting on the precise nature of a lease of oil lands, some courts holding it to be only a license; but in this state it has in several instances been declared to be a genuine lease, creating an estate for years and a present interest in the land. Chandler v. Hart, 161 Cal. 405, 119 P. 516, Ann. Cas. 1913B, 1094; Taylor v. Hamilton, 194 Cal. 768, 230 P. 656. Neither authority nor reason suggests that such a lessee is the agent of the owner. None of the elements of agency are present. Moreover, the right of an owner of land subject to an oil lease to file a notice of nonresponsibility is impliedly recognized in Coulter v. Hensen, 204 Cal. 337, 268 P. 332, although this court there found that the statutory requirement had not been complied with.

We think that the lower court was in error in finding that no sufficient notice of nonresponsibility was given. In our opinion, the notice was made in compliance with the statute and relieved the defendant Brubaker from responsibility to the lien claimants.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; SHENK, J.

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214 Cal. 557

ERICKSON v. ESTERGOMY et al.

S. F. 14420.

Supreme Court of California.

Jan. 11, 1932.

1. Appeal and error 🔑110.

Appeal does not lie from order denying motion for new trial (Code Civ. Proc. § 939).

2. Appeal and error 🔑345(1).

Where notice of appeal from judgment entered May 16 was filed September 1, appeal was taken too late, although there was intervening motion for new trial (Code Civ. Proc. §§ 660, 939).

In Bank.

Appeals from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Henry Erickson against Rudolph Estergomy, etc., and wife. From an order denying defendants' motion for a new trial and from the judgment, defendants bring appeals. On motion to dismiss appeals.

Motion granted.

Frank V. Kington and Leo A. Cunningham, both of San Francisco, for appellants.

R. L. Husted and Joseph A. Garry, both of San Francisco, for respondent.

PER CURIAM.

[1, 2] Motion to dismiss appeal. Judgment in this cause was entered May 16, 1931, and proof shows service of notice of entry of judg-

ment on the same day. Motion for a new trial was filed May 25. Notice of appeal from an order denying motion for new trial was filed August 22, and notice of appeal from the judgment was filed September 1, all in 1931. Respondent now moves to dismiss the appeals on the ground that an appeal does not lie from an order denying a motion for a new trial, and that the appeal from the judgment was taken too late.

The motion is good on both grounds. An appeal does not lie from an order denying a motion for a new trial. Section 939, Code Civ. Proc. The appeal from the judgment was taken too late. Sections 660 and 939, Code Civ. Proc.

The motion is granted, and the appeals are dismissed.

214 Cal. 501

FERRIS v. EMMONS.

L. A. 11537.

Supreme Court of California.

Dec. 29, 1931.

1. **Quieting title** 🔑44(4).

In suit to quiet title to strip, evidence showed common grantor intended by respective deeds to predecessors in interest of parties to convey fractional parts of block as measured from center lines of adjoining streets.

2. **Evidence** 🔑455.

Parol evidence *held* admissible to establish particular meaning common grantor gave word "block" in subdivision map and deeds executed pursuant thereto (Code Civ. Proc. § 1861).

3. **Evidence** 🔑450(3).

Parol evidence is admissible to explain language in deed (Code Civ. Proc. § 1861).

4. **Customs and usages** 🔑15(2).
Evidence 🔑302.

Parol evidence of common reputation and custom existing in community, regarding meaning of word "block" as used in map and conveyances, *held* admissible (Code Civ. Proc. § 1870, subd. 11).

5. **Appeal and error** 🔑1050(1).

Admitting certain evidence, if error, *held* harmless, where it was cumulative and evidence was sufficient to sustain findings and conclusions of law.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis P. Russill, Judge.

Suit by William S. Ferris against C. H. Emmons. From a decree for plaintiff, defendant appeals.

Affirmed.

Walter B. Kibbey and Woodruff, Musick & Hartke, all of Los Angeles, for appellant.

Chauncey E. Snow, of Los Angeles, and T. E. Guerin, of Pomona, for respondent.

WASTE, C. J.

The defendant appeals from a decree quieting plaintiff's title to a strip of land seven and one-half feet wide, adjacent to the center line of block 195 of the Pomona tract, in the city of Pomona, county of Los Angeles.

Block 195 was formerly owned by the Pomona Land and Water Company, which company in the year 1886 conveyed the west half thereof to defendant's predecessor in interest, and in the year 1888 conveyed the northeast quarter thereof to plaintiff's predecessor in interest. The defendant, by mesne conveyances, has since come into the ownership of the northwest quarter of the block, so that now the plaintiff and defendant own, respectively, the northeast and the northwest quarters of block 195. The two deeds running in favor of the predecessors of the parties hereto were made "according to" a map of Pomona tract recorded in the year 1875, thereby incorporating the map in the description of the property conveyed. According to this map, block 195 contains forty acres of land "measuring in every instance to the centers of the adjoining streets." The net acreage of block 195, exclusive of the streets, is 35.46 acres. As the owner of the northeast quarter of the block, the plaintiff claims to be the owner of 8.97 acres of land, exclusive of the streets, which is slightly in excess of one-fourth of the net acreage of the block. The strip of land seven and one-half feet wide, about which this controversy centers, runs along the western boundary of plaintiff's land, which also forms the eastern boundary of defendant's land. If the block be considered as including the streets, plaintiff's land will be seven and one-half feet greater in width, and defendant's land correspondingly smaller in width, than if the block be considered as ending at the boundary line of the streets. This is so because the streets paralleling the east and west sides of block 195 are of different widths. In finding for the plaintiff and quieting his title to the strip of land here involved, the trial court determined that block 195 extends to, and all fractional parts thereof are to be measured from, the center line of the adjoining streets.

Upon this appeal, the defendant and appellant admits that the deeds under which the respective parties make claim are sufficient to convey title to the center of the adjoining streets. This being so, the sole question presented for adjudication is whether the center line, which divides block 195 into an east and a west half, is to be determined by including or excluding the streets on the east and west sides of the block. Appellant's contention that the streets are to be excluded in fixing the division line between parcels and in ascertaining the net acreage covered by each conveyance, finds some support in the cases which hold that, however clearly it may appear that the owner of a parcel of land holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the parcel is technically, therefore, the center of the street, in view of the fact that the owner of such parcel of land has no right to the possession or occupancy of any portion of the public street, it will ordinarily be presumed that the parcel does not include such portion of the street. Earl v. Dutour, 181 Cal. 58, 183 P. 438, 6 A. L. R. 1163; Joens v. Baumbach, 193 Cal. 567, 571, 226 P. 400.

[1] This principle does not apply to the present case, for the record is replete with evidence sustaining the findings of the court below and irrefutably indicating that the common grantor intended, by the respective deeds to the predecessors in interest of the parties hereto, to convey fractional parts of block 195 as measured from the center line of the adjoining streets. That respondent is the owner of the strip of land in dispute is established by the evidence. The deed to respondent's predecessor, delivered in the year 1888, describes the property covered therein as "The North East quarter (N. E. ¼) of Block One Hundred ninety-five (195) of the Pomona Tract, according to map of said Tráct duly recorded in Book 3, pages 96 and 97 of Miscellaneous Records of Los Angeles County, California, estimated to contain Ten (10) acres of land." This map is in evidence, and materially assists in deciding the question presented by the appeal. A careful study and understanding of it discloses that the net acreage (viz., that acreage devoted solely to private use and occupancy) of the several fractional parts of the forty-acre blocks of the tract, of which block 195 is one, adjacent to the streets of the tract, is noticeably less than the acreage of corresponding fractional parts of forty-acre blocks not abutting the streets; thus clearly indicating that, for purposes of dividing the several forty-acre blocks of the tract into fractional parts, all measurements are to be taken from the center line, rather than from the side lines, of the streets. This is borne out by the legend appearing on the face of the map, which discloses that the tract is subdivided into blocks of three sizes; the largest blocks containing forty acres each, the second containing ten acres each, and the smallest containing two and one-half acres each, "measuring in every instance to the centers of the adjoining streets"; the forty-acre blocks, of which block 195 is one, being divided into five and ten-acre lots "measuring from the center of the streets," the ten-acre blocks being divided into "8 equal lots Not including streets," and the two and one-half acre blocks being divided into lots "on the same basis, similar lots in the same blocks all being of the same width." Reading the several deeds here involved in conjunction with the map to which they refer in describing the property transferred, it is immediately apparent that fractional parts of block 195, as well as the fractional parts of all other forty-acre blocks in the tract, are to be measured from the center lines of the adjoining streets. In addition, and by way of explanation of what was intended by the parties to the original conveyances when they used the word "block" in the instrument of transfer, the respondent introduced a substantial amount of parol evidence, both as to the common reputation and custom in the community of Pomona, prior to the institution of this action, as to the meaning of the word "block," as used in the map above referred to and the several conveyances made pursuant thereto by the common grantor. The witnesses testifying in this respect stated that it was commonly understood that "the blocks extend to the center of the streets," and that "the man who owns the property on the side of the street would have less acreage than the man who was on the side where there was no street, where he had the fractional part of the block." Respondent also produced tax receipts for the years 1911 to 1924, inclusive, each of which discloses that the taxable net acreage of the northeast quarter of block 195 is computed by deducting one-half of the street area from the gross acreage. In other words, respondent is assessed and taxed upon the basis of 8.97 acres, being the northeast 10 acres, less 1.03 acres representing one-half the adjacent street area, which includes the strip of land here in dispute.

[2, 3] We find no merit in the contention that the parol evidence above referred to was improperly admitted. Contrary to appellant's claim, the evidence neither altered nor varied the terms of the written instrument. It was offered by the respondent, and received by the court below, not for the purpose of changing or adding to the deed, but for the sole purpose of explaining the language therein contained. That parol évidence is admissible for such a purpose cannot be denied. If the word "block," as used by the common grantor in the subdivision map and several deeds executed pursuant thereto, was intended by him to have a particular and peculiar meaning, it was competent for the court below to permit the introduction of parol evidence to establish that meaning. Section 1861, Code Civ. Proc.; 6 Cal. Jur. 276, 278; Jenny Lind Co. v. Bower & Co., 11 Cal. 194; Higgins v. Cal. Pet. & Asphalt Co., 120 Cal. 629, 52 P. 1080.

Such evidence merely explains the instrument, without varying or adding to it, and serves to give effect to the intention of the parties.

[4] Nor do we find any merit in the claim that this parol evidence was inadmissible as evidence of reputation and custom. Subdivision 11 of section 1870 of the Code of Civil Procedure provides that evidence may be given of "common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary."

[5] The evidence is amply sufficient to sustain the trial court's findings of fact and conclusions of law, and we therefore deem it unnecessary to discuss or pass upon the propriety of the trial court's ruling admitting in evidence certain certificates of title issued to the respondent under the Land Title Act (St. 1915, p. 1932), which certificates covered, along with other property, the strip of land here involved. This evidence was merely cumulative, and, even if erroneously admitted, a point we do not decide, could not have worked any prejudice to the appellant.

We have examined the entire record, and conclude that a judgment for the respondent was not only proper, but mandatory. Appellant's several contentions are without merit.

The judgment is affirmed.

We concur: SHENK, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J; RICHARDS, J.; CURTIS, J.

214 Cal. 540

DAUCH v. GINSBURG et al.

L. A. 10932.

Supreme Court of California.

Dec. 31, 1931.

1. Fixtures 🔑7.

Plumbing fixtures and heating equipment when installed became "fixtures" (Civ. Code, § 660).

[Ed. Note.—For other definitions of "Fixture," see Words and Phrases.]

2. Fixtures 🔑27(1).

Landowner's agreement that article shall retain personal character or be removable as personalty, though affixed to land, is valid (Civ. Code, § 1013).

3. Fixtures 🔑27(3).

Landowner's agreement that article shall retain personal character or be removable as personalty, though affixed to land, has no force against subsequent purchaser or incumbrancer without notice.

4. Fixtures 🔑20.

Generally, subsequent conditional seller will prevail over prior incumbrancer.

5. Fixtures 🔑20.

Where severance of fixtures will substantially injure or diminish security of prior incumbrancer, subsequent conditional seller of fixtures does not prevail over prior incumbrancer.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action for recovery of personal property brought by Al Dauch, doing business under the fictitious firm name of Dauch Heating & Engineering Company, against Ella K. Ginsburg and another, doing business under the fictitious firm name of Maryella Hotel, and others. From an adverse judgment, defendants Standard Mortgage Corporation and another appeal.

Reversed.

Superseding opinion 297 P. 66.

Joe Crider, Jr., John M. Martin, Clarence B. Runkle, and Frank L. Martin, Jr., all of Los Angeles, for appellants.

Arthur V. Kaufman and Paul J. Ziegler, both of Los Angeles, for respondents, amicus curiæ.

Milton M. Golden, of Los Angeles, for defendants Ella K. Ginsburg et al.

O'Melveny, Tuller & Myers, Louis W. Myers, and William Clary, all of Los Angeles, for Mortgage Guaranty Co., amici curiæ.

PER CURIAM.

Plaintiff brought this action for the recovery of certain described personal property, or for the value thereof in case delivery could not be had, and for damages for its alleged wrongful detention. Defendants Ginsburg consented to a default judgment being entered against them. Defendants Standard Mortgage Corporation and Lincoln Investment Company defended the action. The cause was tried before the court without a jury, and resulted in a judgment in favor of the plaintiff for the return of the property or for the sum of $18,500, its reasonable value, if defendants could not make delivery. From this judgment, the last two named defendants appeal.

The facts are practically undisputed. On February 26, 1926, the Ginsburgs borrowed from the defendant Standard Mortgage Corporation the sum of $58,000, giving as evidence thereof their promissory note secured by a deed of trust on certain described real property. It is conceded that this trust deed is second in point of priority to a trust deed securing an indebtedness of $175,000 owing to the Mortgage Guaranty Company of Los Angeles. This latter company was not made a defendant in this action, and its rights are not involved on this appeal. The trial court found that both loans were secured for the purpose of securing funds to construct a hotel building on the premises owned by the Ginsburgs. The loan of the defendant Standard Mortgage Corporation was a construction loan, the principal amount loaned to be advanced periodically as the work progressed. The trial court expressly found "that at the time of the negotiations for said building loan by defendant, Standard Mortgage Corporation, defendants Ella K. Ginsburg and Louis Ginsburg submitted to said defendant complete plans and specifications for the erection of said hotel building on said property, and as a part of said agreement for said building loan it was agreed by and between defendants * * * Ginsburg and defendant Standard Mortgage Corporation that the security for said building loan * * * should be said real property, together with said hotel building in its complete state after construction in accordance with said plans and specifications."

Subsequent to the execution and recordation of the above-mentioned note and trust deed, the defendants Ginsburg started construction of the hotel building contemplated by the above agreement. In connection therewith, the Ginsburgs entered into a contract with the plaintiff whereby plaintiff agreed to furnish and install all of the plumbing and plumbing fixtures and all the heating equipment in the hotel. Pursuant to this agreement, the plaintiff did install all of the rough plumbing in the building. Before installing the plumbing and heating fixtures, however, the plaintiff and the Ginsburgs canceled their agreement, and on November 24, 1926, entered into a new agreement in reference to those fixtures. By the terms of this new contract, the Ginsburgs purchased from the plaintiff these fixtures upon what the parties designated a "lease contract," but what in legal effect is a conditional sales contract. By the terms of this contract title remained in the plaintiff, and plaintiff was specifically empowered to remove the articles from the building in the event of a default by the Ginsburgs. Plaintiff not only had in contemplation that these plumbing and heating fixtures were to become affixed to the real property, but actually affixed them himself. They were attached to the rough plumbing by means of slip joint threaded unions and flanges, and were in some cases hung from brackets attached by screws to the wall or rested upon the floors. The bath tubs were set into the wall and a tile wall constructed to the rim of the tub. If these tubs be removed, it would necessitate ripping out part of this tile wall.

The plaintiff started installation of these fixtures on November 24, 1926, and finished such installation in February, 1927. The evidence is uncontradicted, and the trial court found that the defendant Standard Mortgage Corporation had no knowledge of the conditional sales contract, and of the rights of plaintiff thereunder until approximately the date this action was brought in March, 1928.

After the hotel building was completed, the Ginsburgs defaulted in their payments on the promissory note owing to the Standard Mortgage Corporation, and likewise defaulted in the payments due plaintiff under his conditional sales contract. On November 10, 1927, the defendant mortgage corporation foreclosed its trust deed, and purchased the property at the foreclosure sale. On January 16, 1928, the Standard Mortgage Corporation leased the hotel for a period of fifteen years to the defendant Lincoln Investment Company. The lease of this company was not recorded.

[1] The trial court held that the rights of the plaintiff as conditional vendor were superior to those of the Standard Mortgage Corporation as the holder of a prior trust deed. The trial court found that "said goods and chattels can be detached and removed from that certain real property known as the Mayan (Maryella) Hotel * * * without any damage or injury to such real property." Appellants assail this finding as being contrary to the evidence, and contend that the plumbing fixtures and heating equipment have become such an integral part of the hotel building that to remove them would be to substantially injure the security upon which they made the loan. There can be no doubt that these articles have become fixtures, within the meaning of section 660 of the Civil Code. That section provides: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws; except that for the purposes of sale, emblements, industrial growing crops and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, shall be treated as goods and be governed by the provisions of the title of this code regulating the sales of goods." The articles herein involved are indispensable for the use and operation of the hotel as a hotel. The plaintiff himself so testified, and his attorney so stipulated.

[2, 3] Respondent argues that although the articles may have become fixtures as far as innocent third parties are concerned, that, as

against the Ginsburgs and prior incumbrancers, the plumbing and heating fixtures retained their character of personal property by virtue of the conditional sales contract so providing. This argument is undoubtedly correct as far as the Ginsburgs are concerned. The rule is well settled in this, as well as in other jurisdictions, that an agreement by the owner of land in favor of the owner of an article, to the effect that the article shall retain its personal character or be removable as personalty, even though affixed to the land, is valid and effective against the owner of the realty, and precludes him from contending that the article has become part of the realty by virtue of the fact that it has become affixed thereto. Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524; Watterson v. Cruse, 179 Cal. 379, 176 P. 870; Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Kirkman Nurseries v. Sargent, 42 Cal. App. 290, 183 Pa. 591; see, also, 26 Cor. Jur. 676, § 39. This rule is inferentially recognized by section 1013 of the Civil Code. It is equally well settled that such an agreement has no force and effect as against a subsequent purchaser or incumbrancer who becomes such without notice of the claims of the conditional vendor. Oakland Bank of Savings v. California Pressed Brick Co., supra; Bell v. Mortgage Guarantee Co. (Cal. App.) 292 P. 660. This rule is based on the fact that the subsequent incumbrancer has been misled by the fact that the conditional vendor has permitted the chattels to become attached to the realty so as to have ostensibly become a part thereof.

[4, 5] In the present case, the Standard Mortgage Corporation is in the position of a prior incumbrancer, who has advanced money to the owner of the real property for the purpose of having the latter construct a hotel building thereon. The parties contemplated that the security for the loan should not only be the real property, but also the completed hotel building. Although no case seems to have been decided directly in point in this state, the rule is well settled elsewhere that usually the subsequent conditional vendor, will prevail over a prior incumbrancer, for the reason that the prior incumbrancer has not been misled and has advanced nothing on the faith of such annexation. 26 Cor. Jur. 684, § 49. Plaintiff herein seeks to bring himself within that rule. However, to that rule there is a well-recognized exception, and that is that it has no application where a severance of the fixtures will substantially injure or diminish the security of the prior incumbrancer. 26 Cor. Jur. 686, § 52, and cases cited therein. That exception applies with particular force to the instant case. The plaintiff herein caused these articles to become attached to the real property. He knew that there was a prior incumbrance against the completed structure. He knew and so testified that the hotel could not be operated as a hotel if these fixtures were removed. He knew that the building was being erected for a hotel property and for no other use. He must be charged with notice of the fact that the removal of those fixtures would render practically worthless the main security for the loan. In such a case, it is our opinion that, where the removal of the fixtures will substantially damage or injure the security of the prior incumbrancer, the conditional vendor's rights must be relegated to those of the former. It is true that the trial court found that the articles herein could be removed without substantial damage to the realty, but that finding was not intended as a finding that the articles could be removed without substantial injury to the security of defendant. All that finding amounts to is a finding that the articles can be removed without injury to the basic structure to which they have been affixed. The plumbing and heating fixtures are permanent in character, and absolutely essential to the purpose for which the building was constructed. The hotel building would not be a hotel building without those fixtures. If the above-mentioned finding means that the security of defendant mortgage corporation will not be substantially injured by virtue of the severance, then the finding is contrary to the plaintiff's own testimony and contrary to the stipulation of the parties. Although involving a situation between the vendor and vendee of the realty, the reasoning of this court in Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251, seems applicable here. At page 131 of 58 Cal. it is stated: "Judged by these rules, it would seem as if there was no room for doubt as to the character of the articles in controversy. Taking into consideration their nature, the circumstances under which they were placed in the building, the mode of their connection with it, and the relation which they bear to its use and enjoyment, they must be regarded as essential for the purposes for which the building was used. The plaintiff himself, by his testimony, shows that the globes were lettered 'Orleans Hotel,' and that they, with the chandeliers, etc., were necessary for furnishing light to the building; that the range rested on a foundation of brick, and that it and its attachments were annexed to the building by pipes, which connected them with the tanks and filters on the roof of the building, and by a waste-pipe which ran through the wall of the building and connected with a sewer in an alley outside, and that the range and its attachments were necessary for cooking; that the tanks and filters were attached to the building by a system of pipes which connected them with the main, or pipes of the City Water Company, and with various parts of the hotel, and were necessary to supply the hotel with clear water; that the mosquito-transoms and window-screens were fitted to the windows and transoms of the hotel—each window and transom-frame being fitted to its

particular window, and shoved up and down in it on grooves, and all of them were as necessary to the hotel as its windows, its blinds and shutters. All of the articles were, therefore, essential to the use and enjoyment of the hotel; in fact, as the plaintiff testified, 'it would not have been a hotel without them.'"

Inasmuch as we have determined that the case must be reversed for the above reason, it is unnecessary to discuss, although they have been considered, the numerous other points raised by counsel.

The judgment appealed from is reversed.

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214 Cal. 513

PEOPLE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13095.

Supreme Court of California.

Dec. 29, 1931.

Rehearing Denied Jan. 28, 1932.

1. Indictment and Information 🔑153.

Where neither court nor district attorney requests accused be held to await new indictment after demurrer to former indictment was sustained, further prosecution of accused on same charge *held* illegal (Pen. Code, §§ 1117, 1141).

2. Mandamus 🔑43.

Where further prosecution on charge of perjury was illegal and accused's release could be secured by habeas corpus, mandamus to reinstate criminal cause will be denied (Pen. Code, §§ 998, 1117).

In Bank.

Writ of Mandate Directed to Superior Court, Los Angeles County; Reuben Schmidt, Judge.

Application by the People of the State of California for writ of mandate directed to the Superior Court of the State of California in and for Los Angeles County and another.

Writ denied.

Superseding opinion of district court of appeals, 299 P. 773.

U. S. Webb, Atty. Gen., Buron Fitts, Dist. Atty., Tracy Chatfield Becker, Grant B. Cooper, Willard W. Burgess, and T. P. Menzies, Dep. Dist. Attys., all of Los Angeles, for the People.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Dep. Co. Counsel, both of Los Angeles, for respondent.

James Donovan, of Los Angeles, amicus curiæ.

PRESTON, J.

The object of this proceeding is to accomplish by writ of mandate the following result: To require the superior court to reinstate a criminal cause that it has heretofore dismissed upon the ground that the indictment therein did not charge a public offense, and to that end to cause the defendant therein to be reapprehended, the jury to be resummoned and reassembled, and to thereafter require the cause proceeded with to verdict and judgment. It must be seen at once that these requests are unusual and test severely the strength of the writ of mandate.

The facts out of which this controversy arose are: The indictment was returned on September 30, 1930, purporting to charge one Johnson with the crime of perjury. His demurrer thereto upon the ground that the same did not state a public offense and other grounds was overruled, and thereafter he entered his plea of not guilty and the cause went to trial. After the examination of some twelve witnesses and after the prosecution had rested its case, defendant filed a written motion for a directed verdict and dismissal of the action, specifying, among other things, the particular ground that the indictment did not charge facts sufficient to constitute the crime of perjury. The court sustained this contention, and thereupon entered its order dismissing the indictment, releasing the defendant, exonerating his bail, and discharging the jury.

[1] In making this order, the court did not, as it might have done under section 1117 of the Penal Code, direct the case to be resubmitted to the same or some other grand jury; nor did it require the proceedings set forth in section 998 of said Code respecting the custody of the defendant. Neither did the prosecuting attorney apply for any such relief at the time the indictment was dismissed. But later the petitioner filed this petition for writ of mandate in the District Court of Appeal, Second District, Division One, alleging the above facts, and praying that the writ issue to accomplish the said purpose. Said court denied the petition, and a transfer of the cause was had to this court, largely to give further consideration to the contention that there was a conflict between the holding of the District Court of Appeal in this case and its holding in the case of People v. Superior Court, 39 Cal. App. 324, 178 P. 730.

But the last-mentioned case gives no consideration to the question of immunity of the defendant from further prosecution. The contention here is: If the indictment does not charge an offense, the court committed no error; if it does charge an offense, nevertheless the defendant is immune from further prosecution. The people, of course, must and do contend that the indictment is sufficient. But the court did not of its own motion, nor did the district attorney, request that the defendant be held to await a new and sufficient indictment. This situation makes the further prosecution of defendant on this charge unwarranted and illegal. Pen. Code, §§ 1117 and 1141. This question has been inferentially decided several times in construing section 1008 of said Code. In re Harron, 191 Cal. 457, 465, 217 P. 728; Ex parte Hughes, 160 Cal. 388, 117 P. 437; Ex parte Williams, 116 Cal. 512, 48 P. 499; and Ex parte Hayter, 16 Cal. App. 211, 116 P. 370.

[2] If it can be presumed that the defendant may again be found and arrested, and the jurors may also again be found and reassembled, yet, under the above authorities and on principle, it would be an idle proceeding as the defendant could obtain his release upon habeas corpus. It is therefore clear that no field is present for the operation of the remedy of mandamus.

The alternative writ is discharged, and the petition denied.

We concur: WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

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214 Cal. 506

FOLEY v. EULESS et al.

L. A. 13001.

Supreme Court of California.

Dec. 29, 1931.

1. Contracts 🔑168.

Courts will not rewrite contracts by implying provisions, unless necessary to carry out parties' intention.

2. Contracts 🔑168.

Condition of contract cannot be implied where contrary to express terms or where contract is intentionally silent.

3. Principal and agent 🔑136(1).

Under contract with growers' representatives requiring packer to prepare and market all raisins delivered by growers, representatives *held* not impliedly obligated to cause growers to deliver their entire crop.

> Contract in question provided that packer would weigh, grade, process, pack, store, and market such raisins as representatives would cause growers to deliver to him by specified time; that packer would issue negotiable warehouse receipt and weight tag to each grower; that except for raisins delivered by growers, who dealt in three particular varieties, packer would handle no other raisins of those varieties during term of contract; and that contract should continue until all raisins delivered by growers had been processed and sold.

4. Contracts 🔑172.

Contract between growers' representatives and packer, giving growers option to avail themselves of packer's offer to process and market grower's raisins, *held* not to require growers delivering raisins to have them processed and sold by packer.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by E. Y. Foley against J. M. Euless and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

For opinion of District Court of Appeal, herewith adopted, see 297 P. 131.

Frank Kauke, of Fresno, for appellant.

Iener W. Nielsen, Julius Hansen, Harris & Hayhurst, and Gallaher & Jertberg, all of Fresno, and George A. Clough, of San Francisco, for respondents.

PER CURIAM.

This case is before us upon hearing granted after decision by the District Court of Appeal, Fourth Appellate District, sustaining a judgment entered in favor of defendants after demurrer sustained to the amended complaint without leave to amend. The hearing was granted to enable this court to give further consideration to the question as to whether the agreement upon which the action was based was a mutually binding contract by which defendants agreed by implication, as plaintiff contends, to deliver or cause to be delivered to plaintiff the entire crop of raisins grown by the members of the pool referred to therein. We are now satisfied that the term for which appellant contends cannot fairly be implied from the contract as a whole or from any particular provision thereof. It would be to ask the court to go a long way in contract making. The Appellate Court properly held that the contract left to the judgment or election of respondents the quantity of raisins to be delivered to appellant's packing plant. The action is not one for reformation of the contract. If the provision was inadvertently or improperly omitted, the procedure would have been for plaintiff to seek a reformation upon proper pleadings and proof establishing his right thereto rather than to ask the court to make a contract in the premises. We therefore adopt the portion of the opinion of the District Court of Appeal, written by Mr. Justice Marks, which deals with the obligatory effect of the contract on respondents as part of the opinion of this court. Said opinion is as follows:

Appellant filed suit in the court below seeking the recovery of $100,000 damages for an alleged breach of contract. Respondents filed a general and special demurrer to an amended complaint, which demurrer was sustained without leave to amend. From the judgment entered in favor of respondents, appellant prosecuted this appeal.

A written contract bearing the date of October 9, 1929, forms the basis of appellant's cause of action. E. Y. Foley, the first party named therein, was a packer and shipper of dried fruits, with a packing house in Fresno, Cal. Respondents are described in the contract as "J. M. Euless and Henry Dermer, associated together as the Euless-Dermer Pool of the same county and State, parties of the second part." The contract is signed by the respective parties individually without any indication, as far as the signatures are concerned that they were acting in a representative capacity. The body of the agreement discloses that the second parties were acting as the representatives of a number of growers of raisin grapes who were associated together and acting for their joint benefit and protection under the name of the Euless-Dermer Pool. As the decision of this case will turn on the construction to be placed upon this contract, it will be necessary for us to detail its provisions.

The members of the pool were engaged in raising Thompson Seedless, Sultana, and Muscat grapes and curing them into raisins. They desired to secure packing and marketing facilities for their crops. To effect this purpose appellant agreed to receive at his packing house such of the raisins of the pool members "which the said second parties (respondents) will have the members of the said above-mentioned pool deliver to the first party's (appellant's) packing house not later than January 1st, 1930." Upon such delivery appellant agreed to weigh the raisins and grade them as either extra standard, standard, or sub-standard. In case of any disagreement as to the grades, a regrading by the representatives of the two parties to the contract and a third grader selected by the pool's representative was provided for. Appellant obligated himself to issue to each pool member so delivering raisins a negotiable warehouse receipt and a standard weight tag, showing the amount, kind, and grade of raisins so delivered. Appellant further agreed that he would put the raisins through the standard processes to prepare them for market, and that he would pack them either in cartons or twenty-five pound boxes as and when directed by respondents. Appellant agreed to store, warehouse, and protect them from the elements, and that he would be responsible for the safety of the raisins and guard them against theft and insure them against loss by fire at his own cost and expense. Appellant further agreed to secure purchasers for the raisins. All bids were to be submitted to an executive committee of the pool consisting of respondents and one other, and no bid could be accepted without the consent of the committee. When sold the purchase price was to be paid to the pool. He further agreed that upon the sale of the raisins by the executive committee he would load the raisins on cars for shipment. All expenses of handling, processing, packing, preparing for market, and marketing the raisins were to be paid by appellant, except that the "pool shall pay the regular buyer's two per cent. (2%) cash discount and a broker's commission incurred in the sale of the raisins." It was further agreed that all drafts drawn for the payment of the raisins should be drawn in favor of the pool. The contract also contained the following provisions:

"It is further understood and agreed by and between the parties hereto that in consideration of the said second parties obtaining the delivery of the pool members' raisins to the said first party's packing house, that the said first party will not handle any other natural dried raisins of Thompson Seedless, Sultanas and Muscat varieties, during the term of this contract at his above mentioned packing plant.

"The said second parties will pay to the said first party therefor the sum of 1¼¢ per pound on all raisins packed in twenty-five pound boxes and 1½¢ per pound on all raisins packed in cartons and that the said consideration shall be paid to the said first party by the said second parties, as the said raisins are sold and paid for.

"It is understood and agreed that this agreement shall continue in full force and effect until all of the raisins delivered to first party by the Pool members shall have been processed and sold and delivered to the buyers of the same."

A copy of the contract is attached to the amended complaint as an exhibit.

It is alleged in the amended complaint that the pool members raised and cured, and respondents had under their control, ten thousand tons of the varieties of raisins mentioned in the contract; that appellant could and would have received all of these raisins at his packing plant prior to January 1, 1930, and "could and would have weighed and graded all said raisins, and could and would have performed all the necessary work of putting the said raisins through the standard process, and could and would have prepared said raisins for marketing, and could and would have packed all said raisins in cartons and boxes, and could and would in all respects and particulars have handled said raisins in the manner mentioned and called for in and by said contract," if he had not been prevented in so doing by the respondents. It is further alleged that respondents caused the growers to deliver four hundred tons of the raisins to appellant's warehouse, "but said defendants failed and refused to deliver or cause to be delivered, and did not deliver, nor cause to be delivered, nor suffer or permit to be delivered, at plaintiff's packing plant or to plaintiff, any other or further amount of the raisins of said pool members or any raisins, and said defendants did advise, direct, and cause the said pool members to refrain from delivering other or further raisins to plaintiff, or at said packing plant, and that no raisins, except said 400 tons, or thereabouts, were ever delivered or caused to be delivered or permitted by defendants to be delivered at said packing plant." It is further alleged that respondents "refused to permit or allow plaintiff to process, pack or otherwise prepare for marketing any of said raisins, either of said 400 tons which were so delivered, or of any part of the remaining 9,600 tons of said pool members' raisins, or other raisins; and said defendants prevented plaintiff from doing anything relative to the processing, packing or preparing for marketing of raisins." It is further alleged that on January 1, 1930, respondents notified appellant that they would not proceed under nor comply with the terms of the contract, and that they repudiated the same and would not permit appellant to proceed thereunder and prior to January 20, 1930, caused the four hundred tons already delivered to be removed. It is not alleged that appellant graded or insured the four hundred tons of raisins which were delivered.

This appeal presents two questions for our consideration: First, the liability of respondents to appellant, if any, as to the nine thousand six hundred tons of raisins which were not delivered to appellant's warehouse, and, second, as to the four hundred tons which were delivered but were subsequently removed.

Appellant concedes that the contract, by its express terms, did not obligate respondents to have delivered to the warehouse all, or any definite quantity, of the growers' raisins. He contends that, as the agreement prohibited him receiving at the described packing house any other raisins of the varieties named, and that as the agreement was to remain in force and effect until all the raisins delivered had been processed, sold, and delivered to buyers, there was an implied covenant on the part of the respondents to cause all of the growers' raisins to be delivered to him.

[1, 2] Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision is necessary to carry out the intention of the parties. No implied condition can be inserted as against the express terms of the contract or to supply a covenant upon which it was intentionally silent. The rule is thus stated by the Court of Appeals of New York in Genet v. Delaware & Hudson Canal Co., 136 N. Y. 593, 32 N. E. 1078, 1081, 19 L. R. A. 127: "I know very well that implied promises are to be cautiously and not hastily raised. What they are was very well stated in Scrantom v. Booth, 29 Barb. [N. Y.] 174; in Allamon v. Albany, 43 Barb. [N. Y.] 36; and in Booth v. Cleveland Roll. Mills Co., 6 Hun. [N. Y.] 597. They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. In this court we have thrown some safeguards about the doctrine to secure its prudent application, and have said that a promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it (Dermott v. State, 99 N. Y. 101, 1 N. E. 242), and that it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect (King v. Leighton, 100 N. Y. 386, 3 N. E. 594)."

This rule was recognized in the case of Loyalton, etc., Co. v. California, etc., Co., 22 Cal. App. 75, 133 P. 323, 324, where it was said: "Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound."

[3] With these rules of law in mind we cannot conclude that there was an implied obligation on the part of respondents to cause the pool members to deliver all of their raisins to appellant. The omission of such a covenant might have been intentional on the part of respondents, as the quantity of raisins to be delivered might be determined by them and be governed entirely by the good faith of appellant in performing his obligations and his success in marketing those delivered. The executed contract was clear in its terms and left to the judgment of respondents the quantity of raisins to be delivered. Had appellant desired a covenant requiring a given number of tons of raisins or all of the growers' raisins to be delivered to him, he should have had such a provision inserted in the contract. We cannot rewrite the agreement for him.

[4] The foregoing discussion of the District Court of Appeal is also applicable to the 400 tons of raisins which were actually delivered by the growers to plaintiff's packing plant, but which, it is alleged, defendants "caused to be taken away and removed from said packing plant" prior to January 20, 1930. As to said raisins it is also alleged that defendants "refused to allow or permit plaintiff to process, prepare for market, or sell any of said raisins, or do anything relative to said raisins other than to grade, keep, store and protect said raisins" to the time of removal. By the terms of the contract defendants were given an option to avail themselves of plaintiff's offer to process and market the pool members' raisins as they should elect. By the mere delivery of raisins to plaintiff, they did not lose the right to decide whether plaintiff should proceed to prepare the raisins for market and endeavor to sell them, but said raisins remained subject to the order of defendants or the pool members. That the growers had the right to remove the raisins is further indicated by the fact that the agreement expressly provided that standard weight tags and negotiable warehouse receipts should be issued to the various pool members upon delivery of raisins by them. The contract contains no language by which defendants engaged, either expressly or impliedly, that the pool members or their indorsees should not exercise the rights which the law attaches to such receipts, including the right of removal. It may be that plaintiff could recover from the growers the reasonable charges of storing and grading for the time the raisins remained in his warehouse, but the present action is not designed for that purpose.

Judgment affirmed.

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214 Cal. 547

RIXFORD et al. v. JORDAN, Secretary of State.

S. F. 14316.

Supreme Court of California.

Dec. 31, 1931.

Rehearing Denied Jan. 28, 1932.

1. Mandamus ⇨88.

In mandamus proceeding to compel filing of articles of incorporation, secretary of state, in answer, may show reasons for refusal, which, if well founded, will constitute justification, even though tardily made (Code Civ. Proc. § 1085).

Such reasons may constitute justification when made at such time, even though in letter addressed to attorneys of petitioner, secretary of state, in stating reasons for refusing to file articles, placed them in main on untenable grounds.

2. Corporations ⇨22.

No other party than petitioners presenting articles of incorporation for filing was necessary or proper party to proceeding.

The business intentions of petitioners, whose names appeared in proper form on articles which set out the extent of their respective interests, could not be questioned by the secretary of state, and it would be no concern of his whether persons making application for filing had contract to dispose of their interests or shares of stock immediately upon filing of letters.

3. Corporations ⇨22.

It was duty of secretary of state to file articles of incorporation properly presented, unless they violated statute respecting names (Civ. Code, § 296, as amended by St. 1929, p. 1263, § 6).

Civ. Code, § 296, as amended by St. 1929, p. 1263, § 6, prohibits the use of a name likely to mislead the public or which is same as, or resembles so closely as to tend to deceive, name of domestic corporation or name of foreign corporation authorized to transact intrastate business within state.

4. Corporations ⇨49(1).

To deny filing of articles of incorporation, resemblances between names must be likely to mislead persons of average discernment (Civ. Code, § 296, as amended by St. 1929, p. 1263, § 6).

Unless the resemblances are such as are likely, examined in the light of the business situation as it exists, to mislead persons of average discernment as to identity, the right to select a name should not be too strictly circumscribed lest it interfere with business organization.

5. Corporations ⇨49(1).

Filing of articles of incorporation of "Shredded Foods Company" cannot be denied for similarity of name to "Shredded Wheat Company" (Civ. Code, § 296, as amended by St. 1929, p. 1263, § 6).

6. Corporations ⇨22.

Secretary of state cannot determine whether proposed domestic corporation will become unfair competitor with foreign corporation opposing filing of articles.

CURTIS, J., dissenting.

In Bank.

Application for writ of mandate by Halsey L. Rixford and others, prayed to be directed

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⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes to Frank C. Jordan, as Secretary of State, to compel him to file articles of incorporation.

Writ granted.

W. F. Williamson, Wallace & Vaughan, of San Francisco (Lauder W. Hodges, of San Francisco, of counsel), for petitioners.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen. (McCutchen, Olney, Mannon & Greene, of San Francisco, of counsel), for respondent.

SEAWELL, J.

Petition for a writ of mandamus to compel the secretary of state, upon his refusal to do so, to file articles of incorporation presented by the petitioners as incorporators of a proposed corporation under the name and style of California Shredded Foods Company, Limited. Respondent filed a general demurrer to the petition and at the same time filed his answer. Petitioners have demurred specifically to paragraphs VI to XVI, both inclusive, of said answer, on the grounds of uncertainty and lack of directness and completeness of said allegations and also on the ground that the matters therein contained do not constitute an answer or defense to the relief sought by the petition.

On April 20, 1931, petitioners presented to respondent as secretary of state, at his office at the city of Sacramento, this state, their proposed articles of incorporation, accompanied by the proper filing fee, and in every respect complying with the requirements of the statute in such cases made and provided, and which were entitled to be filed unless said articles of incorporation violated the provisions of section 296, Civil Code (Stats. 1929, p. 1263, § 6), by setting forth a name which was likely to mislead the public or which was the same as, or resembled so closely as to tend to deceive (1) the name of a domestic corporation, or (2) the name of a foreign corporation which was authorized to transact intrastate business in this state. Said statute further provides that the use by a corporation of a name in violation of this section may be enjoined notwithstanding its articles may have been filed by the secretary of state.

[1] Respondent, in a letter addressed to the attorneys of petitioners, dated April 20, 1931, in stating his reasons for refusing to file said articles of incorporation, placed them in the main on untenable grounds. In his answer, however, he set forth the reasons for his refusal, which, if well founded, would constitute a justification of his action even though they were tardily made. Under a similar state of facts, we said in Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784, that, although the reasons assigned by respondent superintendent of banks in attempting to justify his refusal to issue certain permits for the establishment of branch banks within the city of Los Angeles were insufficient, nevertheless such untenable reasons did not preclude him from setting up additional and valid reasons for such refusal. What is there said is not to be taken as authority for including in the instant case the historical and discursive allegations touching the founding, development, and widely extended activities of the National Biscuit Company, a foreign corporation authorized to do business in this state, and its many junior allied and subsidiary corporations, or the extensive plans of advertisements which it has adopted, or the methods of preparing, packing, and marketing the outputs of said corporation, or the numerous patents issued thereto and trademarks which have been filed, or the large variety of other subjects included in respondent's answer beginning with paragraph VI and concluding with paragraph XVI thereof, the last of which has to do with the alleged desires, designs, and purposes of William E. Williams and Thomas Allan Box. All of said matter is extraneous to the issue presented by this proceeding, and affords no tenable reason for the refusal of respondent, a ministerial officer, to file the articles of incorporation as tendered. The proceeding is a direct one brought by certain named citizens and residents of this state who have voluntarily associated themselves together to organize a domestic corporation, with its principal place of business located in the city and county of San Francisco, to compel a public officer to perform an act which the law specially enjoins upon him as a duty resulting from his office. Section 1085, Code Civ. Proc. The purposes, among others set forth, for which petitioners desire to incorporate, are to "manufacture, produce, prepare for market, buy, sell, import, export, distribute and generally deal in, food products and materials of all classes and descriptions in the state of California. To manufacture, purchase or otherwise acquire goods, wares, merchandise and personal property of every class and description and to hold, own, sell and otherwise dispose of, trade, deal in and with the same"; also to purchase, lease, buy, or otherwise acquire real property and dispose of the same, and to carry on manufacturing, distributing, or any other businesses auxiliary to the objects or purposes of the corporation.

[2, 3] The business of the proposed corporation, as shown upon the face of its articles of incorporation, is strictly lawful, and is agreeable to the commercial and business policy of this state. No other person or corporation, notwithstanding respondent's claim to the contrary, was a necessary or proper party to the proceeding, which was between the petitioners and the public officer. The business intentions of petitioners, whose names appear in proper form upon the articles which set out the extent of their respective interests, cannot be questioned by the secretary of state. It would be no concern of his

whether the persons making the application for filing had a contract to dispose of their interests or shares of stock immediately upon the filing of said letters. While there is no reason to believe that such an arrangement existed in the instant case, doubtless the existence of such a plan is not unusual in the preliminary organization of corporations. It is of no importance. Neither would it have been a matter of concern to the secretary of state if the names William E. Williams (who seems to have been an early pioneer in the manufacture of shredded wheat products) and Thomas Allan Box, both of whom are alleged to have been unfair trade competitors of the National Biscuit Company and its subsidiary corporation, Shredded Wheat Company, and who are alleged upon information and belief to be the real parties interested in the formation of the proposed corporation, had actually appeared upon the stock subscription list or that either or both was in fact interested in the formation of the corporation. Nothing appearing upon the record before him, it was his duty to perform a ministerial duty and file said articles unless they violated in some manner the provisions of section 296, Civil Code. The language of the above Code section is too clear and its meaning is too apparent to need the aid of a constructionist. It means precisely what it states, and no more or less. When articles of incorporation are presented to the secretary of state to be filed, it is his duty to turn to his records and compare the name of the proposed corporation with those which may be so similar in construction as to be likely to mislead the public, or, as the statute expresses it, which so closely resemble the name of another corporation, domestic or foreign, which is authorized to transact business in this state, as to tend to deceive.

[4, 5] The foreign corporation authorized to transact business within this state, and which it is claimed the name of the proposed domestic corporation so nearly resembles as to offend against the law, is Shredded Wheat Company, as contrasted with California Shredded Foods Company, Limited. The only word common to both corporations is "shredded." In all other respects the identifying words constituting the corporate names of each are neither similar in print nor in sound. Surely it will not be seriously contended that any corporation or person has been granted the exclusive use of the single word "shredded," or the exclusive right to shred, crush, grind, or otherwise mill and prepare food for consumption, especially one of the most stable and extensively used cereals known to the human family, wheat. By no means is wheat the only product that is shredded or capable of being shredded, which means to cut or tear, rather than crush or grind. Shredded codfish and shredded cocoanut are staples well known to the public. Doubtless there are many other kinds of foodstuffs which are prepared in shredded form for the markets. Corporations naturally are desirous of adopting a corporate name which will be expressive or suggestive of the business in which they are to engage. In view of the present day tendency of doing business through artificial bodies, it would be indeed difficult to select a name descriptive of the business to be transacted without making use of one or more words constituting the corporate name of some other entity engaged in a similar business. Therefore, unless the resemblances are such as are likely, examined in the light of the business situation as it exists, to mislead persons of average discernment as to identity, the right to select a name should not be too strictly circumscribed lest it interfere with business organization. In the instant case the word "shredded" is descriptive of the method by which the food cereals are to be severed. It would be difficult to name a word which would be synonymous with or as appropriate to the subject as the oft-used word "shredded" when applied to the preparation of foodstuffs for human consumption. There is no greater proprietary right inherent in the word "shredded" than there is in cracked wheat, rolled oats, and other known forms of grain reductions. As to the scientific process of bringing about such a result, another question would be presented. An invasion of the latter right is not involved in this proceeding. It is obvious from a comparison of the two corporate names that they are dissimilar and would not tend to mislead or deceive the average trading person or a person of average discernment, and, this being so, it was a duty enjoined by law upon the secretary of state to file said tendered articles. In State v. Howell, 96 Wash. 163, 164 P. 917, 919, the secretary of state under a statute similar to ours, filed incorporating articles of a California corporation which were identical as to name with that of a Washington corporation which was doing a similar business in the state of Washington. The Washington corporation, which was first to file, brought a mandamus proceeding against the secretary of state to compel him to strike from his records the name of the California corporation adopting the same name as the Washington corporation. The writ was issued as prayed for and the articles of the California corporation stricken from the records. In the course of the proceedings, counsel for the respondent, as in the instant case, sought to inject into the proceedings the merits of a controversy existing between the two corporations by which it was claimed that the Washington corporation adopted the name of the California corporation as a move to gain an undue and unfair trade advantage over said California corporation. In answering this argument, the court said:

"Much discussion is indulged in and many authorities cited by counsel for the secretary of state having to do with the respective rights of these corporations to the use of the name 'Progressive Motion Picture Company' as a trade-name. Whatever the rights of either of these companies may be to the use of that name as a trade-name we think is foreign to any proper subject of inquiry here. There are numerous authorities holding that the mere acquiring of a corporate name by the organization of a corporation in accordance with statute, or the mere acquiring of the right of a foreign corporation to do business in a state in accordance with statute, does not give to either of such corporations the right to do business in its corporate name, in violation of the trade-name rights of others. [Citing cases.] But this is not the question here for decision, nor will our disposition of this case impair in the least whatever rights either of these corporations may have as against the other, rested upon its claimed trade-name rights. This is simply a question of the secretary of state having failed to perform a plain duty enjoined upon him by the express language of section 3680, above quoted, which duty we are of the opinion the relator had an equally plain right to have performed, and, having promptly asked for relief in that behalf is now entitled to have that duty in effect performed by striking the name of the California corporation from the records of the office of the secretary of state and the license of that corporation cancelled. It may be that had not the Washington corporation moved promptly in seeking relief by mandamus, it would have lost its right to invoke that remedy against the secretary of state because of rights the California corporation might possibly have acquired which could be rested upon estoppel or laches as against relator. It may also be true that had the names of these corporations, instead of being exactly alike, only resembled each other with a difference such as to furnish room for honest difference of opinion as to whether they so resembled each other 'as to be misleading,' thus presenting a question for the exercise of judgment on the part of the secretary of state for decision, we would not award relator relief by mandamus. But the resemblance of these names to each other is so complete, they being exactly the same, that there is no room for exercise of judgment upon the question of their similarity; hence there was no question for the secretary of state to decide in that respect as to which there was any room for difference of opinion. The secretary of state in our opinion had no authority whatever to entertain the question of what right either of these companies had against the other to the use of the name 'Progressive Motion Picture Company,' except as he was required to determine that question from his own records; and, when by reference thereto it appeared that the Washington corporation was duly organized as such and had issued to it a license, the scope of his inquiry was at an end, and he had no authority whatever to file articles of any other corporation, domestic or foreign, or to issue a license to any other corporation, domestic or foreign, of the same name. Such is the plain mandatory provision of section 3680.

"We have not lost sight of the general rule invoked by counsel for the secretary of state, citing 26 Cyc. 149, and other authorities, that mandamus will ordinarily not be awarded as a remedy where the rights of third parties may be injuriously affected; they not being heard. But we are of the opinion, in view of the plain duty of the secretary of state to have refrained from filing the California corporation's articles and the issuing to it of a license, and the prompt application of the relator for mandamus in this proceeding, that such remedy should not be denied relator because the California corporation is not being heard here. We think the undisputed facts before us render it plain that the California corporation has no such possible rights as entitle it to be heard here."

The test to be applied in determining similarity of trade-names as between two contending corporations, as announced by some of the courts of the country, and with which we are in agreement, is, "Do the two names so closely resemble each other that a person using that care, caution and observation which the public uses and may be expected to use, would mistake one for the other?" It is true that the court in the above quotation mentions the fact that both names were precisely the same and there was no room for the exercise of discretion, and says, perhaps by way of dicta, that, in a case where the question of difference is so close as to fairly cause a difference of opinion in the public mind, the action of the secretary of state would not be disturbed. This is but a statement of the rule which governs all courts in reviewing the action of ministerial officers. But by the uncontradicted record in this case the names are so widely dissimilar as to leave no room for the exercise of discretion or judgment on the part of said public officer which would make it discretionary with him to ignore the existence of patent facts. The same reasoning which justified the issuance of the writ in the Washington case likewise justifies a similar order in the instant case.

This court has held many times that the secretary of state is a ministerial officer, and it has in times past directed the issuance of the writ of mandamus to compel him to perform an office which he, placing his objections upon what he contended were tenable grounds, refused to perform. His duties generally are ministerial and the fact that all officers must use intelligence and must even exercise judgment in the performance of official duty does not clothe them with judicial or arbitrary discretionary power. The statute which prescribes the duties of the secretary of state does not pretend to give him such broad discretionary powers as are reposed in the superintendent of banks or the commissioner of corporations, respectively, who are selected because of their special skill, training, and knowledge of the currency problems and the corporation laws of this state, two of the most important departments of our state government, and what this court may have said in its reported cases touching the grant of power conferred upon such officers would not be applicable to the performance of a simple ministerial duty prescribed by the plain language of the code.

[6] The secretary of state is not clothed with the powers of a court of equity and therefore cannot decide the issue whether or not the proposed domestic corporation will become an unfair competitor in trade with said foreign corporations which are opposing the filing of petitioner's articles of incorporation.

Upon our view of the proceedings instituted, we see no occasion for a reference to a court or referee to take testimony, as there are no material facts essential to a decision of the issues presented which are not disclosed by the record before us.

Under the practice of this court in kindred matters the questions presented are such as entitle petitioners to issuance of the writ.

The demurrer to the petition is overruled. The demurrer to the answer is sustained on the ground that it does not present a defense against the relief prayed for. The writ of mandamus will issue commanding the secretary of state to file petitioners' proposed articles of incorporation, as in such cases provided by law. It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

CURTIS, J.

I dissent. Section 296 of the Civil Code provided that "The secretary of state shall not file articles of incorporation which set forth a name which is likely to mislead the public or which is the same as, or resembles so closely as to tend to deceive, (1) * * * (2) The name of a foreign corporation which is authorized to transact intrastate business in this state. * * *" The name of the proposed corporation, California Shredded Food Company, Limited, resembles so closely the name of the Shredded Wheat Company, a foreign corporation authorized to do business in this state, that its use, in the name of a separate and distinct corporation would tend to deceive and mislead the public in dealing with the products of these two companies. Persons desiring to purchase a shredded wheat product, and being accustomed to purchase that put out by the old company could easily, and undoubtedly would, be misled and deceived if the new company be permitted to do business under the name set forth in its articles of incorporation. There are sufficient names, wholly dissimilar from the name Shredded Wheat Company," which any legitimate company might select under which it could do business without impinging upon the name of a well-established company in the hope that it may deceive and mislead the public into purchasing its products under the belief that they are securing goods put out by the old company. Under this state of facts it was the duty of the secretary of state to refuse to file the articles of incorporation presented to him by the petitioners.

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119 Cal.App. 487

PEOPLE v. ROSE.

Cr. 1643.

District Court of Appeal, First District, Division 1, California.

Jan. 2, 1932.

1. Criminal law 🔑1144(8).

Absent proof that any jurors had been finally discharged from service in criminal cases within year, it must be presumed that jurors impaneled were regularly upon panel and were neither exempted nor disqualified (Code Civ. Proc. § 199).

2. Criminal law 🔑481, 1153(2).

In determining expert witness' qualification, trial court has broad legal discretion and its decision will not be disturbed except for abuse thereof.

3. Criminal law 🔑478(2).

Court did not abuse discretion in permitting attorney who made handwriting special study for 35 years to testify as handwriting expert.

4. Criminal law 🔑1169(9).

Permitting witness to testify as handwriting expert against objection *held* harmless where testimony was merely cumulative.

5. Criminal law 🔑1037(2).

District attorney's improper statements in argument cannot be considered on appeal where defendant demanded no admonition.

6. Criminal law ⚿1171(1).

Where it was not claimed evidence was insufficient to support verdict and verdict was just one, district attorney's improper argument did not warrant reversal.

7. Criminal law ⚿852.

Court's admonition to jury on adjournment that they might think case over, but could not discuss it with any one, *held* proper (Pen. Code, § 1122).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Rollin Rose was convicted of contributing to the delinquency of a minor, and he appeals.

Affirmed.

Frank W. Creeley and Ernest S. Leslie, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

PER CURIAM.

Appellant was accused by information of the crime of contributing to the delinquency of a minor. He was tried and convicted and sentenced to the county jail for a period of six months. Motion for a new trial was made and denied. This is an appeal from the judgment and order.

[1] In support of the appeal it is first claimed that the trial court committed error in allowing certain persons to sit as jurors. It appears from the record that several of the jurors had performed jury duty the previous year. Appellant claims that, under the provisions of section 199 of the Code of Civil Procedure, they were incompetent to act. There is nothing in the record to show that any of the jurors had been finally discharged from service in criminal cases within a year. In the absence of such proof it must be presumed that the jurors impaneled were regularly upon the panel and were neither exempted nor disqualified from acting. People v. Gilmore, 17 Cal. App. 737, 121 P. 697.

[2-4] It is next claimed that the court erred in permitting a certain person to testify as a handwriting expert. It appeared in evidence that appellant, in company with the prosecuting witness, a woman eighteen years of age, had, on several occasions, rented a room in a hotel in the city of San Jose and had, on each occasion, registered himself and the woman as man and wife under an assumed name. For the purpose of proving that the names on the register were written by appellant, the prosecution called one S. G. Tompkins as a handwriting expert. It is claimed that this witness was not qualified to testify as an expert. The record shows that Mr. Tompkins is an attorney at law and that he has made handwriting a special study for the past thirty-five years, during which time he has testified as an expert on the subject in numerous cases. In determining the qualification of an expert witness, the trial court has a broad legal discretion, and its decision in this regard will not be disturbed upon appeal except for an abuse of such discretion. People v. Goldsworthy, 130 Cal. 600, 62 P. 1074. Moreover, the testimony was merely cumulative, as the clerk and the prosecuting witness both testified that they were present when defendant signed the register and they witnessed his act.

[5] Appellant next contends that the district attorney was guilty of misconduct in the use of certain remarks in the course of his closing address to the jury, and his conduct in this regard was designed to provoke ill feeling toward appellant in the minds of the jury. While certain remarks of the district attorney were improper and might well have been left unsaid, no request was made that the court admonish the jury to disregard them. Improper statements of the district attorney, made in his argument, cannot be considered on appeal if no action of the court below with reference to allowing or forbidding such statements was demanded or requested. People v. Beaver, 83 Cal. 419, 23 P. 321.

[6] Then again, no claim is made that the evidence is insufficient to support the verdict and we are satisfied from a reading of the same that the verdict was a just one and would have been reached if the error had not been committed. Under such circumstances the act complained of does not warrant a reversal. People v. Estorga, 206 Cal. 81, 273 P. 575.

[7] Appellant next contends that error was committed by the trial court in failing to admonish the jury properly as prescribed by the Penal Code (section 1122) on the occasion of an adjournment. The court, in its admonition to the jury, stated, among other things, that while they might think the case over, they were not to discuss it with any one. There is nothing in the admonition from which the jurors could conclude that they were at liberty to form a conclusion before the case was finally submitted to them.

We do not consider there is any merit in the appeal.

The judgment and order appealed from are affirmed.

119 Cal.App. 581

KENDALL v. KOLB.

KOLB v. KENDALL et al.

Civ. 8175.

District Court of Appeal, First District, Division 1, California.
Jan. 12, 1932.

Appeal and error 🔑933(1).

Appellate court will not review motion granting new trial, where record contained only notice of appeal; presumption being that order was properly made (Code Civ. Proc. §§ 953a, 953c).

Appeal from Superor Court, Alameda County; Warren V. Tryon, Judge.

Action by M. G. Kendall against Philip Kolb, in which defendant filed cross-complaint against M. G. Kendall and others. From an order granting a new trial after judgment of nonsuit on the cross-complaint as to M. G. Kendall, and for cross-complainant against Grant O. Harde and other cross-defendants, cross-complainant appeals.

Affirmed.

Philip M. Carey, J. W. Clarke, and Chas. D. Wehr, all of Oakland (Marvin B. Sherwin, of Oakland, of counsel), for appellant.

Herbert D. Wise, Burton Jackson Wyman, and Calkins, Hagar, Hall & Linforth, all of Oakland, for respondents Grant O. Harde, Elizabeth M. Harde, and A. B. Hall.

PER CURIAM.

An appeal from an order granting a new trial.

The above action was brought by M. G. Kendall against Philip Kolb to recover upon two promissory notes. The latter filed a cross-complaint against Kendall, Grant O. Harde, Elizabeth M. Harde, and A. B. Hall, alleging that the execution of the notes was induced by fraud, and seeking to set aside the transaction of which they formed a part.

Upon the trial of the action upon the cross-complaint, a judgment of nonsuit was granted as to Kendall, but judgment upon the verdict of a jury was entered against the other cross-defendants. The latter moved for a new trial, which was granted, and Kolb, the cross-complainant, has appealed from the order.

The record, however, which was prepared under the provisions of sections 953a and 953c of the Code of Civil Procedure, contains no copy of the order granting the motion, as required by the Code. Merritt v. Los Angeles, 162 Cal. 47, 120 P. 1064. Appellant avers, however, that the grounds for the motion were the insufficiency of the evidence to justify the verdict, and that the verdict was against law; and that, since the record does not affirmatively show the order granting the new trial to have been based upon the insufficiency of the evidence, it will be presumed that the order was not upon that ground, and the court is thus precluded from considering that question.

As to this it will be sufficient to say that the record discloses none of the proceedings in this matter except the notice of appeal from the order. An appellate court will not review an order disposing of a motion for a new trial if the record is insufficient (2 Cal. Jur., Appeal and Error, § 403, p. 700), as it is the duty of an appellant to show error; and, unless the record establishes the contrary, it will be presumed that the order was properly made (Skinner v. Horn, 144 Cal. 278, 77 P. 904).

For the above reasons, the order is affirmed.

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119 Cal.App. 563

BLUMENTHAL v. MARYLAND CASUALTY CO.

Civ. 8085.

District Court of Appeal, First District, Division 1, California.
Jan. 9, 1932.

Rehearing Denied Feb. 8, 1932. Hearing Denied by Supreme Court March 7, 1932.

1. Judgment 🔑540.

Former judgment concludes parties to action and their privies in all subsequent actions on same demand.

> Former judgment concludes parties and their privies, not only as to all matters decided in the former action, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which might have been raised and determined.

2. Judgment 🔑724.

Former judgment in action on different demand is only conclusive as to such issues as were essential to, or involved in, judgment rendered.

3. Judgment 🔑724.

In action on different demand, if on face of record anything is left to conjecture as to what was necessarily decided in former judgment, no estoppel exists (Code Civ. Proc. § 1911).

> In absence of findings, only those issues are deemed to have been adjudicated

which were actually included in the judgment or necessary thereto.

4. Judgment ⚿725(1).

Judgment in former action for recovery of stock denying plaintiff recovery on cross-complaint seeking damages for acts of claimant to stock *held* not res judicata of action on injunction bond filed in former action.

Facts disclosed that in former action stock was not deposited in court until some three weeks after order restraining plaintiff from disposing of the stock was issued, thereby disclosing that issuance of injunction was cause of plaintiff's loss, in that in the interim the stock had so declined in value as to become worthless, and that plaintiff filed a cross-complaint for damages caused by acts of claimant to the stock, but did not demand damages for issuance of the restraining order, and that the former judgment merely provided that plaintiff take nothing by his cross-complaint.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Charles J. Blumenthal, doing business under the firm name and style of the A. E. White Company, against the Maryland Casualty Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

John Ralph Wilson, of San Francisco, for appellant.

Arthur H. Barendt, of San Francisco, for respondent.

PER CURIAM.

On July 3, 1925, one Julia Powers commenced an action against plaintiff Blumenthal and others to recover certain shares of the capital stock of the Pacific Diesel Engine Company, a corporation. It was alleged that she had been fraudulently deprived of the stock, and that the same had passed into the hands of Blumenthal as a purchaser. On July 3, 1925, a restraining order was issued, enjoining Blumenthal and the other defendants from selling, transferring, disposing of or otherwise dealing in the stock, and later, upon the petition of the corporation—which was made a defendant in the action, but which disclaimed all interest in the stock—an order was made, permitting it to deposit the stock, evidenced by its certificate, with the clerk of the court to await the determination of the conflicting claims of defendant Blumenthal and the remaining defendants thereto. Upon the issuance of the restraining order, a bond for $500, executed by the Maryland Casualty Company, the defendant in the present action, was filed. This undertaking was later superseded by another executed by the same surety, in the sum of $1,000, which provided that the surety would pay to the parties enjoined such damages, not exceeding $1,000, as they might sustain by reason of the injunction if the court finally decided that plaintiff Powers was not entitled thereto.

In his answer to the complaint Blumenthal alleged in substance that certificates for the stock, duly indorsed in blank by Mrs. Powers, were purchased by him in due course of business for value and without notice of the alleged fraud. He further alleged in a cross-complaint that he presented the certificates to the corporation for transfer, but that the latter, at the request of the plaintiff, did, wholly without right, retain possession thereof, and thereafter, as above stated, deposited the same with the clerk of the court; that as a result he had suffered damage in the sum of $1,049.96, the value of the shares, for which amount or the return thereof he prayed judgment against Mrs. Powers.

The court found the above allegations of Blumenthal's answer to be true, but made no findings upon the allegations of his cross-complaint. Notwithstanding its findings, the trial court entered judgment in favor of Mrs. Powers against Blumenthal, and the injunction was made permanent. From this judgment the latter appealed, and the Supreme Court, in Powers v. Pacific Diesel Engine Co. et al., 206 Cal. 334, 274 P. 512, 73 A. L. R. 1398, reversed the judgment, holding that upon the findings Blumenthal was an innocent purchaser for value, and that judgment should have been entered in his favor.

Following the reversal of the judgment, a further hearing was had in the Superior Court, and a second judgment was entered, adjudging that plaintiff Powers take nothing as against Blumenthal, and that the stock certificates be delivered to him by the clerk of the court; further that "defendant Charles J. Blumenthal do not recover anything from plaintiff and respondent under and by virtue of his cross-complaint in this action." Later the judgment was amended to provide that the restraining order be dissolved. No appeal was taken from this judgment, which recites that findings of fact were waived.

On April 23, 1930, the present action was commenced by Blumenthal as plaintiff against the surety company on the injunction bond. The complaint alleges the foregoing facts in substance, and further that the stock, at the time the restraining order issued, was of the value of $1,049.60, and but for the restraining order would have been sold for that amount; and that during the pendency of the action the same became worthless, to his damage in the above sum. A demand was also alleged, and a judgment in the amount of the undertaking was asked.

The surety company pleaded as a special defense to the action the judgment mentioned, alleging that the same was in effect an adjudication of plaintiff's claim and conclusive in the present case.

The court found in accordance with plaintiff's complaint and against the above defense, and judgment was entered accordingly.

Upon this appeal the only question is whether the final judgment entered in the action against Blumenthal had the effect claimed by the surety company.

The cross-complaint mentioned alleged, in substance, that on or about June 10, 1925, when Blumenthal presented the certificates to the Pacific Diesel Engine Company and demanded that they be transferred, the corporation, at the request of Mrs. Powers, retained possession thereof, and refused to return the same, and subsequently obtained the order mentioned permitting the certificates to be deposited in court.

It appears from the above pleading taken in connection with the date of the restraining order that the cause of action was based upon the alleged act of Mrs. Powers in inducing the corporation to withhold possession of the stock, and had no connection with the issuance of the restraining order.

[1-3] It is the rule that a former judgment concludes the parties to the action and their privies in all subsequent actions upon the same claim or demand not only as to all matters actually decided in the former action but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which might have been raised and determined. 15 Cal. Jur., Judgments, § 189, p. 136; Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597. In an action upon a different claim or demand, however, the former judgment is only conclusive as to such issues or matters as were essential to or shown to have been involved in the judgment rendered. 34 Cor. Jur., Judgments, §§ 1156, 1322, pp. 745, 911; Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 P. 1108; Freeman v. Barnum, 131 Cal. 386, 63 P. 691, 82 Am. St. Rep. 355; Horton v. Goodenough, 184 Cal. 451, 194 P. 34, 16 A. L. R. 611. But if upon the face of the record anything is left to conjecture as to what was necessarily involved and decided there is no estoppel (Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; People v. Bailey, 30 Cal. App. 589, 158 P. 1036; Freeman on Judgments, § 258); and, in the absence of findings, only those issues are deemed to have been adjudicated which were actually included in the judgment or necessary thereto (Code Civ. Proc., § 1911; In re Li Po Tai, 108 Cal. 484, 41 P. 486; Beronio v. Ventura, etc., Co., 129 Cal. 232, 61 P. 958, 79 Am. St. Rep. 118; Gardella v. Amador, 164 Cal. 555, 560, 129 P. 993; McDuff v. McDuff, 45 Cal. App. 53, 187 P. 37). As stated, no claim for damages by reason of the issuance of the restraining order was made in the cross-complaint, nor would its issuance alone have constituted a cause of action against Mrs. Powers. Robinson v. Kellum, 6 Cal. 399; Lacey v. Beaudry, 53 Cal. 693; Asevado v. Orr, 100 Cal. 293, 34 P. 777.

[4] At the second trial it was determined that Blumenthal was the owner of the stock, and consequently the only matter essential to the decision that he take nothing by reason of his cross-complaint was that he was not damaged by the acts of Mrs. Powers as alleged and the doing of which acts she admitted. While it may be argued that her acts and the fact that the stock was placed in the court's custody and not the issuance of the restraining order caused the damage alleged, yet it appears that the restraining order was issued nearly three weeks before the order permitting the stock to be deposited in court was made, and we cannot say that, had Blumenthal not been restrained, he could not in the meantime have disposed of his interest therein. The court in the present action so found in effect, and we see no reason for disturbing its finding.

We are also satisfied that its implied finding that plaintiff was not estopped by the judgment entered in the former action is correct.

The judgment is affirmed.

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119 Cal.App. 578

BURNS v. RENAKER CO. et al.

Civ. 6879.

District Court of Appeal, Second District, Division 2, California.

Jan. 11, 1932.

1. Master and servant 🔑**80(9).**

Evidence warranted finding that plaintiff was employed as assistant in defendants' undertaking business and was entitled to separate compensation from husband's.

2. Interest 🔑**19(2).**

Where amount due is computable from fixed data, interest is recoverable from time debt becomes due, even in action for recovery of reasonable value of services.

3. Interest 🔑**19(1).**

Where reasonable value of plaintiff's services could not be computed from facts, court erred in allowing interest from date of termination of employment rather than from date of judgment.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Stella Burns against the Renaker Company, a copartnership, and others. Judgment for plaintiff, and defendants appeal.

Affirmed as modified.

See, also, 2 P.(2d) 408.

Dunn & Sturgeon, of Monrovia, for appellants.

A. D. Orme, of Pasadena (John C. Davis, of Pasadena, of counsel), for respondent.

FRICKE, Justice pro tem.

Plaintiff's first cause of action is one for services rendered by her personally, and the second cause of action is upon an assigned claim for services rendered by Jewel W. Burns, her husband. The only attack by this appeal is upon the judgment on the first cause of action, whereby respondent was awarded $732.30 with interest from the date of the termination of her services.

Appellant Renaker Company, a copartnership consisting of C. Taylor Renaker and his mother, was engaged in the undertaking business. While there is some conflict in the testimony, there is evidence sustaining the concluson that one Leslie Renaker was employed by the copartnership and was in authority equal to that of C. Taylor Renaker, hiring and directing employees and participating in managing the business. It is not denied that respondent rendered services as a lady assistant, but appellants contend that there is no support for the court's finding that appellants promised and agreed to pay her at the rate of $100 a month. We agree with this contention, for there is an entire absence of any testimony of either such a promise or agreement. That finding may, however, be disregarded, for the balance of the findings are a sufficient foundation for a recovery at the rate of $100 per month as the reasonable value of services rendered.

[1] Appellants further contend that there was an agreement that the compensation for the services of respondent was included in the salary paid her husband. This claim is based upon the testimony of C. Taylor Renaker that he had such an agreement with Jewel W. Burns, husband of respondent. Not only is this denied in the testimony of the husband, but there is an entire lack of evidence that the latter had authority to make such an agreement. It is also significant that the husband rendered services for a full month before the wife was employed and that his salary for that month was as large as his salary during the months while she was employed. A reading of the transcript discloses sufficient evidence to sustain the conclusion that respondent was employed by appellants through Leslie Renaker, who on several occasions assured her that she would be paid for her services. There is also evidence that after respondent left the employment Mrs. Renaker, one of the partners, made the admission that a big check was due respondent and she would see that she received it. The trial court was warranted in refusing to find that respondent's compensation was included in the amount paid to her husband.

[2, 3] Appellants assign as error the allowance of interest on the first cause of action prior to judgment, the court having allowed interest from the date of the termination of respondent's employment. They rely upon the case of Macomber v. Bigelow, 123 Cal. 532, 56 P. 449, 451, which holds, in an action for the reasonable value of services and materials furnished "the amount, character, and value of which could only be established by evidence in court, or by an accord between the parties, and which are not susceptible of ascertainment either by computation or by reference to market rates," that the plaintiff is not entitled to interest prior to verdict or judgment. This rule is well settled in this state, and is followed in Shellenberger v. Baker, 101 Cal. App. 615, 618, 281 P. 1102, and Kimes v. Davidson Investment Co., 101 Cal. App. 382, 281 P. 639; both cases being actions for the reasonable value of services rendered. These authorities do not exclude interest as part of the recoverable damages, for the reason that the actions were for the recovery of reasonable value, but because, under the facts, the person liable did not know the sum due until this was determined by verdict or decision, and, until determined, there could be no default. Cox v. McLaughlin, 76 Cal. 60, 67, 18 P. 100, 9 Am. St. Rep. 164. Where the amount due may be computed from fixed data, interest would be recoverable from the time the debt became due even though the action were one for the recovery of reasonable value of the services rendered. In the case at bar there were no facts from which could be computed the reasonable value of the services rendered by respondent, and the court erred in allowing interest on the amount due on the first cause of action.

The judgment is modified by subtracting therefrom the item of interest on the sum of $732.30 from November 19, 1927, and, as so modified, it is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

119 Cal.App. 574

PEOPLE v. BERRY et al.

Cr. 2116.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1932.

1. Indictment and information 🔑159(2).

In prosecution for various felonies, court properly allowed filing of amended information charging prior convictions, though prosecution was unable to sustain charges thereof; it appearing such procedure was in good faith.

2. Criminal law 🔑663.

In absence of bad faith, exhibiting and marking gun for identification after witness failed to connect it with felonies charged *held* not prejudicial.

> Such procedure was not prejudicial error, as the gun was not offered or admitted as evidence, and the marking for identification is customary and appropriate in the course of a trial, not to bring the thing into the record as evidence, but merely to identify it as the very thing mentioned in the record, and not at that time admitted as evidence.

3. Criminal law 🔑1170½(5).

Denying cross-examination concerning witness' remarks indicating prejudice *held* not prejudicial, where similar question was later asked, and defendant made no attempt to disprove unfavorable answer.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Ernest Luthar Berry and another were convicted of burglary, robbery, and grand theft, and defendant Roy V. Trimble appeals.

Affirmed.

R. E. Parsons, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, P. J.

The defendant was convicted on six counts, being all of the counts of the information; three burglaries, two robberies and one grand theft. Also it was charged that before the commission of said several offenses the defendant had been convicted of four other felonies, occurring severally in the states of Idaho, Colorado, and Texas, and in California, and that he had served terms of imprisonment therefor. The defendant admitted the former conviction and imprisonment in California and denied the others. At the trial, the prosecution was unable to complete its proof of said former convictions not admitted, and particularly was unable to prove that this defendant served any term of imprisonment under said alleged convictions in Idaho, Colorado, and Texas, or either of them. Acordingly the jury, in conformity with the court's instructions, found in favor of the defendant on said charges of former conviction.

The offenses charged in the information in the present case consisted of a burglary committed on the 14th day of December, 1930, and a robbery in connection therewith; a second burglary committed on the same day and the crime of robbery in connection therewith; and the crime of burglary committed on the 29th day of November, 1930; and the crime of grand theft in connection therewith. On conviction of these several crimes, judgment was pronounced by the court, the several sentences to run concurrently. He appeals from the judgment and from the order denying his motion for a new trial.

The grounds of appeal are stated under four points, viz., "That it was prejudicial error to mark the gun and exhibit the same to the jury." "That the court erred in not permitting counsel to pursue the line of questions which would have tended to show the bias of the witness McGuire." "That the verdict was contrary to the law and the evidence." "That it was highly prejudicial and error to file the amended information against the defendant and appellant charging priors which could not be proved and established."

[1-3] There is practically no merit in any of these points. (1) It does not appear that the amended information was not filed in good faith, or that it was not filed in expectation of proving the same. (2) There is abundant evidence directly sustaining the charge that each of the several crimes was committed and that the defendant was guilty thereof. (3) When the gun was produced in connection with the testimony of a witness, the testimony failed to identify it as a gun used in the commission of any of the offenses. The gun was not offered or admitted in evidence, and the defendant did not object when it was "marked for identification." Such marking is customary and appropriate in the course of a trial, not to bring the thing into the record as evidence, but merely to identify it as the very thing mentioned in the record and not at that time admitted as evidence. There is no evidence that the act of the district attorney in bringing the gun before the court, and attempting to prove its use in the perpetration of the crimes, was an act done in bad faith, or without expectation that the proof would be forthcoming. (4) The court did not err in sustaining the objection to certain questions asked on cross-examination of the witness McGuire. These questions were in the form of an inquiry as to whether or not the witness during

the time of selection of the jury, every time the defendant's counsel excused a prospective venireman, made the remark, "What to hell did he do that for?" The contention of appellant is that the making of such remark, if established, would tend to show bias or prejudice of the witness. Thereafter, and without objection, counsel for defendant asked this question: "Now, as a matter of fact, when I picked one of the ladies in the back row, didn't you make the remark that you would like to kick her off the jury?" To which the defendant replied, "No, I didn't make any such remark." No attempt was made by the defendant to prove that this answer was untrue. There was no abuse of discretion in the court's rulings on this subject.

There being no other stated grounds of appeal, and it appearing that the defendant was convicted upon sufficient evidence and after a fair trial, it seems clear that there is no merit in the appeals.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

119 Cal.App. 82

PEOPLE v. BEESLY.

Cr. 2143.

District Court of Appeal, Second District, Division 2, California.

Dec. 24, 1931.

1. Indictment and information ⚿161(5).

Amending information by changing allegation that defendant was accused of forgery to averment that he was accused of violation of narcotic law changed substance of charge so that failure to charge intent to defraud in use of forged prescription was immaterial (St. 1929, p. 380).

2. Indictment and information ⚿161(5).

As regards amendment of information, intent to defraud is necessary element of forgery, but not of violation of narcotic law (St. 1929, p. 380).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer and William C. Doran, Judges.

On petition for rehearing.

Petition denied.

For former opinion, see 6 P.(2d) 114.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

FRICKE, Justice pro tem.

The petition is largely a restatement of the argument presented in appellant's brief. The argument that no case has as yet been decided involving the sufficiency of an information charging the precise offense here involved is not at all persuasive. As to the case of People v. Horiuchi (Cal. App.) 300 P. 457, 460, the statement quoted from the opinion in the petition that, "Such statement must be in ordinary and concise language and made in such manner as to enable a person of ordinary understanding to know what was intended. But, above all other things, the charge must be so certain that a court would be enabled to pronounce judgment upon conviction," we cannot but feel that the learned court rendering the opinion could not have had in mind the fact that by the amendment of 1927 to section 959 of the Penal Code those requirements for the sufficiency of an indictment or information were removed from our rules of pleading. The facts of the Horiuchi Case have no resemblance to the facts here.

[1, 2] Petitioner is in error in the assertion that the amendment of the information, by changing the allegation of the information that the defendant was accused for forgery to the averment that he was accused of a violation of the narcotic law, did not change the substance of the charge. As a charge of forgery, the information was defective because it failed to allege an intent to defraud, but, with the charge changed to a violation of the narcotic law (St. 1929, p. 380), which does not require an intent to defraud as an element of the crime, the failure to charge that intent ceased to be a defect. Furthermore, section 952 requires that the public offense be "specified" in the pleading. A further material difference is evident when we consider that the penalty which would follow a conviction is not the same for the two offenses.

The cases cited upon the question of the constitutionality of the Poison Act (St. 1907, p. 124, as amended) are not in point. In the case of In re Lockett, 179 Cal. 581, 178 P. 134, the sole description of the act made punishable was contained in two words, neither of which was in the English language and neither of which had any common use in any language; People v. Ah Sum, 92 Cal. 648, 28 P. 680, while apparently in point, ceased to be authority with the change in the law of pleading; and In re Peppers, 189 Cal. 682, 209 P. 896, was not a decision passing upon a statute not in the English language.

The petition is denied.

We concur: CRAIG, Acting P. J.; IRA F. THOMPSON, J.

CONNESS et al. v. McCARTY.*

Civ. 6954.

District Court of Appeal, Second District, Division 1, California.

Jan. 6, 1932.

Rehearing Denied Feb. 4, 1932. Hearing Granted by Supreme Court March 3, 1932.

Appeal and error 🔑1066.

Automobiles 🔑218, 246(31).

Pedestrian walking at night on right-hand side of road and struck by automobile *held* not contributorily negligent, and hence instruction on contributory negligence was prejudicial error.

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Mrs. William S. Conness, Jr., and another against William E. McCarty. From a judgment for defendant, plaintiffs appeal. Reversed.

John A. Gilligan and W. A. Alderson, both of Los Angeles, for appellants.

George H. Moore, of Los Angeles, for respondent.

HOUSER, J.

The pertinent facts upon which a decision of the pending appeal depends appear to be that a man named Conness, together with another and two young women, had been traveling at night in an easterly direction in a roadster automobile on a narrow paved road lying between the city of Venice and the city of Los Angeles. At a specified point the roadster was stopped on the south or right side of the road for the purpose of permitting Conness to put on his overcoat. When for such purpose Conness alighted from the roadster, one of the young women also alighted therefrom, and thereupon the two of them, each holding the hand of the other, ran up the right or south side of the road toward Los Angeles for a distance of approximately fifty to seventy-five feet, at which point, still each holding the hand of the other, they walked across the road and immediately started to walk back on the north side thereof toward the roadster, at which time, or very shortly thereafter, they were struck by the sedan automobile driven by defendant, and which collision resulted in the death of Conness. It also appears that at all times in question the headlight of the roadster was burning; that the paved portion of the road was about twenty to twenty-five feet wide; that there were no sidewalks or street lights on either side of the road; that a suburban railway right of way adjoined the road on its south side; and that off the pavement on its north side were weeds and "a slight ditch." At the time the accident happened, the headlights were burning on the sedan. The glass on its windshield was dirty. The sedan was traveling at the rate of about thirty-five miles per hour, with its left wheel about two or three feet to the right of the center of the paved portion of the road. The night was dark. The view of the driver of the sedan was rendered more defective by reason of a shadow which was cast ahead of the sedan by the headlight of an interurban street car on the railway right of way, which was following the sedan. After the accident had occurred, the body of Conness and that of the young woman who accompanied him were found together, lying at a right angle to the road, and were partly on and partly off the paved portion thereof. Defendant testified that "at no time" did he see either Conness or his companion "before the impact." The action was tried before the court sitting with a jury. From a judgment in favor of defendant, the plaintiffs, who are the widow and the minor child of Conness, appeal to this court.

From the record herein it appears that, at the request of defendant, the trial court gave to the jury for its guidance in returning a verdict elaborate instructions regarding the law of contributory negligence; and in that connection it is contended by appellants that as a matter of law the evidence conclusively showed that Conness was not guilty of contributory negligence, and consequently that the giving of instructions relating thereto constituted prejudicial error on the part of the trial court.

The facts in the case of Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027, present a situation closely resembling that hereinbefore set forth. In the opinion therein the court deals exhaustively with the various principles of law which affect the decision relative to the ultimate question of whether, not only generally, but as well in particular circumstances such as were there and here present, upon the happening of an accident to a pedestrian upon a highway, he may be said to be guilty of contributory negligence. With reference thereto, the conclusion by the court is to the effect that, where it appears that there is a mere use of the highway by the pedestrian, in the absence of any evidence which would tend to show the commission by the pedestrian of some act which in similar circumstances would not have been committed or performed by a reasonable person, on the happening of an accident such as has been hereinbefore outlined, contributory negligence may not be imputed to the pedestrian.

Assuming that the legal principles announced in such case, and in others therein cited,

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*For subsequent opinion see 14 P.2d 507.

constitute a correct expression by the Supreme Court of the law of this state applicable to the facts herein, it follows not only that the trial court was in error in instructing the jury regarding the law of contributory negligence, but that as well such error was substantial in character and in prejudice of the rights of the plaintiffs in the action.

The case to which attention has been directed also affords ample authority for the conclusion that, in the circumstances of the instant case, a jury would be justified in finding that defendant was guilty of negligence which was the proximate cause of the accident.

The judgment is reversed.

I concur: CONREY, P. J.

I dissent: YORK, J.

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119 Cal.App. 420

Application of BOATWRIGHT.

Cr. 1638.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1931.

1. Criminal law ⚷1211.

Person convicted of petty theft after four convictions of felony *held* subject to life imprisonment under Habitual Criminal Act (Pen. Code, §§ 17, 484, 490a; § 644, as amended by St. 1927, p. 1066; § 667, as added by St. 1909, p. 364).

> This is so, since under Penal Code, §§ 17, 484, 490a and section 667, as added by St. 1909, p. 364, a conviction of petty theft after conviction of felony is punishable by imprisonment in the state's prison.

2. Statutes ⚷231.

That, after enacting Habitual Criminal Act, Legislature revised many Code sections without excluding petty theft offenders from that act's operation indicates Legislature intended its application to such offenders (Pen. Code, § 644, as amended by St. 1927, p. 1066).

3. Criminal law ⚷1213.

Judicial interference with punishments under Habitual Criminal Act are unwarranted, since they do not contravene Federal or State Constitutions as cruel or unusual (Pen. Code, § 644, as amended by St. 1927, p. 1066).

4. Habeas corpus ⚷30(3).

That punishment of life imprisonment compulsorily fixed under Habitual Criminal Act was not contemplated when offender was prosecuted and sentenced for petty theft *held* not to authorize offender's discharge on habeas corpus (Pen. Code, § 644, as amended by St. 1927, p. 1066; § 969a, and § 969, as amended by St. 1927, p. 1152).

5. Indictment and Information ⚷114.

Information under Habitual Criminal Act, not charging that person convicted served terms in prison, *held* not defective (Pen. Code, § 644 as amended by St. 1927, p. 1066; § 969 as amended by St. 1927, p. 1152).

6. Habeas corpus ⚷85(1).

Absent showing that offender did not serve term after felony convictions, presumption arises in support of judgment that contrary was established before sentence under Habitual Criminal Act (Pen. Code, § 644 as amended by St. 1927, p. 1066; § 667 as added by St. 1909, p. 364).

Application by James Boatwright for a writ of habeas corpus against the warden of San Quentin prison to secure release of petitioner on the ground of illegal detention.

Writ discharged, and proceeding dismissed.

E. E. Keyes, of Oakland, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Dep. Atty. Gen., for respondent.

KNIGHT, J.

The petitioner, James Boatwright, is a prisoner in the state prison at San Quentin, and seeks to be discharged therefrom on habeas corpus. He was charged in the trial court with petty theft and four prior convictions of felony. He admitted the prior convictions, pleaded not guilty to the charge of petty theft, and, after trial by jury, was found guilty. The judgment of sentence was that he be imprisoned in the state prison at San Quentin until legally discharged. The alleged theft was committed on September 6, 1927, petitioner was sentenced on November 5, 1927, and, so far as the record shows, he took no appeal from the judgment of conviction. In support of his application, he contends that the maximum penalty imposed by law for the commission of the crime for which he was committed to prison is five years' imprisonment (Pen. Code, § 667), and that after deducting therefrom the credits allowed by the prison board he has served more than the full period of a five-year sentence, and therefore is entitled to immediate discharge. In opposition to the application, it is claimed that, by virtue of the prior convictions of felony, petitioner's case falls within the so-called Habitual Criminal Act (Pen. Code, § 644), and that therefore he must serve a life term without being eligible to parole.

Section 667, relied upon by petitioner, as enacted in 1909 (St. 1909, p. 364) and in force in 1927, provided that every person convicted of petty theft, after having been convicted of any offense punishable by imprisonment in the state prison for which he served a term in a penal institution, was punishable by imprisonment in the state prison not exceeding five years, and was subject to parole by the state board of prison directors, under the restrictions provided by law for the parole of first-term prisoners, any act to the contrary notwithstanding. The 1927 amendment to the Habitual Criminal Act, St. 1927, p. 1066 (section 644), which became operative about six weeks prior to the date on which petitioner is alleged to have committed the theft, contained the following provisions: "* * * Every person convicted in this state of any felony who shall have been previously three times convicted, either in this state or elsewhere, of any felony, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole. * * *"

[1] As stated, in the present case there were four prior convictions of felony; but as will be noted, the opening clause of the provision of the Habitual Criminal Act just quoted restricts its application to persons subsequently convicted "of any *felony*" (italics ours); and petitioner contends therefore that the word "felony" as there used was intended to apply to such offenses only as are in and of themselves felonies, and that since petty theft is but a misdemeanor, a subsequent conviction thereof is excluded from the operation of said act. We are unable to sustain petitioner's contention for the reason that section 17 of the Penal Code declares that "a felony is a crime which is punishable with death or by imprisonment in the state prison," and as will be observed, under the provisions of section 667 a conviction of petit larceny (now designated as petty theft, Pen. Code, §§ 484 and 490a), after conviction of a felony, etc., is punishable by imprisonment in the state prison. Moreover, such has been the statutory law of this state since 1872, and, in construing the same, it has been held repeatedly that to charge a person with petit larceny and previous conviction of felony is to charge such person with a felony. People v. Delany, 49 Cal. 394; People v. Smith, 143 Cal. 597, 77 P. 449.

[2, 3] In further support of his contention that subsequent convictions of petty theft do not come within the scope of the Habitual Criminal Law, petitioner calls attention to the fact that in the present case the property alleged to have been taken consisted only "of a 32 x 3½ Goodyear Cord Tire, * * * tube, rim and felloe of the value of $25.00," and he argues therefrom that it was never intended by the Legislature that a person should be imprisoned for life without hope of parole for the theft of property of such trivial value; furthermore, that such a penalty was never contemplated by any one, including the trial judge, at the time that judgment of sentence was pronounced.

It is apparent, however, from a review of the various Code sections relating to the Habitual Criminal Act (Pen. Code, § 644), which were first enacted in this state in 1923, that the Legislature intended to make imperative the imposition of severe penalties in cases where the offender had been previously convicted of two or more felonies and had served terms therefor in penal institutions; and the fact that in revising many of said Code sections during the three succeeding sessions of the Legislature it has not expressly excluded from the operation of said act persons subsequently convicted of petty theft, clearly indicates that it was always intended that the severe penalties prescribed therein should apply in such cases. In any event, judicial interference with legislative act relating to the severity of punishment is warranted only where the nature and extent of the punishment invades a constitutional right; and in passing upon the constitutionality of the Habitual Criminal Act it has been expressly held that the penalties prescribed therein are neither cruel nor unusual, and therefore are not in contravention of the Federal or State Constitutions, the basis of the decision so holding being that the Legislature is vested necessarily with a large discretion in determining not only what the interests of the public require, but what measures are necessary for the protection of such interests. In re Rosencrantz, 205 Cal. 534, 271 P. 902.

[4] Nor does the fact, if it be such, that the imposition of the term of imprisonment fixed by the Habitual Criminal Act was not contemplated at the time petitioner was being prosecuted and sentenced, serve as legal grounds for his release on habeas corpus, for the reason that said act made it compulsory to charge all prior convictions (Penal Code, §§ 969, 969a), and fixed the penalty at life imprisonment without parole, where three or more prior convictions were established. Therefore, regardless of whatever was contemplated, the imposition of such penalty was imperative.

[5, 6] Petitioner makes the further point that the information is defective in that it does not allege that as a result of the prior convictions he served terms in penal institutions. There is no merit in the point for the reason that section 969 of the Penal Code, as amended in 1927 (St. 1927, p. 1152), prescribes the form of allegation to be followed in charging a prior conviction, and the form here used follows the one there prescribed. It is true that in order to bring an accused within the provisions of section 667 it is essential to establish the fact in the trial court, either by evidence introduced to that effect, or by admission of the accused, that as a result of the

prior convictions of felony he has served terms in penal institutions; and in the second Rosencrantz proceeding (In re Rosencrantz, 211 Cal. 749, 297 P. 15) it was held that a conviction of felony within the meaning of the Habitual Criminal Act was not established where it was shown that the accused was released on probation. But in the present proceeding, petitioner makes no claim that he did not serve terms in penal institutions as the result of the convictions of felony charged against him; therefore, in the absence of a showing to that effect, it must be presumed, in support of the judgment that the contrary was established in the trial court prior to the pronouncement of the judgment of sentence.

The legal sufficiency of the form of the judgment pursuant to which petitioner was committed to prison is not challenged; consequently as to all matters connected therewith we express no opinion; and, since the grounds urged in the present proceeding do not warrant petitioner's release, the writ is discharged and the proceeding dismissed.

We concur: TYLER, P. J.; CASHIN, J.

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119 Cal.App. 515

ASSEMBLA CRISTINA NEL NOME DI GESU et al. v. ZAMPELLI et al.

Civ. 7008.

District Court of Appeal, Second District, Division 2, California.

Jan. 4, 1932.

Rehearing Denied Feb. 3, 1932. Hearing Denied by Supreme Court March 3, 1932.

1. Religious societies ⟹9.

Internal affairs of religious corporations, like those of any other, are vested exclusively in directors.

2. Mandamus ⟹129.

Mandamus will lie to compel delivery of church books, records, and papers by outgoing officers to their successors (Civ. Code, § 277 et seq.).

Mandamus will lie for such purpose since the general provisions of Civ. Code, § 277 et seq., apply to all corporations formed within state unless provision is otherwise made by special statute removing particular institutions from their purview in specific instances.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge pro tem.

Action for a writ of mandate by Assembla Cristina Nel Nome Di Gesu, a corporation, and others, against Pietro Zampelli and others. From an adverse judgment, defendants appeal.

Affirmed.

Caesar A. Roberts, of Los Angeles, for appellants.

Praeger & Biddle, of Los Angeles, for respondents.

CRAIG, J.

The respondent corporation and its duly elected directors and officers petitioned the superior court of Los Angeles county for a writ of mandate, directing the defendants and appellants to deliver to the petitioners the corporate books and records which were withheld by said defendants, whom the petitioning directors had theretofore succeeded. The writ was granted as prayed, and the defendants appealed.

The evidence and findings of fact below are not here questioned. Section 599 of the Civil Code provides that corporate powers, business, and property of corporations formed for purposes other than profit, as was the one here in question, may be exercised, conducted, and controlled by a board of directors. Section 310 of the same Code also provides that such board may be removed from office by a vote of two-thirds of its members, at a general meeting called by previous notice of the time and place thereof.

[1, 2] Appellants' assertions of procedural defects in the election and incidental errors are not sufficiently supported to justify comment. Unquestionably the internal affairs of religious corporations, like those of any others, are vested exclusively in the directors. The books and records here in dispute are the property of the church corporation. The general provisions of part IV of the Civil Code apply to all corporations formed within this state, unless provision is otherwise made by special statute removing particular institutions from their purview in specified instances. People ex rel. Weatherly v. Golden Gate Lodge No. 6, B. P. O. E., 128 Cal. 257, 60 P. 865; Hooper v. Stone, 54 Cal. App. 668, 202 P. 485. No such exception is directed to our attention. Hence, mandamus will lie to compel the delivery of the church books, records, and papers by outgoing officers to their successors, and the rule has been so enforced in similar cases in other jurisdictions. State v. Riedy, 50 La. Ann. 258, 23 So. 327; Proprietors of St. Luke's Church v. Slack, 7 Cush. (Mass.) 226.

Other grounds urged by the appellants arise from an erroneous premise as to illegality of the acts of a majority of the members, and for reasons already stated are untenable.

The judgment is affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

MENEAR v. NUTTER.*

Civ. 7000.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1932.

Rehearing Granted Feb. 5, 1932.

1. Automobiles 🔑244(49).

Evidence *held* to justify jury's conclusion that pedestrian struck by automobile was not contributorily negligent.

There was evidence that pedestrian had progressed beyond center of street when automobile, approaching from left, was 150 feet away on left side of street a little ahead of car it had passed, and that he then turned his attention to third automobile approaching from right, and, seeing driver's purpose to pass behind him, hurried forward and collided with first car, which had turned farther to left as though to pass third car.

2. Appeal and error 🔑216(1).

Defendant not requesting instruction that plaintiff could not assume defendant would use required care, if he should have noticed facts indicating otherwise, cannot complain of instruction not so stating.

3. Trial 🔑296(4, 5).

Instruction that pedestrian had right to assume that automobilist would use required care *held* not reversible error, in view of other instructions.

The jurors were told in other instructions that pedestrian owed continuous duty as he crossed street to maintain lookout to right and left for approaching automobiles, that negligence is always matter of time, place, and circumstance, and that he was required to govern himself with surrounding circumstances in view.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by William J. Menear against Daniel C. Nutter. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Leonard G. Shelton, of Glendora, for respondent.

BISHOP, Justice pro tem.

Two related reasons are advanced by the defendant in support of his appeal from a judgment following a jury's verdict. First, he urges that, as a matter of law, the plaintiff appears from the evidence to have been guilty of contributory negligence, and so not entitled to damages for the injuries of which defendant's negligence was, at least, one of the causes. Secondly, he finds fault with the instructions given the jury, respecting the reliance which the plaintiff could place upon the presumption that the defendant would comply with the law. We are of the opinion that on neither score is the judgment to be reversed.

[1] The plaintiff, a mail carrier, was injured while crossing a busy highway. As he approached the spot where he stepped off the south curb into the street, he noticed two cars approaching from the west at a distance of four or five hundred feet. One, the defendant's, then drew past the other (the other is identified in the record as the "larger" car), and in doing so, drove over on and along its left-hand side, the north side, of the roadway. There was no traffic to prevent the defendant from returning to his own right side of the highway after he passed the larger car. During this passing, the plaintiff had progressed to a point beyond the center line of the highway, at which time the automobile of defendant was some one hundred and fifty feet away from him, and just a little ahead of the larger car. From this moment on, plaintiff turned his attention to a third automobile approaching from his right, and in whose path he now found himself. Walking slowly, until he saw that the third car purposed to pass behind him, he then hurried forward, only to collide with the car of the defendant, which had not only continued on the left side of the highway, but at the last moment had been directed even more to the left, as though to pass the third car on the north side. This narrative, in spite of conflicting evidence, the jury could have accepted as containing the facts of the case, and from them they were justified in concluding that the plaintiff was not imprudent and did not contribute by his negligence to the causes of the accident.

[2, 3] As the jury could, however, although under the facts it is little likely that they would, have found that the plaintiff was negligent, the fairness and correctness of the instructions given remains an important question. Of two, considered together, the defendant takes exception. As given to the jury, they were:

"It is the duty of the driver of an automobile where the view is unobstructed to see persons on the road in front of the machine and even though the driver may (be) driving at a speed and in a manner allowed by law, he still remains bound to anticipate that he may meet persons at any point on the street, and he must, in order to avoid the charge of negligence keep a proper outlook for them, and keep his machine under such

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 12 P.2d 138.

control as will enable him to avoid a collision with another person using proper care and caution and if the situation requires, he must slow up and stop."

"The court instructs the jury that the plaintiff herein, William J. Menear, had a right, in determining what was the prudent course for him to take, to assume that defendant would use such care and circumspection as the circumstances required and would not closely approach him at an excessive rate of speed nor endanger him without warning."

The point pressed by appellant is, that in the first instruction reference is made to "another person using proper care and caution," and that by the second instruction, a wrong understanding is given of the proper care and caution required of a prudent person. The real objection thus falls upon the second instruction, and it is this: While as an abstract rule it is true that the plaintiff had a right to assume that the defendant would use such care and circumspection as the circumstances required, etc., there is this limitation on the rule—plaintiff could not rely on that assumption when, as a reasonably cautious man, he should have noticed that the facts of the situation were out of harmony with it. This criticism of the instruction, it will be seen, is not an objection that it incorrectly states the rule, other than that it fails to state a limitation upon it. Having failed to request a more complete expression of the principle of law involved, appellant is in no position to complain. In O'Connor v. United Railroads (1914) 168 Cal. 43, 141 P. 809, 813, two criticisms were being considered respecting an instruction "that the violation of the ordinance constitutes negligence per se." The first criticism was that "negligence per se" should have been defined to the jury; and, secondly, that the rule as stated is incorrect in that it lacks the qualification that before the violation could be considered it must appear to have contributed proximately to the injury. Of the first objection, the Supreme Court said (page 52 of 168 Cal., 141 P. 809, 813): "When the instruction was given if counsel for appellant had any doubt whether the jury understood it, or that its meaning might be misapprehended, they should have either asked the court to explain it, or prepared an instruction themselves doing so." As to the second objection, the comment of our Supreme Court was (page 53 of 168 Cal., 141 P. 809, 813): "As the instruction so far as it went correctly stated the law, it is to be said of the claim now made, as is said of the other objection to the instruction, that counsel for appellant should have either asked the court to instruct the jury as to the qualification which the court would have done, or have presented an instruction embodying it. * * *" See, also, Townsend v. Butterfield (1914) 168 Cal. 564, 143 P. 760; Wirthman v. Isenstein (1920) 182 Cal. 108, 187 P. 12; Daniel v. Asbill (1929) 97 Cal. App. 731, 738, 276 P. 149; Comstock v. Morse (1930) 107 Cal. App. 71, 290 P. 108. Moreover, the jurrors were told, in other instructions, that there was a continuous duty on plaintiff's part, as he crossed the street, to maintain a lookout to right and left to see whether automobiles were approaching, and that negligence is always a matter of time, place, and circumstance, and that plaintiff was required to govern himself with the surrounding circumstances in view. We find, in the instructions, no error so prejudicial to appellant that the judgment should be reversed.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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119 Cal.App. 548

PEOPLE v. HAWLEY et al.

LOS ANGELES ROCK & GRAVEL CO. v. CITY OF LOS ANGELES et al.

SAME v. CRYER et al.

Civ. 6977–6979.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1932.

Rehearing Denied Feb. 4, 1932. Hearing Denied by Supreme Court March 7, 1932.

1. Costs ⚷206.

On motion to strike cost bill, court properly disregarded grounds for striking not appearing in notice (Code Civ. Proc. §§ 1033, 1034).

Motion to strike cost bill after appeal was noticed on grounds that memorandum of costs was not filed and served as required by Code Civ. Proc. § 1033. Section 1034 regulating the securing of costs on appeal was not mentioned, nor was it contended that costs were taxed against the city in one action, although judgment was not rendered against it, or that three separate cost bills for stated sum were filed, although that sum was total claimed in all the actions.

2. Costs ⚷264.

Noncompliance with Code section regulating securing costs by party recovering judgment is not ground for striking cost bill on appeal regulated by following section (Code Civ. Proc. §§ 1033, 1034).

3. Costs ⚷203.

Code section regulating appeal costs does not require filing of cost memorandum with clerk prior to service on adverse party (Code Civ. Proc. § 1034).

> Code Civ. Proc. § 1034, provides that party claiming costs awarded on appeal must, within stated time after remittitur is filed with clerk below, "deliver to such clerk and serve upon the adverse party a memorandum of his costs."

4. Appeal and error 🔑151(6).

If nominal as well as actual party is charged with costs, another party's appeal from order denying striking of costs is without merit.

5. Appeal and error 🔑151(6).

Actual party's appeal from order denying striking of costs properly charged against nominal party is without merit.

6. Costs 🔑203.

Filing of three cost bills for stated amount only recoverable once *held* cured by orders denying striking of bills permitting only one recovery.

7. Costs 🔑260(4).

Municipality appealing merely for delay from orders refusing to strike cost bills in two cases taxed $100 additional in each case.

Appeals from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Three actions; the first by the People of the State of California against H. W. Hawley and others, the second by the Los Angeles Rock & Gravel Company against the City of Los Angeles and others, and the third by the Los Angeles Rock & Gravel Company against George E. Cryer and others. From orders denying the motion in each action to strike the cost bill of the Los Angeles Rock & Gravel Company, the plaintiff in the first action and the defendants in the second and third actions take three appeals, which were by stipulation consolidated.

Affirmed.

Erwin P. Werner, City Atty., and Frederick Von Schrader, Dep. City Atty., both of Los Angeles, for appellants.

Charles H. Mattingly, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

In each of the above-entitled actions, a motion to strike the cost bill of the Los Angeles Rock & Gravel Company was made and denied. From the order (called "judgment") denying the motions to strike in each of these cases, appeals were taken. By stipulation in this court, the three appeals were consolidated for hearing, "based upon the fact," the stipulation recites, "that the appeals taken in said causes all involved the same point."

[1] Each of the motions made in the court below was noticed "upon the grounds that said Memorandum of Costs and Disbursements was not filed and served, as required by section 1033 of the Code of Civil Procedure." An affidavit by one of appellant's counsel was filed with the notice and in support of each motion, reciting that at the time of the service of the memorandum (a copy being received) the original had as yet not been filed. No other fact was set forth. A memorandum of points and authorities accompanied the notice of motion, and the only rule of law which it suggested had been violated was that a cost bill must be first delivered and then served. There is therefore nothing in the record to justify the statement in appellant's opening brief that their motions to strike were made on the three grounds: (1) That the cost memorandum was not filed and served as required by sections 1033 and 1034, Code of Civil Procedure; (2) that costs were taxed against the city in the first cause of action, although judgment did not go against the city; (3) that three separate cost bills for $1,868.47 each were filed, although that was the total sum claimed in all actions. It does not appear from the record that section 1034 was ever mentioned, or that the second and third grounds were ever advanced in support of the motion in the court below; but, if they were, the lower court was justified in disregarding them because they were not set forth in the notice of motion. Mojave, etc., R. Co. v. Cuddeback (1915) 28 Cal. App. 439, 152 P. 943; W. H. Marston Co. v. Kochritz (1926) 80 Cal. App. 352, 359, 251 P. 959.

[2] The memoranda of costs, which it was moved to strike, appeared on their face to be and admittedly were for costs on appeal. It was not a ground for striking them, therefore, that compliance with section 1033, Code of Civil Procedure, had not been observed for it is section 1034, and not section 1033, which prescribes the procedure for securing costs on appeal.

[3] As the point appellants argue, however, could have been urged under either section, we will consider that this point was placed on the grounds set forth in appellant's brief, rather than on that shown by the record. So far as necessary to understand the point, we quote from section 1034, Code of Civil Procedure: "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk and serve upon the adverse party a memorandum of his costs. * * *"

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

From this language, counsel for appellants conjure the conclusion that unless the filing, or delivery to the clerk, of the memorandum precedes its service, the party claiming costs fails to establish his right to them. We are impressed by the argument—very unfavorably. The section does not warrant the interpretation that the delivery to the clerk must be antecedent to the service, nor would that interpretation justify the ruling that a reverse order of events would fail to secure costs. On no fanciful theory, certainly on no reasonable one, could appellants here say that they had been prejudiced in the slightest because the cost bill was served first, followed ten minutes later, as appears in this case, by the delivery to the clerk for filing. If authority is needed, it may be found in State v. District Court (1930) 86 Mont. 358, 284 P. 125. The court did not err in denying the motion.

[4, 5] Although, for the reason already given, appellants are not in a position to urge the remaining points appearing for the first time in their opening brief, lest it seem that an injustice is being done the city of Los Angeles by reason of the limited content of the notices to strike the memoranda of costs, we call attention to two matters appearing of record. In action numbered civil 6977, the nominal plaintiff is the people of the state of California; the city of Los Angeles is not named a party. Costs were adjudged to be paid by the city. The nominal appellant is the people, not the city. If the actual plaintiff-appellant is the people and not the city, it is not affected by the judgment for costs against the city, and its appeal is without merit. If the plaintiff-appellant is actually the city suing in the name of the people, the costs were properly assessed, and the appeal is without merit.

[6] As to the point that the same tax bill was filed three times, any harm the city might suffer is cured by the provision of the orders appealed from, that there may be only one recovery. Here again the objection is at best to a matter of form, and not of substance, so far as the city is concerned.

[7] We are forced to conclude that these consolidated appeals were taken for purposes of delay, and not to serve the ends of justice. We know of no reason why the city of Los Angeles, the real appellant, should be treated any differently from any other party who makes use of the processes of appeal from other than a worthy motive. The orders, called judgments, appealed from are affirmed, and in addition to the costs on appeal otherwise to be taxed against appellant city in actions numbered civil 6978 and 6979, in each action the city shall be taxed, as costs, the sum of $100.

We concur: CONREY, P. J.; HOUSER, J.

119 Cal.App. 470

McCORMAC v. CHANCY et al.

Civ. 7597.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1931.

Hearing Denied by Supreme Court Feb. 29, 1932.

1. Appeal and error 🔑1064(1).

Automobiles 🔑246(4).

Instruction automobile driver is charged with "higher degree" of care than pedestrian *held* erroneous but not to require reversal.

Such error did not require reversal where defendant was not asking reversal on grounds that he was not guilty of negligence and court further instructed that all persons must exert constant care and caution for the conservation of their correlative rights commensurate with the special hazard which is peculiar to and nowadays ever present in the use of public highways.

2. Trial 🔑296(3).

Instruction car owner, if present, is liable for injuries to third person where car is driven by another, though omitting element of driver's negligence, *held* not prejudicial in view of other instructions.

Omission of the element of negligence of the driver was not prejudicial when viewed with other instructions to effect that plaintiff could not recover without establishing negligence as a proximate cause of the injury, and that the affirmative was upon the plaintiff in this case.

3. Trial 🔑260(1).

Instructions on matters adequately covered by other instructions *held* properly refused.

Appeal from Superior Court, Santa Barbara County; William D. Dehy, Judge.

Action by Virginia Ann McCormac against C. R. Chancy and another. Judgment for plaintiff against defendant R. L. Brunson, and he appeals.

Affirmed.

Clark, Nichols & Eltse, of Berkeley, and Preisker, Goble & Twitchell, of Santa Maria, for appellant.

Shaeffer & Weldon, of Santa Maria, for respondent.

YORK, J.

This is an appeal from a judgment rendered in favor of plaintiff and against defendant Brunson only, for damages on account of injuries sustained by plaintiff on August 7, 1929, when appellant's automobile, north-bound, struck plaintiff as she was crossing the highway from west to east, but after she had proceeded approximately from two to six feet beyond the paved portion on the east side of the highway, which was the generally traveled portion thereof, at a point about fifty feet south of the intersection of the highway with another street in the city of Santa Maria. The paved portion of the street at the point where plaintiff was injured was eighteen feet in width. The distance between the eastern edge of the pavement and the property line on the east side of the street was about sixteen feet. There was also evidence showing that traffic could pass on the side where plaintiff was injured (the east side) on that portion of the highway between the curb and the paved or generally traveled portion of the highway.

The facts disclosed by the evidence are that the plaintiff alighted from an automobile on the west side of the street and started to cross to the east side; that when she reached the paved portion of the highway, before entering the same, she looked in both directions and observed an automobile approaching from the north; that she waited until this car had passed, looked again, and saw the automobile—which later struck her—about one block distant, coming from the south, on its own (the east) side of the street. She then hurried across the paved portion of the street, and when she had entirely passed over the paved portion, she began to slow up. The machine in which the appellant was riding either skidded or was driven off the paved portion of the highway close to the point where the plaintiff then was, and the projecting luggage carrier on the left side of appellant's automobile came in contact with plaintiff's leg, very seriously and probably permanently injuring her.

A great many objections are made to the instructions given, and objections are made to the court's refusal to give certain instructions requested by defendants. However, the instructions as a whole properly and completely covered the law applicable to the facts admitted in evidence.

There was some conflict in the evidence, but the main reliance of defendants, in so far as the insufficiency of the evidence is concerned, is upon the testimony of plaintiff that she did not look back or on either side of her, after she had passed over the paved or main traveled portion of the highway. This fact was fully before the jury, and it was a question for them to determine whether or not this constituted negligence on the part of the plaintiff under all of the facts and circumstances of the case.

The judgment is affirmed.

CONREY, P. J.

[1] I concur in the judgment. But I do not agree to an unrestricted approval of the instructions given to the jury. Instruction No. 15 reads thus: "You are instructed that the driver of a motor vehicle is in charge and control of a dangerous instrumentality, capable of inflicting serious and often fatal injuries, and for that reason he is charged by the law with a higher degree or greater amount of care than the pedestrian." It is not a correct expression of the rule to say that the driver of a motor vehicle is charged by law with a *higher degree* of care than is the pedestrian. Counsel is in error when he says that the instruction given is the same instruction which was approved in Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724. The instruction there under consideration is quoted at the bottom of page 58 of the opinion (page 58 of 92 Cal. App., 267 P. 727). It specifically stated that the defendant and the plaintiff were both chargeable with only the exercise of reasonable care, but that "*a greater amount of such care* was required of the defendant." But while I think that the use of the words "a higher degree" in said instruction No. 15 was incorrect, I also am of the opinion that the entire clause in which it occurs, when taken together with the other instructions given (and the fact that it is not claimed as a ground of reversal that the defendant was not in fact guilty of negligence), makes of the error a thing of negligible importance. It is not likely that the jury made any fine distinction between "degree" and "amount." Moreover, the jury was instructed (Instruction No. 20) concerning the equal and common right of pedestrians and automobile drivers in the use of public highways and that "all persons using the same must exert constant care and caution for the conservation of their correlative rights commensurate with the special hazard which is peculiar to and nowadays ever present in the use of public highways." A reading of the other instructions shows that the court nowhere undertook to discuss the differences between ordinary care, slight care, and extraordinary care, but was seeking to instruct the jury concerning the rules applicable to different persons alike bound to the use of ordinary care.

[2] Instruction No. 22 deals with the liability of an owner whose car is being driven by another person. Objection is made to the clause thereof which says, "that in all cases where the owner is present he will be responsible for injuries sustained by third persons unless," etc. Unfortunately the element of negligence of the driver was omitted from the statement, with the consequence that appellant now claims that the instruction was an unqualified instruction for a verdict in favor of the plaintiff. Again we must

have recourse, as we reasonably may do, to the other instructions, which clearly declare that the plaintiff cannot recover without establishing negligence as a proximate cause of the injury. Not only so, but the court even went so far as to tell the jury (Instruction No. 6) that "the affirmative is upon the plaintiff in this case," without making the appropriate exception which should have been made in relation to the issue of contributory negligence.

Concerning the other instruction given of which appellant complains (Instruction No. 35) it is not criticized as an erroneous statement of the law, but only as not justified by the evidence. I am inclined to think that the instruction was appropriately given.

[3] Appellant complains that the court refused certain instructions requested by him. They are found on pages 206, 207, and 208 of the transcript. If the court had not given other instructions in effect covering the same ground, I think it would have been seriously an error to have refused some of them; and particularly those relating to the equal duty of both parties to exercise ordinary care under the circumstances existing at the time when the accident occurred, and the duty of the plaintiff to use ordinary care and to reasonably exercise for her personal safety her powers of sight and hearing. But the court did give instructions which in substance declared the equal and correlative rights and duties of the parties, and also declared (Instruction No. 24) that the law requires of the pedestrian that "he must look at least in those directions from which danger may be easily apprehended as often and as carefully as would a person of ordinary prudence under like circumstances."

I conclude that the judgment should be affirmed.

I concur: HOUSER, J.

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119 Cal.App. 543

KARSH v. FIDELITY UNION CASUALTY CO.

Civ. 6974.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1932.

1. Principal and surety 🔑7.

Surety on bond conditioned on payment of order for money *held* not released from liability because no liability existed under order.

Surety was not released from liability, since bond was not contract of guaranty but a strict obligation to pay money released only by payment of order, and since there remained an obligation to pay the order under the bond whether the order was a binding obligation or not.

2. Principal and surety 🔑55.

Power of attorney authorizing agent to execute "bonds" authorized agent's execution of bond securing order for payment of money.

Power of attorney authorized agent to execute on surety company's behalf bonds and undertakings, recognizances, contracts of indemnity, and other writings, obligatory in their nature.

[Ed. Note.—For other definitions of "Bond," see Words and Phrases.]

3. Principal and surety 🔑55.

Surety company *held* bound by agent's execution of bond securing payment of order for money notwithstanding revocation of previous power of attorney.

Facts disclosed obligee had held similar bonds executed by same attorney in fact on behalf of surety, and that upon inquiry by obligee surety confirmed its agent's power by letter and telegram, and that vice president of surety company was present and impressed the corporate seal on the bond sued on.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Charles Karsh against the Fidelity Union Casualty Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hiram T. Kellogg, of Los Angeles, for appellant.

G. C. De Garmo, M. W. Crane, and H. B. Cornell, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The defendant corporation appeals from a judgment entered against it on a bond executed on its behalf by a Mr. Frederic, its attorney in fact. The judgment is attacked on several grounds, which may be summed up in these: The bond by its terms is not a binding obligation; its execution by Frederic does not bind the appellant. With neither of these propositions did the trial court agree, and neither do we.

Much of the situation out of which the transaction in question grew is given us in a sketchy fashion, yet sufficiently in full for the purposes of this appeal. Certain contractors were engaged in building a house; the cost of construction being financed in part, at least, by the proceeds of a first mortgage loan, deposited in a bank in the name of appellant, and subject to the joint control of Frederic and the contractors. J. A. Waldorf was a subcontractor, desirous of some money in advance of its due date. An order for $2,000 payable to Waldorf, addressed to "Frederic, attorney-in-fact, Fidelity Union Casualty Company," and signed jointly by the owner of the building under construction and the contractors, was presented to the respondent for discount. He agreed to take it, giving two checks, one for $1,740 and one for $40, drawn in favor of Waldorf and appellant. As a part of the transaction a written document was given to the respondent, dated November 5, the recitals of which, somewhat condensed, were substantially these: The Fidelity Union Casualty Company is held and firmly bound to Charles Karsh in the sum of $2,000, for the payment of which sum on or before sixty days from date, it binds itself; that the condition of the obligation is such that, whereas an order was executed in favor of Waldorf, as a part of the contract price due or to become due him, and Charles Karsh, in consideration of the execution of this instrument, agreed to and has bought the order. Now therefore the condition of this obligation is such that, if the said sum of $2,000 shall be paid under said order on or before sixty days, this obligation shall be void, "otherwise said surety herein named, does hereby expressly promise and agree that it will promptly on or before three days after said sixty days due date herein mentioned" pay the sum of $2,000. This instrument had affixed to it the name of appellant by Frederic, attorney in fact, and bore appellant's corporate seal. A short time after its execution, Frederic informed the respondent that Waldorf objected to so great a discount, in view of the certainty that the order would be honored in much less than sixty days, and the respondent gave Frederic two checks in exchange for the two first given; the new checks being for $1,840 and $40 respectively. These checks were payable to the appellant alone, and were deposited by Frederic in its account. Subsequently, the sum of $1,880 was withdrawn from appellant's account by Frederic, Waldorf getting none of it, nor did appellant see it again. Frederic (to complete the picture we note it) also gave respondent a check for $100, to be cashed if the order was not paid at as early a date as was represented. The order was not paid, either early or within the sixty days, nor was the $100 check cashed when presented.

[1] As a subdivision of one of his arguments, appellant's counsel urges that the instrument just set forth created no obligation, because, as there was no liability under the order, there can become no liability on the instrument guaranteeing the order. This argument begs the question, it seems to us, in assuming that the November 5th instrument has no effect other than that of guaranteeing an unaccepted order. If we have an unaccepted order, then we have, not a contract of guaranty, but a strict obligation to pay money, released only by the payment of the order voluntarily. Whether the order is a binding obligation or not, if it is not paid, there remains an obligation to pay under the November 5th contract.

[2] Appellant's counsel further argues that Frederic never had any authority to execute, on behalf of appellant, such an instrument as that herein sued upon. This leads us to view the power of attorney under which Frederic had been acting some time prior to November 5th. Its pertinent portions are these: "The Fidelity Union Casualty Company * * * does hereby * * * appoint Jay G. Frederic * * * its true and lawful Agent and Attorney-in-fact, to make, execute, seal and deliver for and on its behalf and as its act and deed any and all bonds and undertakings, recognizances, contracts of indemnity, and other writings obligatory in their nature." We are of the opinion that the instrument in question is covered by the power thus conferred. In Walter Pratt & Co. v. S. J. Langston Mercantile Co. (1905) 111 Mo. App. 96, 85 S. W. 134, 136, a number of definitions of "bond" are quoted: "Bouvier says that a bond is a 'simplex obligation.' Anderson, in his Law Dictionary, defines a bond to be 'any instrument in writing that legally binds a party to do a certain thing. "Bond," "obligation," and "instrument in writing" are sometimes used in convertible terms.' Anderson's Law Dict. p. 128. A bond has been judicially defined as follows: 'An obligation under seal.' Commonwealth v. Smith, 92 Mass. [10 Allen] 448, 87 Am. Dec. 672. 'A sealed obligation to pay money * * * on the happening of some future event' (quoting Murfree on Off. Bonds). Rawson v. Taylor [69 Neb. 473] 95 N. W. 1033. 'A clause that a sum affixed as a penalty binding a party to pay the sum, conditioned, however, that the payment of the penalty may be avoided by the performance by one or more of the parties of certain acts.' United States v. Rundle, 100 F. 400, 40 C. C. A. 450. 'An instrument that implies an obligor bound to do what is agreed shall be done.' Davenport v. Dodge County, 105 U. S. 237, 26 L. Ed. 1018. 'Any instrument in writing that legally binds a party to do a certain thing.' Courand v. Vollmer, 31 Tex. 397." The instrument is a bond, and, as Frederic was authorized to sign bonds by the power of attorney given him, his execution of it bound the appellant. The same power of attorney was under review before this court in the recent case of California Standard Finance Corp. v. Bessolo (November, 1931) 5 P.(2d) 478, where a similar conclusion was reached.

Whether or not appellant had terminated the agency of Frederic before November 5th does not clearly appear, and we are of the opinion that the trial court was warranted by the evidence in concluding that the power of attorney was still in effect on November 5th. Appellant's counsel, early in his brief, argues that respondent was put on notice that Frederic did not have authority to execute the bond on behalf of the company, but the evidence advanced in support of the argument tends to prove that respondent should have suspected that the power of attorney had been revoked, but does not support the conclusion that it had been.

[3] If, however, the power of attorney had been revoked prior to November 5th, the circumstances were such that Frederic's acts still bound the appellant to the respondent. It appears that the bond involved in the case at bar was not the first of its kind Frederic had executed in connection with the purchase by respondent of these orders, a fact which was well known to the company. If Frederic's authority had been terminated, respondent knew nothing of it. Whether suspicious or merely cautious, however, the respondent on October 25th sent a telegram to the president of the appellant company, stating that he (respondent) had been receiving bonds of the appellant, signed by Frederic, attorney in fact, and requesting a statement as to what extent Frederic's power of attorney held good. The reply was: "Frederic formerly represented us. Entire matter handled by our Los Angeles office to whom your telegram is being referred." On the same day, October 26th, on which the telegram was received, a Mr. Rimassa, superintendent of insurance for the appellant, came from the Los Angeles office, because of respondent's telegraphic inquiry, and said that Frederic was still acting as appellant's attorney in fact. Rimassa took a list of the bonds already executed to check over, and in a few hours telephoned that the office had a record of them. Upon respondent's request "in order to do further business with them," Rimassa confirmed his report with this letter on the letterhead of the Fidelity Union Companies, Los Angeles, Cal.:

"Confirming our conversation of this morning, any bond signed by Jay G. Frederic as attorney-in-fact for the Fidelity Union Casualty Company, and bearing our seal imprint, is an authentic document of our company. Thanking you for your interest, we are,

"Yours very truly,
"Fidelity Union Casualty Company,
"By [Sgd] John Rimassa."

Rimassa, appellant's vice president testified, was sent to Los Angeles to check up on appellant's bond business.

The bond in question was not only signed by Frederic as indicated, shortly after the receipt of this letter, but it was signed by him in the presence of the vice president of the appellant corporation, who was present because the corporate seal had been sent for, and who made the impression of the seal on the bond upon which judgment was given.

In view of these facts, established by competent evidence, we think further comment is unnecessary.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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118 Cal.App. 748

BARKER et al. v. SOUTHERN PACIFIC CO. et al.

Civ. 4369.

District Court of Appeal, Third District, California.

Dec. 31, 1931.

Hearing Denied by Supreme Court Jan. 28, 1932.

Railroads ⚷275(1).

Defendant's agent instructing wrecking company's engineer to move car of bricks to weighing scale *held* charged with knowledge that defendant's tracks were only available approach to scale track and one customarily used.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 5 P.(2d) 970.

W. D. Tillotson, of Redding, and George R. Freeman, of Willows, for appellants.

L. C. Smith, of Redding, and Cooley, Crowley & Supple, of San Francisco, for respondents.

PER CURIAM.

Our attention has been directed to certain statements of facts which appear in the original opinion.

As to the conduct of decedent, it appears from the record that his engine was "barely moving," as he approached the switch leading to the scale track. The opinion states that he "stopped." Whether he actually stopped or was barely moving does not affect our conclusions that there was evidence to justify the jury in finding decedent free of contributory negligence.

As to who had an exclusive right to use the scale track, the record is not clear. Assuming that this track was the exclusive property of the smelter company, the fact still remains that to get upon this track it was necessary to use the tracks of the Southern Pacific Company. As we stated in our opinion, there is evidence from which the jury could find that the approach to the scale track, which was used by decedent, was the only one available, and the one customarily used. It was the duty of the agent of appellant company to keep himself informed upon these facts, before he directed the weighing of the car.

As to whether the accident occurred on the scale track or the main spur track on the slag pit track is simply a question of how the numerous switches should be designated. Neither appellant nor respondents agreed upon the proper designation. From plaintiffs' Exhibit 1 it would appear that the branch line from Kennett ran directly past the scales; hence we placed the scene of the accident upon the scale track. The decedent's engine, when it was struck, was moving slowly over, or a few feet beyond, the switch. The testimony is not clear upon this point.

The evidence shows, as we stated in the opinion, that the train of defendant company originated at Kennett.

The petition for rehearing is denied.

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119 Cal.App. 521

STOUT v. FARWELL et ux.

Civ. 8067.

District Court of Appeal, First District, Division 2, California.

Jan. 5, 1932.

1. Appeal and error 🔑766.

Appeal may be dismissed for failure to comply with rule stating requirements for appellant's brief (Rules of Supreme Court and District Courts of Appeal, rule 8).

2. Appeal and error 🔑931(1).

On contention on appeal that complaint and findings are insufficient, every intendment must be indulged in favor of judgment.

3. Pleading 🔑433(9).

Complaint in action to foreclose mechanic's lien, though possibly subject to attack by special demurrer for uncertainty, *held* sufficient after judgment.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action to foreclose mechanic's lien brought by James B. Stout against Lyman Farwell and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

D. A. Knapp, of Los Angeles, for appellants.

Victor R. Hansen, of Los Angeles, for respondent.

SPENCE, J.

Defendants appeal solely upon the judgment roll from a judgment decreeing foreclosure of a mechanic's lien in the sum of $248.24.

[1] Appellants' brief fails to comply with rule 8 of the Rules of the Supreme Court and District Courts of Appeal. It contains but two headings, "The Complaint," and "The Findings," neither of which heading shows "the nature of the question to be presented." We again wish to stress the importance of compliance with said rule and to point out that under its provisions an appeal may be dismissed for failure to comply therewith. Richmond Terminal Corporation v. Parr Terminal Company (Cal. App.) 2 P.(2d) 579; Hawkins v. Doolittle (Cal. App.) 298 P. 862.

[2, 3] Owing to the brevity of appellants' brief it is not difficult to ascertain that the main contentions are that the complaint and findings are insufficient. No demurrer to the complaint was interposed, but appellants now seek a reversal upon the ground that the complaint, the allegations of which were followed in the findings, contained no direct averment to the effect that the materials were used and that the labor was performed in the construction of the building upon the premises described. The attack is somewhat similar to the one made upon the complaint and findings in Stone v. Serimian, 198 Cal. 520, 246 P. 45, where it was held that the omission of such direct averment was not necessarily fatal. In the present case we may summarize by stating that in this connection the complaint alleged that appellant Lyman Farwell was the owner of the premises described; that he began the erection and construction of a building upon said premises; and that respondent, at the special instance and request of said appellant, sold and delivered to him certain materials and performed certain labor "in connection therewith" of a certain reasonable value. These allegations were followed by the customary allegations found in a complaint to foreclose a mechanic's lien and the customary prayer for foreclosure of the lien. Appellants contend that the words "in connection therewith," as used in the complaint, merely signify that the labor was performed in connection with the materials furnished without reference to any particular building, while respondent contends that said words signify that the materials were used and that the labor was performed in connection with the construction of the building upon the premises described.

It may be conceded that the allegations are open to either construction and that the complaint would be subject to attack by way of special demurrer for uncertainty. Nevertheless, every intendment must now be indulged in favor of the judgment (2 Cal. Jur. 852), and in our opinion it cannot be said that the complaint fails to state a cause of action nor that the findings do not support the judgment.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

119 Cal.App. 518

NOLA et ux. v. ORLANDO et al.

Civ. 7763.

District Court of Appeal, First District, Division 1, California.

Jan. 4, 1932.

Rehearing Denied Feb. 3, 1932. Hearing Denied by Supreme Court March 3, 1932.

Waters and water courses ⚷262.

Property owners sustaining damage through escape of waters pumped by defendants into cement flume for irrigation could recover without proof of negligence.

> Negligence was immaterial, since cement flume of defendants constituted an artificial watercourse, and escape of water therefrom onto plaintiffs' lands occurred solely by reason of the manner of the construction and maintenance of the flume plus act of defendants of pumping water through it.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Peter Nola and wife against Antone Orlando and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

R. V. Bressani and John M. Burnett, both of San Jose, for appellants.

Maurice J. Rankin, and C. E. Luckhardt, both of San Jose, for respondents.

ATTERIDGE, Justice pro tem.

The plaintiffs in this action are the owners of land on the west side of Capital avenue in Santa Clara county, and the defendants own the land immediately across said avenue on the easterly side thereof. Defendants maintained on their lands a cement flume through which water was pumped for irrigation purposes. Plaintiffs allege in their complaint and the trial court found that waters escaped from said flume and came onto the lands of plaintiffs, thereby causing a certain well pit and pump located at the point of its influx to cave in. For redress of this injury, plaintiffs brought action, and the trial court awarded them the present judgment, from which defendants appeal.

As originally framed, plaintiffs' complaint did not charge the defendants with negligence, but instead relied upon the legal doctrine hereinafter stated as the basis of this decision. But on the trial, under the pressure of a vigorously urged motion for judgment on the pleadings, plaintiffs sought and obtained the trial court's permission to amend their complaint by alleging that the acts forming the basis of their complaint were negligently done. The trial appears to have then proceeded on the assumption that the theories of negligence and liability without negligence were both in issue. On the termination of the trial, the court found in entire accordance with plaintiffs' complaint, except that it did not find that the defendants were negligent in permitting the water to be discharged upon plaintiffs' lands. In this connection it should be noted, however, that on oral argument before this court appellants waived any and all reliance upon the claim of a material variance between the complaint and findings, and rested their appeal squarely upon their asserted proposition that in no event could there be a recovery for the damages caused by the escape of said water from defendants' flume unless it be affirmatively established that the same was caused by and through the negligence of defendants.

As we conceive the present state of the law in California relating to the outlined evidentiary situation, appellants' contention cannot be upheld. The cement flume of defendants constituted an artificial and not a natural watercourse. The escape of water therefrom was not in any degree caused by the added pressure of flood or storm waters, nor was the same occasioned as a consequence of an inevitable accident. It occurred solely by reason of the manner of the construction and maintenance of defendants' said flume, plus their act of pumping water through it. With this certain cause of the injury in view, we regard it as immaterial whether or not these acts be in terms held negligent; it being a sufficient basis upon which to predicate liability in a case such as this that said acts constitute the sole, efficient, and proximate cause of the injury.

In the case of Parker v. Larsen, 86 Cal. 236, 238, 24 P. 989, 21 Am. St. Rep. 30, the Supreme Court, after reviewing a set of facts which closely parralleled the present, said: "The water which did the injury to plaintiff was not a natural stream flowing across defendant's land, but was brought upon the land by artificial means. And the rule is general that, where one brings a foreign substance on his land, he must take care of it and not permit it to injure his neighbor. The law upon the subject is tersely expressed in the maxim, sic utere tuo ut alienum non laedas."

This rule was recently reiterated and elaborately stated in Green v. General Petroleum Corp., 205 Cal. 328, 334, 270 P. 952, 955, 60 A. L. R. 475, where the court declared:

"* * * It is the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury."

Appellants maintain that the case of Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766, is of controlling importance in support of their aforestated contention, but that case, as was pointed out in Green v. General Petroleum Corp., supra, was based upon an "inevitable accident" arising from an extraordinary and unprecedented flood, which the decision states was "an agency" not only "beyond defendant's control," but one "beyond human control," and we do not regard the case sufficiently in point upon the present controversy to overcome as authority either the rule announced or precedents cited in the preceding paragraph hereof.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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119 Cal.App. 539

RASMUSSEN v. SULLIVAN et al.

Civ. 623.

District Court of Appeal, Fourth District, California.

Jan. 6, 1932.

Rehearing Denied Feb. 5, 1932. Hearing Denied by Supreme Court March 3, 1932.

1. Mines and minerals 🔑38(15).

Evidence sustained finding that defendants' locations of claims were made after rights of plaintiff's predecessor expired.

> Defendants' location notices recited: "This claim was located after 12 o'clock A. M. July 1st, 1927; and I was on the property until 1 o'clock P. M. July 1st, 1927, and there was no one on the claim up till this time, and there has been no assessment work done on this claim for 1927."

2. Mines and minerals 🔑14(1).

Defendants' mere retention of key to house on claim received while employed by plaintiff's predecessor, *held* not to preclude defendants' locating on same claim after plaintiff's predecessor's rights expired.

> Defendants' mere retention of possession of key to house did not constitute defendants agents or representatives of plaintiff's predecessor in interest, where defendants had previously left employ of plaintiff's predecessor because of its failure to pay their wages and instituted proceedings against it to collect wages due and were not thereafter employed by such company.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by J. P. Rasmussen against P. T. Sullivan and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

D. A. Knapp, of Los Angeles, for appellant.

Pollock & Mitchell, of Ontario, for respondents.

MARKS, J.

Appellant brought this action in the court below to eject respondents from several mining claims which we will hereafter refer to as the Anaconda Group and which are located near Twenty-Nine Palms in San Bernardino County, Cal. Findings of the trial court were made against the right of possession of appellant and judgment was entered for respondents, from which this appeal was taken.

The Anaconda Gold Mining Company was a California corporation. In the years 1921 and 1922 it received quitclaim deeds to the several claims comprising the Anaconda Group from persons who were presumably the locators or in possession. In February, 1928, and before the commencement of this action, the Anaconda Gold Mining Company by quitclaim deed conveyed to appellant whatever interest it had in the Anaconda Group. Respondents located the claims in their own right after 12 o'clock noon on July 1, 1927.

Appellant urges a number of grounds for a reversal of the judgment. It will not be necessary to consider them separately, because it is evident that his real contention is that the evidence fails to support the findings and judgment for the reason that, as he maintains, the locations of the claims were made by respondents before the hour of 12 o'clock noon on July 1, 1927, and before the lawful possession of the claims of appellant's predecessor in interest had expired, thereby making respondents' entry unlawful.

The evidence offered by appellant shows that he, acting for the Anaconda Gold Mining

Company, did a small amount of assessment work on the claims in May, 1927. On June 29th of that year he purchased a secondhand automobile in Los Angeles, a wheelbarrow, candles, picks, shovels, and some food to take to the claims with which to do the necessary assessment work. He hired M. C. Lande to drive the automobile to the claims and to perform the actual work. The two left Los Angeles on the morning of June 30th, but had motor troubles not uncommonly encountered by the operators of old used cars. They did not reach their destination until between 3 and 4 o'clock in the afternoon of July 1, 1927. The tools and supplies were not unloaded from the automobile, but were returned unused to Los Angeles on the following day.

Undisputed evidence shows that respondents worked for the Anaconda Gold Mining Company prior to the year in question and did assessment work on the claims. The company failed to pay them for this work and owed them the sum of $312 therefor. As they could not collect their money, they evidently decided to locate the claims for themselves if the necessary assessment work was not done before noon on July 1, 1927.

On June 29, 1927, Sullivan went to the claims and found a man camped there who was planning to "jump" them on July 1st. Sullivan explained the matter of the unpaid wages to him and he left the claims. According to his testimony, Sullivan returned to the claims at about 3 o'clock on the morning of July 1, 1927, and found no one in possession and that no assessment work had been done. He waited until after 12 o'clock noon on this day and then built his monuments and posted the location notices. He left the claims at about 3 o'clock in the afternoon with his work of location completed. The location notices were recorded in the office of the county recorder of San Bernardino county on July 5, 1927. Respondents did the required assessment work on the claims for the year.

Respondents kept careful watch of the claims, and there is evidence in the record which would justify the trial court in concluding that no assessment work was done on the Anaconda Group for the year ending on July 1, 1927.

[1] Under this state of the record appellant maintains that the locations by respondents were prematurely made. He bases his argument principally upon the following language which appears in each of the location notices: "This claim was located after 12 o'clock A. M. July 1st, 1927; and I was on the property until 1 o'clock P. M. July 1st, 1927, and there was no one on the claim up till this time, and there has been no assessment work done on this claim for 1927." He maintains that because these location notices contained the statement that respondents located them after 12 o'clock on the morning of July 1, 1927, the trial court was required to conclude that the claims were located after that hour and before 12 o'clock noon of the same day. We cannot agree with this contention. Twelve o'clock noon is after 12 o'clock in the morning. Any location made after 12 o'clock noon would be after 12 o'clock in the morning of July 1, 1927. Sullivan's testimony that the monuments were built and the location notices posted between 12 o'clock noon and 3 o'clock in the afternoon of July 1, 1927, was uncontradicted and is entirely sufficient to support the trial court's conclusion that the locations were made between those hours.

[2] During the time that respondents had been employed by the Anaconda Gold Mining Company to work for it on the Anaconda Group, respondent Boling was given a key to a house located upon one of the claims. He remained in possession of this key, and appellant maintains that this is sufficient to show that respondents were still in possession of the claims for the Anaconda Gold Mining Company and that, therefore, being agents for the company, they could not make a valid location of the claims for themselves. The evidence does not support this contention. After respondents left the employ of the company because of its failure to pay their wages, their position immediately became adverse to it. They instituted proceedings against it to collect the wages due them and were not thereafter employed by the company nor were they its agents or representatives. The mere possession of a key to a house upon one of the claims did not constitute them agents or representatives of the company nor possessors of the claims for it.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

119 Cal.App. 529

KELLY v. FERBRACHE et ux.

Civ. 7406.

District Court of Appeal, First District, Division 1, California.

Jan. 5, 1932.

Rehearing Denied Feb. 4, 1932. Hearing Denied by Supreme Court March 3, 1932.

1. Dismissal and nonsuit 🔑60(1).

Court must dismiss action against defendant not served within three years (Code Civ. Proc. § 581a).

2. Courts 🔑107.

Effect of decision is not extended or determined by reference to single phrase, but it must be considered in its entirety.

3. Process 🔑45.

Issuance of "alias summons" does not extend three-year period within which service must be had (Code Civ. Proc. §§ 408, 581a).

> The duplication of previously issued process, under Code Civ. Proc. § 408, is not to be held identical with the "alias process" or writ known to common law. At common law, writs were returnable at the next or a specified term of court, and an alias writ was one sued out within the specified return period where the original had not produced the required effect or was itself defective.
>
> [Ed. Note.—For other definitions of "Alias Summons," see Words and Phrases.]

4. Appeal and error 🔑1011(1).

Trial court's determination on substantially conflicting affidavits as to whether defendant absented herself from state and secreted herself within state to avoid service of summons *held* conclusive (Code Civ. Proc. § 581a).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action to recover deficiency after sale of real property under a deed of trust brought by Agnes L. Kelly against J. Albert Ferbrache and wife. From judgment and order of dismissal, plaintiff appeals.

Affirmed.

Morettini & O'Neill, of San Jose, for appellant.

Brobeck, Phleger & Harrison, of San Francisco (Kenneth Ferguson, of San Francisco, of counsel), for respondent.

ATTERIDGE, Justice pro tem.

This action was instituted by appellant as plaintiff in the court below to recover a deficit resultant after a sale had been made under the provisions of a deed of trust securing a promissory note. The defendants named in the complaint were J. Albert Ferbrache and the respondent Mary J. Ferbrache, joint makers of said promissory note.

The complaint was filed February 8, 1926, and summons issued the same day. Defendant Albert Ferbrache was duly served with complaint and summons within two months thereafter, and judgment was subsequently rendered against him. Respondent Mary Ferbrache, however, was not served with either summons or complaint until August 6, 1929, a period approximately three years and six months after the commencement of the action—when an alias summons was served upon her.

[1] It is apparent from the facts stated that the failure of appellant to serve respondent with summons within three years after the commencement of the action immediately called into operation the provisions of section 581a of the Code of Civil Procedure, which have been repeatedly held in a long line of cases to impose a mandatory as well as statutory prohibition upon the Superior Court from taking any further proceedings against a defendant who has not been served with summons within the prescribed period of limitation, other than to order a dismissal of the action against such defendant. Vide Bellingham Bay Lumber Co. v. Western Amusement Co., 35 Cal. App. 515, 518, 170 P. 632, and cases therein cited; Sauer v. Superior Court, 74 Cal. App. 580, 241 P. 570.

It, however, further appears from the record that upon the failure of respondent to appear in response to the alias summons served upon her on August 6, 1929, appellant caused the former's default to be entered, and subsequently, on September 13, 1929, with such default as its underlying basis, obtained from the trial court a judgment for the relief prayed for in her complaint.

Respondent appeared in the action for the first time on September 14, 1929, by filing a motion to dismiss the action because of delay in service and return of summons, and, upon then ascertaining that a judgment had already been entered against her, promptly moved, upon September 17, 1929, to vacate and set the judgment aside upon the grounds that the same was void and beyond the jurisdiction of the court to make or render. The trial court, convinced of the improvident nature of the default judgment and its own want of jurisdiction in rendering the same, granted the latter motion to vacate and ordered a dismissal of the action. It is from this order and judgment, based upon section 581a of the Code of Civil Procedure, that appellant appeals.

[2] The principal contention urged by appellant on the appeal is that section 581a of

the Code of Civil Procedure does not apply to actions such as hers, "which have gone to judgment." In support of this claim she relies upon certain excerpts from the case of Jones v. Gunn, 149 Cal. 687, particularly the sentence appearing on page 694 of that reported case, 87 P. 577, 580, which in part states: "That subdivision 7 of section 581, Code of Civil Procedure, must be construed to apply to pending actions * * * and not to actions which have gone to judgment. * * *" This portion of the opinion must, we believe, be construed with due regard to, and consideration of, the particular facts then under adjudication, for it is a recognized rule of judicial construction that the effect of a decision is not to be extended or determined by reference to a single phrase, but, on the contrary, must be determined by a consideration in its entirety of the opinion in the case. Young v. Southern Pacific Co., 189 Cal. 746, 757, 210 P. 259.

Upon so considering the sentence quoted from Jones v. Gunn, supra, it will be observed that the same immediately follows a sentence in which the Supreme Court had carefully pointed out concerning the case then under adjudication that "* * * after commencement of the action, service of summons was made, the trial had, and a judgment, which has long since become final, was rendered *within a year after the commencement of the action.*" (Italics ours.) As we construe the decision, it was only because these acts requisite to jurisdiction had severally occurred prior to the expiration of the three-year period upon which, had they not so occurred, the trial court, under section 581a, would have ex necessitate legis been without jurisdiction, that the court held the then existing similar subdivision 7 of section 581 of the Code of Civil Procedure is inapplicable "to actions which have gone to judgment." By reason of the fact that all the acts relied upon to confer jurisdiction in Jones v. Gunn, supra, were taken within the three-year period of final limitation, whilst in the instant case the jurisdictional requisites of service of summons and return thereon are definitely shown to have been made after the expiration of such period, we hold that the case cited is not in point.

[3] Appellant makes the further point that the provisions of section 581a of the Code of Civil Procedure relate and apply only to the service of original summons and not to an alias summons. Her claim in this respect is that the issuance of an alias summons at a date some seven months later in point of time than the issuance of original summons had the effect of extending the three-year period prescribed by section 581a of the Code of Civil Procedure for a like period of time. We are constrained to hold this claim to be without merit. The duplication of previously issued process, whose issuance is provided for by section 408 of our Code of Civil Procedure, is to be had only in the event the original summons has been "returned without being served on any or all of the defendants, or if it has been lost." This form of mesne process is not to be held identical with the alias process or writ known to the common law. At common law, writs were returnable at the next or a specified term of court, and an alias writ was one sued out within the specified return period where the original had not produced the required effect or was itself defective. It was so-called from the words "as we have formerly commanded you," being inserted after the usual commencement "we command you." Farris v. Walter, 2 Colo. App. 450, 31 P. 231, 232. The so-called alias summons, for which provision is made in said section 408, Code of Civil Procedure, contains no such recital; it merely duplicates its original, and is a mere substitute therefor. Some of these distinctions were early pointed out by the Supreme Court in Dupuy v. Shear, 29 Cal. 238, 240 (decided prior to the enactment of our Codes), where it said:

"A technical alias summons is not known to our law, and in fact, under our system of practice, there is no necessity for one. The summons specifies no return day, and when it has once been issued, it may be served and returned at any time without reference to the time of the commencement of the next term of Court. * * * If more than one summons is authorized by the Practice Act, the second has no necessary connection with, or dependence upon, the first. It is based upon the complaint alone. The capias ad respondendum under the common law system was returnable at the next succeeding term of the Court, and a return of the writ was a necessary prerequisite to the issuing of an alias."

Section 408, Code of Civil Procedure, merely provides that an alias summons may, in either of the two events therein specified, issue "within such time as the original might have been served," and that period of time by the express limitations of section 581a of the Code of Civil Procedure is fixed as three years. But this does not mean, as appellant contends, that a plaintiff will still have three years from the date of issuance of alias summons in which to secure service and return of process, because *all* actions are barred and the court is without jurisdiction under the express provisions of said section 581a, Code of Civil Procedure, "unless the summons shall be served and return thereon made within three years *after the commencement of said action.*" (Italics ours.)

Aside from this plain mandate of the statute (section 581a, Code Civ. Proc.) to the contrary, the recognized mischievous results that would follow by permitting the successive issuance of a series of alias and pluries summons to indefinitely toll its prescribed three-year period of limitation are most persuasive reasons for withholding our approval of appellant's contention. Some of these are pointed out in Weaver v. Woodling, 220 Mo. App. 970, 272 S. W. 373, 374, where it is said: "A plaintiff, after filing his petition, might wait indefinitely and then bring the defendant into court pursuant to an alias summons, after his witnesses were dead or his proofs lost or destroyed, and obtain judgment upon claims not founded in justice, and the practice thereby becomes a means of injustice and oppression. Courts could not sanction a practice so fraught with mischief, unless it were so long and clearly established as to have the force of positive law."

[4] Appellant makes the further claim that respondent absented herself from the state and likewise secreted herself within the state for the purpose of avoiding service of summons, and invokes those provisions of said action 581a of the Code of Civil Procedure which prescribe that no dismissal shall be had where actions or conduct of the character specified prevented service of summons; but, inasmuch as this question of fact was fully presented to the trial court upon a series of substantially conflicting affidavits and counter affidavits, and by it determined adversely to appellant's claim, it follows that such determination is necessarily conclusive. Wilson v. Leo, 19 Cal. App. 793, 797, 127 P. 1043.

For the reasons given, the judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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119 Cal.App. 552

DARRAH v. LANG.

Civ. 4464.

District Court of Appeal, Third District, California.

Jan. 8, 1932.

1. Fraudulent conveyances 🔑172(1).

Deed to realty is valid and binding between parties thereto, though made with intent to defraud creditors, where no creditor is complaining of transfer (Civ. Code, § 3439).

2. Fraudulent conveyances 🔑172(2).

Debtor conveying realty with intent to defraud creditors is estopped from denying grantee's title (Civ. Code, § 3439).

3. Fraudulent conveyances 🔑172(1).

Effect of finding that transfer was made with intent to defraud creditors of grantor *held* to render deed binding as between parties (Civ. Code, § 3439).

4. Appeal and error 🔑1071(1).
Fraudulent conveyances 🔑310.

Finding that transfer was made with intent to defraud grantor's creditors, and finding that grantee held property in trust as security, *held* in irreconcilable conflict, requiring reversal.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Albert Darrah against Mike Lang. Judgment for defendant, and plaintiff appeals.

Reversed.

Louis Lamy, of Los Angeles, for appellant.

Murphy & Cohen, of Los Angeles, for respondent.

R. L. THOMPSON, J.

This is an appeal from a judgment for the defendant in a suit to quiet title to real property.

The plaintiff contracted to purchase lots 17 and 18, block 1, of tract No. 3308 of the city of Los Angeles from the Pacific Southwest Trust & Savings Bank, for the sum of $1,500. This contract was assigned to the defendant. May 11, 1926, after the lots had been fully paid for, at the request of the plaintiff, they were conveyed to the defendant, who is the holder of the paper title thereto. The complaint alleges these lots were deeded to the defendant without consideration; that the transfer was made to protect the plaintiff against "unjust litigation" with which he was threatened and subject to an agreement to reconvey the property to plaintiff on demand; that the defendant failed and refused to reconvey the lots upon demand therefor.

The answer denies that the property was conveyed without consideration. On the contrary, it is asserted the transfer of title was made in violation of section 3439 of the Civil Code, with intent to defraud the creditors of plaintiff. It is further alleged the conveyance was made to the defendant in trust to secure the repayment of a specified sum of money which was paid by the defendant toward the purchase price of the land, and also to secure the value of services which were performed by the grantee in maintaining and improving the property.

The court found that the lots were conveyed to the defendant with intent on the part of the plaintiff to defraud his creditors. There is substantial evidence to support this finding. The court further found that the property was conveyed to the defendant, in trust, to secure the payment of the sum of $776.47

which was advanced by the grantee toward the purchase price thereof, and also to secure the repayment of the further sum of $675 which was expended by the defendant in maintaining and improving the land. In effect, these findings are in irreconcilable conflict. The court, however, rendered judgment that the plaintiff take nothing by this action. From this judgment an appeal has been perfected.

The appellant contends that the findings and judgment are contrary to law, unsupported by the evidence, and in irreconcilable conflict.

Every transfer of property which is made with the intent to defraud creditors is void as against creditors of the debtor or their successors in interest. Section 3439, Civ. Code.

[1] No creditor of the plaintiff in the present case was a party to this action or is complaining of the transfer. A deed of conveyance to real property is valid and binding between the parties thereto even though it may have been executed with intent to defraud creditors, where no creditor is complaining of the transfer. First National Bank v. Eastman, 144 Cal. 487, 77 P. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Berryman v. Dore, 47 Idaho, 582, 277 P. 565; Sexey v. Adkinson, 34 Cal. 346, 91 Am. Dec. 698; Frink v. Roe, 70 Cal. 296, 308, 11 P. 820; 1 Moore on Fraudulent Conveyances, 64, § 26; Bump on Fraudulent Conveyances (4th Ed.) 461, § 449. In the text-book last cited the author says: "The title of a fraudulent grantee is not only good against the debtor, but it is also good against all parties except creditors and their representatives. It is voidable only at the suit of creditors, and if no creditor interposes and complains, the transfer is as binding and effectual to pass the title as if made with the best intents and for the most innocent and commendable purposes."

[2] This rule is invoked on the ground of public policy. Under the foregoing doctrine, since the respondent is the holder of a deed of conveyance to the real property which is here involved, which deed was executed and delivered with intent to defraud the creditors of the plaintiff, he is estopped from denying the title of the grantee. Based upon the binding validity of this deed of conveyance, the grantee must therefore be deemed to be the owner of the property in question.

[3] The effect of the finding that the transfer was made with intent to defraud the creditors of the plaintiff is to render the deed valid and binding. It requires a decree holding that the defendant is the owner of the property in fee. By necessary implication, it is a determination that the plaintiff has no right, title, or interest in the land.

[4] The court, however, adopted another finding to the effect that the defendant holds the title to the property in question, *in trust*, to secure the repayment of claims for specified sums of money which were found to be due from the plaintiff to the grantee. If the defendant merely holds the property in trust to secure the payment of these claims, the deed becomes a mortgage, and the legal title remains in the plaintiff. In that event the plaintiff had a right to an adjudication that he is the owner of the legal title to the property subject to the lien as security for the payment of the defendant's claims. 51 C. J. 267, § 255. These inconsistent findings may not be harmonized. They are in irreconcilable conflict. One of them holds that the defendant is the legal owner of the property. The other one determines that he merely holds an equitable title therein to secure the payment of certain ascertained claims. It is impossible to say which finding should control the court in rendering the judgment.

Where material findings are in irreconcilable conflict, it becomes necessary to reverse the judgment. 2 Cal. Jur. 1030, § 612; Boyle v. Boyle, 97 Cal. App. 703, 276 P. 118; Huling v. Seccombe, 88 Cal. App. 238, 263 P. 362.

The judgment is therefore reversed.

We concur: PRESTON, P. J.; PLUMMER, J.

119 Cal.App. 457

DODWELL & CO., Limited, v. LOS ANGELES WAREHOUSE CO.

Civ. 6886.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1931.

Rehearing Denied Jan. 27, 1932. Hearing Denied by Supreme Court Feb. 25, 1932.

Warehousemen ⟹34(7).

Evidence sustained finding that owner suing warehouseman for conversion of rugs had settled claim with pledgee, precluding assertion of any further liability against warehouseman.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by the Dodwell & Co., Limited, against the Los Angeles Warehouse Company. From the judgment, plaintiff appeals. Affirmed.

Superseding opinion of District Court of Appeals, 2 P.(2d) 181.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for appellant.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Muhleman, Anderson & Palmer and C. Sherman Anderson, all of Los Angeles, for respondent.

IRA F. THOMPSON, J.

On February 17, 1925, plaintiff delivered to Los Angeles Steamship Company, at San Francisco, four cases containing thirty-four Chinese rugs consigned to plaintiff at Los Angeles. The evidence shows that Cyrus A. Hasty arranged with plaintiff for the shipment, and that the cases were to be put in a warehouse belonging to defendant upon arrival and a warehouse receipt issued to plaintiff. The latter expected they would be so warehoused as to make it possible for Hasty to display the rugs to prospective customers, and, if a sale was made, Hasty was to get a delivery order from plaintiff; it being understood that the rugs would be sold for cash, or if on credit it was to be subject to plaintiff's approval of the purchaser. Hasty was to pay the storage charges, under his verbal agreement with plaintiff. Pursuant to this plan, Hasty conducted the negotiations with defendant under which the warehousing was done. In some way not disclosed by the evidence, but evidently with plaintiff's consent, in view of the fact that the goods were consigned to it and the bill of lading was its own, Hasty warehoused the goods on March 6, 1925, in accordance with his verbal agreement with plaintiff, without notice to defendant that plaintiff was the owner of the shipment. The "in sheet" of defendant shows that the rugs were received from Cyrus A. Hasty & Co. The next day, however, a warehouse receipt was issued covering the rugs and delivered to Hasty, showing that they were received in storage by defendant "for the account of Dodwell & Company, Ltd., pledgee, Ex Cyrus A. Hasty & Co." The rugs were stored, so that they could be displayed, in a room designated as No. 533, in which room Hasty had theretofore officed and which was in a part of the warehouse where offices were rented by various parties. In some way unknown to either plaintiff or defendant, except in one instance disclosed by the evidence, the rugs were removed by Hasty from said room prior to January 6, 1926. On the latter date the original warehouse receipt was canceled by Mr. Berbower, who was the office manager of defendant and who passed away prior to the date of trial. The evidence shows that it was mailed to Los Angeles by plaintiff on January 4, 1926. On January 6, defendant's general manager was told by representatives of plaintiff that the rugs had been stolen from the warehouse and sold by Hasty, and upon investigation defendant found that they had been removed. Hasty was not present at the trial, and apparently was desired as a witness by both parties.

The complaint contained two counts; the first for damages for failure to deliver the goods as provided in said warehouse receipt, and the second for damages for conversion of the goods stored.

Defendant, in addition to a general denial of the matters alleged in the complaint, alleged as separate defenses that in storing and safeguarding the rugs in question it at all times exercised such care and diligence as a reasonable and careful owner of similar goods would have exercised under the same circumstances, that in employing its servants and agents it made diligent inquiry as to their honesty and integrity, and that to the best of its knowledge during the period such rugs were so stored it had only honest and faithful employees, who carefully and prudently looked after and cared for them.

The court's findings are very voluminous, but among them are the following: "VIII. During all the time said rugs were stored with defendant they were kept in defendant's warehouse in a locked room, access to which could be gained only by unlocking the door thereof with a key securely kept in the possession of the defendant, and it had instructed its employees not to allow said Cyrus A. Hasty, or any person or persons other than employees of defendant, to enter said room unless accompanied by one or more of defendant's employees. That defendant's employees were instructed by defendant not to inspect or handle any goods stored with the defendant, except in the ordinary course of business, and defendant never, at any time, had any knowledge of any violation of any instructions; and in the storing and safeguarding of said goods defendant at all times exercised such care and diligence as a reasonable and careful owner of similar goods would have exercised under the same or similar circumstances. IX. In employing its servants and agents, defendant at all times made diligent inquiry as to the honesty and integrity of such applicants, and, to the best of defendant's knowledge, it had in its employ during said period from March 6, 1925, to January 6, 1926, honest and faithful employees only."

Defendant both by its answer and in the evidence produced by it took upon itself the burden of proving that the rugs were not taken from the warehouse by reason of its negligence, and we are of the opinion that it properly had such burden by reason of the production of the warehouse receipt introduced in evidence and the fact that defendant did not have the rugs to deliver when the receipt was surrendered to it. Such proof would seem to make a prima facie case under the first cause of action alleged, as no showing was even attempted that the deliveries were made on the order of plaintiff or upon production of such receipt, which the evidence shows remained at all times in plaintiff's possession from shortly after its issuance until it was mailed to Los Angeles on January 4, 1926.

In placing the rugs in a room where they could be displayed to prospective customers, defendant carried out the arrangement made between Hasty and the plaintiff. Mr. Turner, defendant's general manager, testified that the display room was kept locked and the key to it retained in Mr. Berbower's desk in defendant's main office; that Hasty did not have a key to the room, and that in order to enter such room it was necessary for him "to get in touch with Mr. Berbower, who would send a man with him with a key, and they would go to the room and open it up"; that he knew of no instance when Mr. Hasty was not compelled to go through that procedure to obtain access to the room; that their instruction to employees was that no one was to be allowed in any of the buildings without one of the employees being with them; that the only keys that he knew of to the room in question were one "with the night janitor; there would be a key with the superintendent and I carry a pass key, and the original key"; and that the original key was "kept in Mr. Berbower's desk." The witness also testified that there was one window in the room opening upon a sheer drop of five stories; that there was no fire escape nor any ladder or other means of gaining access to the room other than through the doors and window; that a day and night watchman were kept on duty at the warehouse; that at the time the rugs were in storage a watchman was maintained so that people could not get onto the fifth floor, where the rugs were, without the knowledge of the watchman; that during such period the first floor of the building was occupied by the Los Angeles Furniture Mart, and no one could get in or out of the building unless they had an office there and were known to the telephone operator or the manager on the first floor, or unless they came through the main office at 315 Commercial street; that the Los Angeles Furniture Mart closed its office about 6 p. m., when the night watchman locked the door, both inside and out; that it was not possible for any one to enter the building through the first floor. Turner further stated that he had no knowledge of any of the employees being dishonest, and that it never came to his attention that any of the goods in question had been stolen from the warehouse or removed until January 6, 1926.

The superintendent of defendant testified that, while that portion of its building in which room 533 is located was used by the public, every one was required to have an order, whether a tenant or whether it was a storage account, before removing anything from the building; that any one who wanted to see the various tenants, at that time, could not go up the elevator entering from San Pedro street at all; that during the day one or more persons were on duty in the lobby all of the time until 5:30 p. m., when the place was "locked up"; that the Los Angeles Furniture Mart was operated by defendant, and its watchman and clerical employees were in the employ of defendant. The witness also said that he had no personal knowledge of any goods ever having been lost through theft except the rugs in question and in 1926, when the watchman was bound and gagged and some six or seven hundred cases of whisky were taken.

The finding as to the diligence used by defendant in selecting its servants and agents and as to the employees being honest and faithful is not questioned, and the evidence seems to support it. It is true that one witness, a tenant of the building by the name of Hartog, testified that he went with Hasty to room 533, and that on his first visit he entered through a connecting door from room 531, which was next to it, and that he bought one of the rugs from Hasty and carried it out through the hall door of room 533 and out of the building without being questioned. The witness also testified that he had frequently been in room 531, and that the door opening into room 533 "was open most of the time"; also that he had observed other tenants on the fifth floor going out with bundles and had not seen them stopped, and that on other occasions he himself had carried "samples or small packages" out of the building. He was asked, "Were you ever stopped?" to which he replied: "No, I was a tenant and everybody knew me." A witness who worked for the occupant of room 531 testified that Mr. Hasty had room 533 for a while, but could not remember whether it was in 1923, 1924, or 1925; that there was a roll of rugs against the wall but she did not know what kind they were, also some pongee silk; that the door between the rooms was left open on numerous occasions, and she answered Mr. Hasty's telephone calls during his absence; that the latter had a desk in his room; that she never saw him carrying any goods out of the room, although she had seen him in the room alone. No witness testified to removing or seeing any rugs removed except Mr. Hartog. Another witness said no rugs had been stored in the room except in the instance under consideration. Mr. Turner, the general manager of defendant, also testified that he did not know of his personal knowledge whether the connecting door between rooms 533 and 531 was unlocked. Both he and the superintendent testified on direct examination, without reference to this particular door, that the room was kept locked; the superintendent stating that his presumption that it was kept locked was based upon the instructions given to defendant's employees and "his daily observations to see that the orders were carried out."

There is no doubt that the testimony substantially supports the finding as to general care both as to guarding the building and as to the selection of and instructions to its employees, but the question is: Does the evidence of general care conflict with the evidence respecting the door between the two rooms? The testimony of the witness Hartog that he had frequently been in room 531 and that the door into room 533 "was open most of the time," and that of the witness who worked for the occupant of room 531 that the door between was left open on numerous occasions is apparently uncontradicted. The word "apparently" is used because the particular testimony is uncontradicted unless the general statements concerning custom and orders is sufficient to raise a conflict. The proof, however, of general caution does not establish, in the face of specific testimony, the lack of negligence in the particular instance. If, as testified, Hasty could not enter or remain in room 533 without the presence of an employee of defendant, the employee in all human probability knew of the situation. It is manifest that that portion of finding VIII reading as follows: "During all the time said rugs were stored with defendant they were kept in defendant's warehouse in a locked room, access to which could be gained only by unlocking the door thereof with a key securely kept in the possession of the defendant"—is not supported by the evidence. It may be argued that, inasmuch as the defendant received the rugs at the hands of Hasty, they were not advised of the necessity of protecting the plaintiff's interests against actions of Hasty, and hence the particular lack of negligence is not sufficient to overcome the general finding of due care. It is to be observed, however, first, that the warehouse receipt was issued in the name of plaintiff "pledgee ex Cyrus A. Hasty Co." Here immediately is recognition of an interest of plaintiff perhaps as great from the viewpoint of value as that of owner. Furthermore the testimony stands uncontradicted that the instructions were to the effect that Hasty was not to be allowed in the room without an employee of defendant, which is also subject to the interpretation that defendant was to guard the goods against disposal by Hasty. We are forced to the final conclusion that those portions of finding VIII lack sufficient support in the evidence.

Finding No. III reads as follows: "That on or about March 6, 1925, plaintiff, as owner thereof, delivered to one Cyrus A. Hasty thirty-four (34) Chinese rugs having the following dimensions, to-wit: (Here follows number and measurement of rugs). On or about said 6th day of March, 1925, Cyrus A. Hasty caused said rugs to be stored in the defendant's warehouse at Los Angeles, California. in the name of Cyrus A. Hasty Co." From the discussion of the case to this point it is obvious that Hasty did not store the goods in his own firm name, but rather in the name of Dodwell & Co. Hence this finding is without support in the evidence.

Finding No. IV is also subject to attack. A portion of it reads as follows: "Said Hasty, was, at the time of the delivery of said rugs, permitted and authorized by plaintiff to sell said rugs on behalf of plaintiff, and said Hasty could, after a sale, deliver the possession of such rugs as were sold by him, upon receipt of the purchase price and the payment of same to plaintiff." The respondent attempts to justify this language by the contents of a letter written to Hasty by plaintiff on February 26, 1925. The material portion of that letter reads: "We are unable to understand why the procedure outlined by you cannot be successfully worked, as it would merely require the renting of space by you where you would unpack and *display* the rugs. Your customers could be taken there and if a sale were made, our Los Angeles office would *issue a Delivery Order* in return for the payment of said rug or rugs." (Italics ours.) It will thus be noted that the finding does not accurately portray the true situation—that the parties contemplated that delivery should not be made to Hasty until a delivery order was given him in return for the purchase price of the rug.

Finding No. XV is to the effect that Hasty was engaged as a factor and in such capacity was permitted and authorized by plaintiff to sell the rugs, and respondent now contends that he was acting as such. It is plain that Hasty was not entitled to deliver a rug to any one until he had purchased it and received written authority directed to defendant for its delivery. That is the reason the goods were placed in storage in the name of the plaintiff. The true situation is in fact reflected by another finding wherein it is said that "plaintiff was the owner thereof and entitled to the possession of the same upon payment to defendant of its proper charges for storing and handling said goods." Hasty had only the right to display and to purchase. Under these limitations the authority of Moody v. Goodwin, 53 Cal. App. 693, 200 P. 733, is in point. That case holds that a person intrusted with the possession of an automobile by the owner thereof for the purpose of showing it to a prospective purchaser and then returning it is not clothed with the authority of a factor and has not the right to sell it. Certainly the restraint imposed by plaintiff of requiring the issuance to itself of a nonnegotiable warehouse receipt to accomplish its protection against just such a contingency may well be compared to the inability on the part of the automobile dealer to transfer the pink certificate. If anything, the defendant here is in a less favorable position to urge the authority of Hasty than was the purchaser in the Moody Case, because here the defendant was the author of the nonnegotiable receipt.

Another point requires discussion before we can determine this appeal. There are two findings, the one, in substance, saying that on May 11, 1926, Hasty made and delivered and plaintiff accepted his promissory note in the sum of $4,507.97 in full payment for said rugs and in full settlement of all claims plaintiff had against Hasty, and the other that on May 25, 1926, plaintiff and Hasty entered into an agreement reciting the indebtedness evidenced by the note and providing that the sum should be paid in installments as follows: $200 on or before May 20, 1926, and $200 on the 20th of each calendar month thereafter until May 20, 1927, at which time the full remaining balance was to be paid. The agreement it is found, also recites the assignment by Hasty to plaintiff of certain sums due from one Lewis M. Smith and the execution of a deed by Hasty and wife to plaintiff covering certain lands in the state of Minnesota, to be held as security. It also is found to contain this paragraph: "All former agreements, oral or written, and promissory notes, are cancelled and merged herein upon the execution of this agreement, by the parties hereto." The finding concludes with the statement that "plaintiff parted with all of its interest in and to said rugs and accepted the obligation mentioned in said agreement of the said Cyrus A. Hasty in full payment for said rugs and by said agreement the parties intended to and did arrive at a final settlement, including payment to the plaintiff for the said rugs stored in defendant's warehouse." It is not contended by respondent, nor was it shown that the promissory note had been paid nor the agreement fulfilled; it being its contention that the agreement was intended to be substituted as a new obligation to extinguish an old obligation. The appellant claims that the court was in error in concluding that the agreement was intended to be in payment of the claim appellant had against Hasty for the conversion of the rugs. It is to be observed, according to the testimony and another finding, that the plaintiff brought action against Hasty in July of 1926, one cause of action therein being upon the note and the other for conversion of the rugs. E. W. Hardie, an employee of plaintiff, testified with respect to the note as follows:

"Q. Don't recollect whether it was given in payment for these twenty-one rugs? A. I don't know that it was so stated on the note, I couldn't recall that.

"Q. Well, was it given for the rugs mentioned in this complaint? A. That is a hard question to answer. What was the date of it?

"Q. May 11, 1926. A. Can I answer by saying it must have been given in payment of the rugs?

"Q. Answer to the best of your recollection, Mr. Hardie. A. I will say so far as I recollect, it was given to us in payment for the rugs."

Recalling in connection with these facts, and the unliquidated nature of the claim against Hasty, the paragraph already quoted to the effect that all former agreements were merged and canceled, we cannot say that the trial court was in error in finally concluding that the parties intended to do away with the old claim and substitute a new one in its place. If so, the old one was paid and the respondent here was as effectually released as though it had been paid in cash. Taylor v. King, 102 Cal. App. 361, 282 P. 1017.

Further discussion is unnecessary.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

119 Cal.App. 535

McCLELLAN v. STATE.

Civ. 8014.

District Court of Appeal, First District,
Division 1, California.

Jan. 6, 1932.

Rehearing Denied Feb. 5, 1932. Hearing Denied by Supreme Court March 3, 1932.

1. Taxation ⚷543(6).

First count in complaint to recover moneys illegally collected as corporate franchise taxes for year 1915 *held* not to state cause of action.

Complaint alleged that the board of equalization determined actual cash value of respective franchises of various assignor corporations on specified date and levied taxes thereon in certain specified sums; that the assignor corporations paid taxes under protest and filed with state controller written protest which was attached as exhibit to complaint and made part thereof by reference; that the various and several choses in action had been duly assigned to plaintiff.

2. Pleading ⚷311.

Deficiency of pleading cannot be cured by reference to statements in exhibits.

3. Taxation ⚷543(7).

Burden is on plaintiff to establish that state illegally collected and retained taxes (Code Civ. Proc. § 1963, subd. 7).

4. Trial ⚷37.

Deputy Attorney General's waiver of proof of "formal matters" in action to recov-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

er taxes paid to state *held* not to include proof of matters showing illegality of tax.

[Ed. Note.—For other definitions of "Matter of Form," see Words and Phrases.]

5. **Attorney general** ⚷7.

In actions against state, Deputy Attorney General cannot bind state by oral stipulations (Code Civ. Proc. § 283, subd. 1).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Robert B. McClellan against the State. From judgment for defendant, plaintiff appeals.

Affirmed.

Robert B. McClellan, in pro. per., and A. A. Sanderson, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Deputy Atty. Gen., for the State.

ATTERIDGE, Justice pro tem.

Appellant, as the assignee of some 142 corporations, brought this action to recover a sum approximating $173,000 from the state of California. In his briefs he contends that this amount was illegally exacted and collected from his assignors as corporation franchise taxes in the year 1915. Judgment went against him in the court below, and we are constrained to affirm the same on appeal, for the reason that his contention is wholly unsupported either by pleading or proof.

Appellant states his contention as follows: "There is but one point at issue in this case, namely, whether the method adopted by the State Board of Equalization in fixing the said franchise tax for the year 1915, of the foreign corporations included in this action, to-wit, by using as a basis for computation the market value of all of the *authorized capital stock* thereof, was legal."

There is nothing either in the pleadings or in the evidence adduced on the trial which tends in the slightest degree to support the assumption of appellant that the state board of equalization adopted and exercised the method of computation he thus ascribes to that body.

[1] The complaint in its amended and supplemental finality attempts to set forth two alternative causes of action. Aside from certain purely formal allegations, the first cause of action merely sets forth: (1) That the board of equalization determined the actual cash value of the respective franchises of the various assignor corporations on a specified date and levied taxes thereon in certain specified sums; (2) that the assignor corporations paid said taxes under protest, and filed with the state controller a written protest, which said protest is attached to the complaint as an exhibit and made a part thereof by reference; (3) that the various and several choses in action were duly assigned to plaintiff.

[2] The utter failure of the recited group of facts to state a cause of action is too obvious to warrant comment, and this deficiency of the pleading is in nowise cured by its reference to the written protest pleaded as an exhibit. Not only does the written protest fail to specify the ground urged in appellant's above-quoted contention, but, even had it done so, it would nevertheless have been wholly insufficient in such form to tender the feigned issue raised by the briefs, which of necessity was a matter of substance. "Matters of substance *must* be alleged in direct terms, and not by way of recital or reference, much less by exhibits merely attached to the pleading. Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint." (Italics ours.) Los Angeles Humane Society v. Adler, 46 Cal. App. 35, at page 36, 188 P. 827.

The court, in declaring as above, said: "The principal point made upon this appeal is that the complaint failed to state a cause of action * * * and with this contention we agree"—for the above-stated reason.

[3] The second or alternative cause of action set forth in appellant's complaint is in the form of the common count for money had and received. Conceding, in accordance with appellant's contention, that under the authority of Welsbach Co. v. State of California, 206 Cal. 556, 558, 275 P. 436, that this is a sufficient pleading upon which to recover money illegally collected and retained by the state, the burden of establishing such illegality nevertheless remains and rests squarely upon the party seeking recovery.

"The fact that the money sued for was paid by the plaintiff to the defendant raises no presumption that it was so paid for the use of the plaintiff, but, on the contrary, the presumption is that it was due the defendant." 17 Cal. Jur. 635; Code Civ. Proc. § 1963, subd. 7.

Consequently, in order to warrant a recovery in the present case, it was essential for appellant to establish by competent proof that the state board of equalization did in fact adopt and exercise an illegal method of computation in its assessment of the corporation franchise taxes involved herein. As previously stated, we find the record wholly destitute of any evidence upon this essential requirement.

We will not and ought not presume that the state board of equalization adopted an illegal method of taxation, in the absence of allegations and proofs to that effect.

[4, 5] In avoidance of the deficiency of evidence that exists in the present case upon its asserted and, in any event, most vital issue, appellant refers us to certain alleged understandings claimed to have been had prior to the trial with counsel representing the state. Even if it be conceded that the state's counsel had the power to bind the state in an action of this character through stipulations having the effect of dispensing with proofs which otherwise would be of vital necessity (a proposition which we gravely doubt, but find unnecessary to herein determine), the alleged agreement with the Deputy Attorney General relied upon by appellant did not have the effect he ascribes to it of waiving the production of essential proof. The only portion of the claimed understanding which is in writing merely states that: "While the answer is in the form of a general denial which is now authorized by the statute by this it is not to be intimated that we intend to put you to *proof upon formal matters such as the corporate capacity of your assignors.*" (Italics ours.) The method of computation actually used by the state board of equalization was, of course, not a "merely formal matter"; on the contrary, it was the very crux of plaintiff's action. With respect to the remaining portion of the alleged understanding, it suffices to state that it rests entirely upon the oral testimony of plaintiff ascribing certain verbal statements to defendant's attorney, clearly in such form in excess of the latter's authority, which, as expressly limited by subdivision 1 of section 283 of the Code of Civil Procedure, was solely "to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, *and not otherwise.*" (Italics ours.)

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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119 Cal.App. 475

FORD & McNAMARA, Inc., et al. v. WILSON et al.

Civ. 4468.

District Court of Appeal, Third District, California.

Dec. 31, 1931.

Rehearing Denied Jan. 30, 1932.

1. Joint adventures 🔑1.

In suit to recover undisclosed profits from sale of realty record *held* to establish existence of joint adventure between parties.

2. Joint adventures 🔑4(1).

Members of joint adventure sustain a fiduciary relationship toward each other and may not retain secret profits from associates.

3. Joint adventures 🔑4(1, 2).

Absent contrary agreement, members of joint adventure participate equally in profits and losses of enterprise.

4. Joint adventures 🔑4(1).

The relationship of joint adventurers may be terminated by mutual consent.

5. Joint adventures 🔑4(1).

Letter to member of syndicate by others authorizing him to sell property and retain profits after paying certain sum to each member *held* not to terminate agreement creating joint adventure.

6. Appeal and error 🔑931(1).

In action to recover profits from sale of realty by joint adventurer, reviewing court would assume on conflicting evidence in support of judgment for defendant that defendant was not guilty of violation of trust with respect to other joint adventurers.

7. Joint adventures 🔑5(2).

In action for undisclosed profits from sale of realty by joint adventurers, court's finding defendant not guilty of breach of trust or misrepresentation regarding sale of property *held* not supported by evidence.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Suit by Ford & McNamara, Incorporated, and others, against Fred S. Wilson and another. From a judgment for defendants, plaintiffs appeal.

Reversed and remanded.

Brown & Bissell, of Los Angeles, for appellants.

Fogel & Beman, of Los Angeles, and Arthur A. Weber, of Santa Monica, for respondents.

R. L. THOMPSON, J.

This is a suit to recover undisclosed profits derived from the sale of real property, which proceeds were retained by the defendants as members of a joint adventure.

Mary Flynn Smurda was the owner of Cedar Hedge Apartments, consisting of lots M, N, O, and P, block 25, of the city of Santa Monica, in Los Angeles county, together with the apartment house and furnishings thereof. By agreement on the part of plaintiffs, the defendant Fred S. Wilson took an option in his own name to purchase the property for the sum of $175,000. This option was dated December 3, 1925, and expired February 28, 1926. The several real estate firms, who are party plaintiffs in this action, formed the syndicate for the purpose of reselling the property. This syndicate consisted of six units, which composed a joint adventure with an agreement to participate equally in the profits of the enterprise. One of these units was represented by the real estate firm of Ford & McNamara, of which the defendant McNamara was an officer and active member. On February 16, 1926, the property was still unsold. The morning of this last-mentioned date, Mr. Bergman, who was a salesman in the real estate firm of George E. Reed, Inc., of Beverly Hills, called at the office of the defendant McNamara and made an offer, in behalf of an undisclosed customer of the firm, to purchase the Smurda Apartments for the sum of $175,000. The offer was rejected. McNamara, however, recognized the bid as an indication of a real prospect for the sale of the property. He immediately prepared and procured each of the members of the joint adventure to sign a written authorization for him to sell the property upon terms which would pay each unit of the syndicate the sum of $1,000, as their share of the profit therefrom. This agreement further provided that McNamara should retain the balance of the profit from the sale in compensation for his personal services. The document was couched in the following language:

"Santa Monica, Cal. Feb. 16, 1926.

"T. J. McNamara, Inc.,
"1347 Fourth street,
"Santa Monica, Calif.

"Gentlemen:

"We, the undersigned, being interested in a certain option given to Fred Wilson, on property known as Cedar Hedge, at corner of Ocean avenue and Idaho, do hereby agree as follows:

"In view of the fact the syndicating of said property looks doubtful, and the time of expiration of option drawing close, and in further view of the fact that you have a prospect for the sale of said property. And in consideration of the fact that in turning property in said proposed syndicate you did so without commission. We agree to and hereby consent to your selling the said property for an amount which will be sufficient to pay each of us the amount we paid into option fund, plus $1,000 per unit.

"It being understood and agreed that should you be successful in getting for said property a sum greater than that required to pay said amounts, then you are to retain as yours for services said excess, provided said deal is consummated on or before Tuesday, February 23rd, 1926.

"[Signed]	Fred S. Wilson	One unit
	"Bulling Bros.	One unit
	"Robert H. Mottet	½ unit
	"W. H. Fitchmiller	½ unit
	"Fred McNamara, Inc.	1 unit
	"H. D. Burton	
	"By L. M. Lord	1 unit
		"1 unit."

On the afternoon of this same day, McNamara gave the firm of George E. Reed, Inc., an exclusive listing and authorization to sell the property for the sum of $195,000. On the 17th of February, McNamara signed an agreement to sell the property to George E. Reed, Inc., for $195,000, acknowledging the receipt of $5,000, as part payment therefor. It must be presumed McNamara then knew the property would be sold for a profit of $20,000. Yet none of the vital facts or prospects of this sale were disclosed to the members of the joint adventure. The signature of at least one of these parties was procured after the exclusive listing was given to Reed. Neither the name of the proposed purchaser nor the selling price was furnished to McNamara's own partner, nor to any other member of the syndicate. They were evidently deceived regarding the prospects of this sale. Except for the fact that they understood McNamara would participate in the usual broker's commission with the firm through which he was dealing, it seems apparent they expected to share equally with him in the balance of the profits of sale. Mr. Ford testified in this regard: "I did ask him who he was selling to, and his answer to me was he was selling through a broker; and I said, 'Mac, you know I have an interest in this, we are in it on the same basis, share and share alike, and whatever is in this that is good for you is good for me.'"

With full knowledge of the terms and conditions of this sale, McNamara, on February 20th, addressed a communication to the members of the joint adventure, through his associate, Wilson, asking them for a further concession allowing the deduction of an additional $1,000, to renew the option for the purchase of the property and the further sum of $450, as costs of the escrow and expense of sale. This communication contained the following paragraph:

"The sale price of the property to my client or purchaser is of an amount sufficient to comply with your letter of the 16th inst., providing the members of the syndicate will deduct therefrom the One Thousand Dollars ($1000) necessary to pay for the extension of the option, and pay for the alley assessment and escrow fees or charges referred to."

Without knowledge of the fact that the property was being sold for $195,000, and construing the last-mentioned document to mean the profit from the sale was insufficient to pay the members of the syndicate the promised sum of $1,000 apiece unless they made the requested concession therein mentioned, they signed this instrument, ignorant of the fact that the profit of the sale then left approximately the sum of $16,513.95 to be divided between McNamara and Wilson.

The members of the real estate syndicate brought this suit for their share of the undisclosed profit of the sale. The action is based upon an alleged violation of the trust imposed upon the defendants as members of the joint adventure and upon fraud in procuring the signatures of the plaintiff to the two documents above quoted. Upon trial of the cause, the court adopted findings to the effect that the defendants were not guilty of false representations or omission to disclose material facts with relation to the transaction in procuring the agreements for distribution of the proceeds of the sale of the real property. A judgment was accordingly rendered in favor of the defendants. From this judgment the plaintiffs have appealed.

The appellants contend the findings of an absence of fraud are not supported by the evidence.

[1] The record in the present case conclusively establishes the fact that the respective parties to this action entered into a contract with each other constituting a joint adventure for the purpose of selling the Smurda property and participating in the profits of the sale thereof.

[2-5] The members of a joint adventure sustain a fiduciary relationship toward each other. Each is bound to the highest degree of good faith in his conduct and participation in the enterprise, and may not retain secret profits the receipt of which are undisclosed to his associates. 14 Cal. Jur. 763, §§ 4 and 5; Munson v. Fishburn, 183 Cal. 206, 190 P. 808; Menefee v. Oxnam, 42 Cal. App. 81, 183 P. 379. The rights and liabilities of joint adventurers, as between themselves, are governed by the same principles which apply to a partnership. Menefee v. Oxnam, supra; Irer v. Gawn, 99 Cal. App. 17, 277 P. 1053. In the absence of an agreement to the contrary, the members of a joint adventure will participate equally in profits and losses of the enterprise. 14 Cal. Jur. 761, § 2; Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; Irer v. Gawn, supra.

It is true the relationship of joint adventurers may be terminated by mutual consent. 33 C. J. 848, § 21; Irer v. Gawn, supra. There is, however, no evidence in the present case that the parties to the joint adventure intended, by their execution of the document dated February 16, 1926, above quoted, to terminate their former agreement with respect to the enterprise of selling the Smurda property. This document clearly indicates that they intended to authorize McNamara, as their agent, to sell the property and retain the profits thereof after paying to each unit of the syndicate the sum of $1,000. This document is a mere agreement with respect to the distribution of the profits of the sale. It does not purport to otherwise change or terminate the former agreement creating the joint adventure.

[6] The record seems to indicate that McNamara failed to disclose to his associates and partner all of the essential facts within his knowledge respecting his prospect for a sale of the property, when he secured their signatures to this document. At least, he used great haste to procure the signatures to this document after the offer to purchase the property was submitted to him by the representatives of George E. Reed, Inc. It may be doubted whether he used the utmost good faith toward them in this transaction. Since there is a conflict of evidence regarding McNamara's knowledge or expectation at the time of the signing of the document, of receiving some $20,000, profit on the sale of the real property, we may assume, in support of the findings of the court, that he was not guilty of a violation of his trust with relation thereto, and that the plaintiffs were bound by their agreement to accept $1,000 per unit as full compensation for their share of the profit of the sale.

[7] The same doubt may not be resolved in favor of the defendants with respect to the procuring of the signatures of their associates to the document of February 20th, by the terms of which they made a further concession authorizing the withholding of some $1,450, from their agreed shares of the profits of sale. On February 17th, McNamara gave George E. Reed, Inc., a written agreement to sell the property for $195,000, and receipted for the sum of $5,000 as part payment thereof. He then knew or anticipated he would receive a profit of approximately $20,000, on the sale of the property. He informed his associates nothing of these facts. Even if he was not then assured of a sale at $195,000, in the exercise of good faith, they were entitled to know the terms of his contract and the fact that he expected to secure a sale at that price. Upon the contrary, they were deceived by the very terms of the document when he said: "The sale price of the property * * * is of an amount sufficient to comply with your letter of the 16th inst. (agreeing to accept $1,000 per unit in full compensation for their share of the profit of sale) providing the members of the syndicate will deduct therefrom the One Thousand Dollars ($1,000) necessary to pay for the extension of the option, and pay for the alley assessment and the escrow fees." The construction of this paragraph clearly infers that unless the plaintiffs made the concessions mentioned, the profit of the sale would be insufficient to pay their agreed proportion of $1,000 per unit. This was not true. This last-mentioned document was therefore procured to be signed by the plaintiffs under false representations. The defendants were not only guilty of omitting to inform their associates of the essential facts of the transaction, but the last-mentioned document contains an affirmative misrepresentation of

facts which must have been an inducement for them to sign the document. For this reason the last-mentioned document is invalid. It follows that the findings of the court to the effect that the defendants were not guilty of a breach of their trust in failing to disclose the essential facts regarding the transaction, to their associates, and that they were not guilty of misrepresentations regarding the sale of real property, are not supported by the evidence.

The judgment is reversed, and the cause remanded for a new trial.

We concur: PRESTON, P. J.; PLUMMER, J.

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119 Cal.App. 568

FULLER v. MANN et al.

Civ. 4480.

District Court of Appeal, Third District, California.

Jan. 9, 1932.

1. Evidence 🔑397(1).

Evidence to show oral changes made in written agreement *held* properly admitted, where oral contract was fully executed.

2. Brokers 🔑37.

In action for accounting, evidence showed landowner waived stipulated period within which first units of land were to be sold by defendant.

3. Brokers 🔑29.

Performance under contract under which defendant was to sell land could be waived by landowner, where contract limited time.

4. Contracts 🔑238(2).

Fully executed oral modification of written agreement under which defendant was to sell land for plaintiff *held* binding.

5. Contracts 🔑237(2).

Executed oral modification of written contract under which defendant was to sell land for plaintiff *held* supported by good consideration.

6. Brokers 🔑37.

Evidence showed landowner estopped to question time of performance and division of land units under contract under which defendant was to sell land.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for an accounting and to establish trust in certain property brought by Charlotte Estelle Fuller, etc., against Charles S. Mann and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Rush & Beirne, of Los Angeles, for appellant.

Joe Crail, Harold C. Morton, Fredericks, Hanna & Morton, and E. A. Penprase, all of Los Angeles, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

An action in equity to compel an accounting and to establish a trust in certain property.

The case was tried before the court without a jury, and judgment went in favor of the plaintiff and against defendant Charles S. Mann for $351.05 and against Citizens' Trust & Savings Bank for $243.51. From this judgment, the plaintiff Charlotte Estelle Fuller prosecutes this appeal.

The material facts are not in dispute, and are briefly these: In the year 1919, Mrs. Fuller, the plaintiff and appellant herein, owned 315 acres of land in Los Flores canyon in Los Angeles county. This property was mortgaged for $6,000, which was due and unpaid. There were also delinquent taxes against the property.

Appellant was very anxious to sell the property in order to save her equity therein. She had considerable negotiations with respondent Charles S. Mann relative to employing him as her agent to negotiate a sale of said property. Finally, on July 7, 1919, a written agreement was entered into between appellant and respondent, Charles S. Mann, reciting the ownership of the land by appellant, and that respondent had prepared a plan for developing and disposing of the property (a copy of which plan was attached to and made a part of the agreement), and further reciting that appellant desired to have the assistance of respondent in developing and disposing of the property, and utilizing the plan proposed by said respondent.

The contract gave to respondent the exclusive right to carry out the purposes of the plan, and, among other provisions, the contract provided as follows: "To sell, or agree to sell, on or before ninety days from date hereof, twenty-five one-one hundredth (1/100) interests in said property at a price of four hundred ($400.00) dollars for each one-one hundredth (1/100) interest agreed to be purchased; out of which sum shall be paid first, the amount of said mortgage, together with all accrued interest, taxes, etc., and, second, such commissions and expenses as may have been created by Chas. S. Mann in selling and disposing of said interests."

The agreement then provides that, after the completion of the sale of the twenty-five units above set forth, respondent should have the right to dispose of 25 additional units at the price of $500 each unit, of such amount one-half was to be paid to the appellant as received, and the other one-half was to be paid to the respondent, out of which he was to pay all expenses of the sale in connection therewith; the respondent to have one year in which to dispose of the additional 25 units. It was then provided that, upon the completion of the second 25 units, and "within the time specified," the remaining 50 units should be divided equally between appellant and respondent. The agreement also provides that the title to the property should be held in the name of a trust company, which would issue certificates of ownership and hold title to the property.

While the agreement provides that the defendant "should sell or agree to sell" the first 25 units on or before 90 days from the date of the agreement, it appears without conflict that the conveyance was not made to a trustee and a trust was not created until more than 90 days after the date of the agreement.

It further appears that, during the 90 days immediately following the execution of the agreement, the respondent attempted to interest various persons in the project, planned a road to the property so that it would be accessible, and investigated the feasibility of the plan in various ways, etc.

After the 90 days had expired, respondent advised appellant that he believed the plan would be a success, and it was after that time the property was deeded to the trustee and the trust created. It also appears that respondent arranged for a loan of $6,000 from the trustee to pay off the mortgage existing on the property, and also deposited collateral of his own, in addition to the trust estate, as security for said loan.

During the interval from the date of the contract, July 7, 1919, to the creation of the trust, respondent paid interest on the mortgage and advanced other sums for and on account of the development of the property.

After the trust was created, respondent proceeded to have the property improved and to sell the units; the sale of the first 25 units being made over a period of about three years. During this period of time, respondent advanced money for the protection and upkeep of the property, all with the consent and approval of appellant. Among other things done by respondent, he employed a man referred to him by appellant to stay upon and look after the property during the time the units were being sold; also that some of the units were sold for more than $400, and some for less, but all sales were made with the consent and approval of appellant.

Appellant admitted that she did not know how soon he was going to sell the first 25 units, and that she knew he could not commence to sell the units until the trust was created by the bank. She further testified that she left it to respondent to sell the units, and expected him to use his best judgment in connection with the matter, and that she made no objection after the time within which respondent was taking to sell the units, and that she was satisfied, at the time, at the way in which sales were being made. After the first 25 units were sold, respondent then entered upon the sale of the second units, which, instead of being sold for $500 each, as provided in the contract, were sold for more, some being sold for $750 per unit.

The negotiations of the sale of the second units were entirely agreeable and satisfactory to appellant, and she left it to respondent to fix prices. After five of the second 25 units had been sold, respondent and appellant then agreed orally to a division of the remaining units, each to take one-half of them, the appellant to sell three of her units to a purchaser then available, so she could get ready money. Each of the parties received 35 units on this division, and then both believed at this time that the units were worth $750 each. At the time of the trial, appellant testified that the units had enhanced in value, and the prices of her units were $2,500 each.

The appellant knew that respondent would sell his units at a price higher than $500, and seemed entirely satisfied with the division and the entire transaction.

About two years after the division, this action was brought without previous notice or demand.

The complaint makes certain specific charges against the respondent, which we will briefly summarize as follows: That respondent, without consideration and without the knowledge or consent of appellant, caused 35 of the units to be issued to him; that respondent did not sell the first 25 units within the time and the price agreed upon, and in violation of the terms of the agreement, etc.; that respondent had diverted sums of money which belonged to appellant to his own personal use; that respondent had entered into sales or contracts for the sale of the units under fictitious names; that appellant had demanded an accounting which had been refused; that respondent had received from the sale of the units sums of money for which no account had been made; that respondent had refused appellant an inspection of the books.

All of these allegations were denied by respondent in his answer.

As above stated, appellant's own testimony shows that the division of the units was made with her full consent, knowledge, and approval, and because it was deemed advantageous to her.

There was no proof that appellant was wrongfully charged with the expense of sales or that funds were diverted by respondent for his own use or that demand was made for an accounting. Neither was there any proof of fictitious sales or refusal on the part of respondent to permit his records to be examined.

In fact, none of the charges in the complaint was sustained, except the allegation that the first 25 units were not sold within 90 days after July 7, 1919.

At the conclusion of the trial, the court found in favor of the respondent in the main, and entered judgment and findings accordingly.

[1-3] Appellant contends that the trial court erred in denying her motion to strike out certain portions of the testimony of the respondent, which were in conflict with the terms of the original agreement. This testimony related to the waiver of the 90-day period within which the first 25 units were to be sold, and also to the oral agreement between the parties to divide the 70 units.

We think the evidence clearly shows that appellant waived the 90-day period within which the first 25 units were to be sold.

The law is well settled that performance under such contract could be waived by appellant, who was the party entitled to performance. Boone v. Templeman, 158 Cal. 292–294, 110 P. 947, 139 Am. St. Rep. 126; Estes v. Hotchkiss, 63 Cal. App. 284, 218 P. 605; Umphray v. Hufschmidt, 73 Cal. App. 140–144, 238 P. 749; Moore v. Borgfeldt, 96 Cal. App. 306–312, 273 P. 1114; Redd v. Garford Motor Truck Co., Inc., 205 Cal. 245–249, 270 P. 447; Fickbohm v. Knaust, 103 Cal. App. 443–447, 284 P. 692.

[4] The oral agreement between the parties that they would divide 70 units instead of 50 was fully executed and binding upon the parties.

The written agreement of July 7, 1919, provided that, after 50 units had been sold, the remaining 50 would be divided equally between the parties. Instead of doing this, they agreed orally to divide 70 units after 30 had been sold. The division was actually made according to their oral agreement, and no complaint or objection was raised by appellant until about 2 years after the division. Such oral modification of a written instrument is binding. Civ. Code, § 1698; Anderson v. Adler, 42 Cal. App. 776–779, 184 P. 42, 43; Oatman v. Eddy, 4 Cal. App. 58, 87 P 210; Miles v. Zadow, 87 Cal. App. 406, 262 P. 396.

In Anderson v. Adler, supra, the court said:

"'A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.' Civ. Code, § 1698. An 'executed agreement' is one the terms of which have been fully performed. Henehan v. Hart, 127 Cal. 656, 657, 60 P. 426.

"When therefore the trial court, on sufficient evidence, found the existence of an executed oral contract modifying the terms of the original lease as to the rent, and further found that it had been fully performed, it finally settled the issues of this case."

[5, 6] There is no question but that a good consideration existed for the executed oral modification of the written contract. The respondent had the right to sell the remaining units at the price of $500 and receive one-half of the selling price; the units at the time of the division being worth more than that sum. Appellant desired to have the division made in order that she might sell three units to a customer then available and receive the entire purchase price therefor.

We think the evidence above set forth also clearly shows that appellant was estopped to question the time of performance as to the sale of the units, and also estopped to question the division of remaining units after such division was made. Giberson v. Fink, 28 Cal. App. 25, 151 P. 371.

We are therefore of the opinion that it was entirely proper to admit evidence to show oral changes which the parties made in the written agreement as to the time of performance and a division of the units, and the motion to strike out was properly denied.

Appellant also contends that the findings are inconsistent and irreconcilable. We have examined all the findings with care, and find no substantial merit in this contention.

The court determined that the transaction was in all respects fair and equitable, and we find no valid reason to disturb the conclusions and judgment of the learned trial court.

The authorities relied upon by appellant have no application under the facts of this case.

We think the evidence fully supports the material findings, and that the judgment should be affirmed, and it is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

EAST BAY MUNICIPAL UTILITY DIST. v. CITY OF LODI et al.*

Civ. 4313.

District Court of Appeal, Third District, California.

Jan. 12, 1932.

Rehearing Granted Feb. 15, 1932.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

On rehearing.

For former opinion, see 6 P.(2d) 325.

Robert M. Searls, of San Francisco, Glenn West, of Lodi, and Edward R. Solinsky, Frank J. Solinsky, Corbet & Selby, and Humphrey, Searls, Doyle & MacMillan, all of San Francisco, for appellants.

Harold Raines and T. P. Wittschen, both of Oakland, John Hancock, of Stockton, Joseph R. Huberty, of Woodland, and Charles P. Snyder, of San Andreas, for respondent.

PER CURIAM.

Appellant's petition for a rehearing is hereby granted, for the purpose of re-examining the question of damages and also the sufficiency of finding No. 32 to sustain a judgment therefor.

It is further ordered that the cause be, and the same is hereby, resubmitted upon the briefs on file, with privilege to counsel for the respective parties to file additional points and authorities touching these questions, within twenty days from the date hereof.

It is further ordered that the clerk of this court furnish counsel for the respective parties with a copy hereof.

119 Cal.App. 596

ERICKSON v. GRADY et al.

Civ. 4403.

District Court of Appeal, Third District, California.

Jan. 12, 1932.

1. New trial 🔑70.

Granting or refusing new trial for insufficiency of evidence to justify verdict rests largely in trial court's discretion.

2. Appeal and error 🔑933(1).

Every presumption is indulged in support of trial court's ruling on motion for new trial.

3. New trial 🔑70.

Trial court's discretion in granting new trial for insufficiency of evidence will not be deemed abused, unless decision in favor of movant would be without substantial legal support in evidence.

4. Automobiles 🔑160(3).

Motorist making right turn at intersection without giving any warning to pedestrians on crosswalk is negligent.

5. Automobiles 🔑245(72).

Pedestrian is not contributorily negligent as matter of law because of failure to look behind him and discover approaching automobile.

6. Automobiles 🔑168(6).

Motorist making right turn at intersection must have machine under control to avoid injuring pedestrians on crosswalk.

7. Appeal and error 🔑878(6).

Appellate court could not consider whether evidence justified verdict as against defendant not appealing from order granting new trial, as to which defendant order had become final.

8. New trial 🔑70.

Evidence of motorist's negligence in making turn at intersection and that pedestrian was not contributorily negligent authorized granting new trial for insufficiency of evidence to support verdict for motorist.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Burt Erickson against H. H. Grady and others. From an order granting plaintiff's motion for a new trial after verdict for defendants, named defendant alone appeals.

Affirmed.

Irving D. Gibson and Gerald M. Desmond, both of Sacramento, for appellants.

Fred J. Harris and R. L. Shinn, both of Sacramento, for respondent.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

Action for damages for personal injuries alleged to have been sustained by plaintiff through the negligent operation of an automobile by defendant H. H. Grady.

The case was tried before a jury and resulted in a verdict and judgment in favor of the defendants. A motion for a new trial was made by plaintiff, based upon the following statutory grounds: "1. Insufficiency of the evidence to justify the verdict; 2. That said

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing granted 8 P.(2d) 532.

verdict is against law; 3. Errors in law occurring at the trial and excepted to by plaintiff."

The court granted the motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict. From this order, the defendant H. H. Grady alone prosecutes this appeal.

[1, 2] It is clear under all the decisions that the granting or refusing of a new trial, where the ground of the motion is insufficiency of the evidence to justify the verdict, rests very largely in the discretion of the trial court, and every presumption is indulged in support of the action of the court in passing upon the motion.

[3] The court's discretion in granting a new trial upon the ground of the insufficiency of the evidence will not be deemed to have been abused, unless a decision in favor of the moving party would have no substantial legal support in the evidence. Therefore, these two questions are here presented: (1) Is there any substantial evidence in the record showing that defendant Grady was negligent? If this question be answered in the affirmative, then: (2) Was such negligence the proximate cause of plaintiff's injuries? We think both questions must be answered in the affirmative.

The accident, out of which this action arose, occurred in the city of Sacramento on February 13, 1930, about 9:30 p. m.

[4] There is substantial evidence in the record to establish these facts: The defendant Grady was driving his automobile north on Sixth street. Upon reaching the intersection of Sixth street and J street, he made a right turn easterly into J street for the purpose of traveling east on J street towards his home, and while making said turn, or just after he made the turn into J street, the right fender of his automobile struck and severely injured plaintiff, who, at the time, in company with a friend named Lee, was walking northerly across J street on the east lane of the intersection of Sixth and J streets; or, in other words, Grady turned his automobile into the pedestrian lane on J street from Sixth street to the rear of plaintiff, who was crossing J street with his back to the automobile, and had reached a point near the south car track (which runs east and west on J street, which would place him a little south of the center of J street), when struck by the Grady machine. Grady gave no signal or warning of any kind or character of his intention to make the right turn into J street. Neither plaintiff nor his companion Lee saw or heard the automobile before the accident.

We think these facts clearly show negligence on the part of defendant Grady in failing to give any audible warning of his intention to make a right-hand turn.

In the recent case of Cleveland v. Petrusich, 3 P.(2d) 384, 387, where the facts are very similar to those in the case at bar, we said: "We think that the rule of reason requires that, when a motorist, at 10 o'clock at night changes the course of his automobile and attempts to pass over a crosswalk occupied by pedestrians, the siren of the car should be sounded or some audible signal given of the fact that the course of travel is about to be changed. Section 95 of the California Vehicle Act (St. 1929, p. 531, § 37) requires all automobiles to be equipped with a siren capable of giving a signal that can be heard for a distance of at least 200 feet. In this particular we think what this court said in the case of Devecchio v. Ricketts, 66 Cal. App. 334, 226 P. 11, 13, applicable: 'A person lawfully on a public highway may rely upon the exercise of reasonable care by drivers of vehicles to avoid injury. Failure to anticipate omission of such care does not render him negligent. A pedestrian is not bound, as a matter of law, to be continuously looking or listening to ascertain if automobiles or other vehicles are approaching, under penalty that if he fails to do so and is injured, his own negligence will defeat recovery of damages sustained.' And further, as said in that case: 'The rule of reasonable precaution which the law enjoins upon a driver of an automobile upon a public highway includes the necessity of making certain that foot passengers are aware of the rearward approach of the vehicle; that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach; and, finally, that the vehicle is under such control as that it may be stopped promptly.' We think the same rule as to giving some audible notice by the sounding of the siren applies here, just as the rule was stated by the Supreme Court, speaking through Mr. Justice Preston, in the case of Berguin v. Pacific Electric Ry. Co., 203 Cal. 116, 263 P. 220, 224, when dealing with the failure of a motorman to give audible warning of the approach of a street car when following an automobile, to wit: 'This being true, his duty to look ahead, and not behind, would have demanded of the motorman the ringing of the bell, or the use of some other method of attracting attention of said plaintiff, before coming into collision with him.'"

[5] Appellant also contends that plaintiff was guilty of contributory negligence as a matter of law. We are unable to agree with this contention. A pedestrian is not guilty of contributory negligence, as a matter of law, because of a failure to look behind him and discover an approaching car which may heedlessly run him down. Devecchio v. Ricketts, 66 Cal. App. 334, 226 P. 11; Raymond v. Hill, 168 Cal. 473, 143 P. 743; Fahey v. Madden, 58 Cal. App. 537, 209 P. 41; Stras-

burger v. Prescott (Cal. App.) 295 P. 357; Burk v. Extrafine Bread Bakery et al., 208 Cal. 105, 280 P. 522.

Assuming that plaintiff had looked back, and that he had seen the automobile coming from his rear along Sixth street, he could not have determined whether the driver intended to continue across the intersection or turn to the right or the left.

[6] Defendant Grady had no right to assume that pedestrians lawfully in the intersection would or should stop to learn what he intended to do. The law demanded of him, under such circumstances, to give some audible warning signal showing what he intended to do. This he did not do. The law also demanded of him that he have his machine under control so as to avoid injuring pedestrians lawfully using the street.

The evidence as to the speed of the Grady car is conflicting.

[7] It is not contended that there is no evidence in the record to support a verdict against American Investment Company. We have no authority to consider this question, because the American Investment Company, a corporation, has not appealed from the order granting a new trial, and as to it the order has long since become final.

The only notice of appeal appearing in the transcript reads as follows:

"(Title of Court)

"Burt Erickson, Plaintiff, vs. H. H. Grady, Bank of America of California, et al., Defendants.

"No. 44640 Dept. 3

"Notice of appeal from order granting new trial.

"Notice is hereby given that defendants H. H. Grady and Bank of America of California in the above-entitled action hereby appeal to the District Court of Appeal of the state of California in and for the Third Appellate District, from that certain order granting a new trial of the above-entitled action to plaintiff therein, made, rendered and entered in said action by the above-entitled superior court on the 21st day of January, 1931, and from the whole of said order.

"Dated: This 14th day of March, 1931.
"Irving D. Gibson
"Gerald M. Desmond
"Attorneys for defendants H. H. Grady and Bank of America of California."

A motion for a nonsuit was made by defendants as to Bank of America and the same was granted by the court, and plaintiff never appealed from that order; so as to it, the order granting a nonsuit is final.

[8] We are not to be understood as holding that, upon a new trial of this case, the plaintiff should or should not prevail; that is a matter entirely within the province of the trial court; but we are fully satisfied, after a careful examination of the entire record, and do hold, that there is sufficient evidence in the record to show that Grady was negligent and that such negligence was the proximate cause of the injury complained of, and that plaintiff was not guilty of contributory negligence, and therefore the learned trial court did not abuse its discretion in granting plaintiff a new trial upon the question of the insufficiency of the evidence to support the verdict.

Appellant's motion for a diminution of record is denied for the reason that the record sought to be corrected is wholly immaterial under our view of the case.

The order granting a new trial is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

HENDRICKS v. HENDRICKS.*

Civ. 8150.

District Court of Appeal, First District, Division 2, California.

Jan. 12, 1932.

Rehearing Denied Feb. 11, 1932. Hearing Granted by Supreme Court March 10, 1932.

1. **Divorce** ⟹167.

Equity will not interfere with collusive divorce decree, absent showing of coercion, imposition, or fraud upon complaining party.

2. **Divorce** ⟹167.

Fraud or coercion authorizing equity's interference with collusive divorce decree must be extrinsic to subject of dispute in divorce suit.

> If the evidence of coercion or duress or fraud could have been presented to the court or to an attorney of the complainant's own choosing during the pendency of the proceedings, so that full examination of the facts could be made and full protection given to the rights of the parties, equity will not interfere, but will leave the litigants where they have placed themselves.

3. **Divorce** ⟹167.

Wife could not annul collusive divorce decree for coercion because of threats and charges upon which wife could have had thorough hearing in divorce action.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*For subsequent opinion see 14 P.2d 83.

4. Divorce 🔑167.

Husband's threat to secretly take away child required vacation of collusive divorce decree obtained thereby, since threat was extrinsic to determination of divorce action.

While the court had the right to determine the custody of the child, the threat to secretly take the child from its mother presupposed an intention to take the child without the approval of its mother or the court, so that the threat was a matter extrinsic to the determination of the divorce action brought upon the ground of desertion, and was promised to be consummated before the trial unless wife agreed to husband's demands.

5. Appeal and error 🔑917(1).

In determining appeal from judgment sustaining demurrer to complaint, facts alleged in complaint are assumed to be true.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Ida May Hendricks against Clifford Hendricks. From the judgment, plaintiff appeals.

Reversed and remanded, with directions.

Lorrin Andrews, of Los Angeles, for appellant.

Macfarlane, Schaefer, Haun & Mulford and Henry Schaefer, Jr., all of Los Angeles, for respondent.

WARD, Justice pro tem.

Plaintiff instituted this action to set aside and annul an interlocutory decree of divorce alleged to have been obtained by threats, coercion, and duress of the defendant. A general demurrer was sustained without leave to amend, and thereupon judgment was entered by a dismissal of the action, from which judgment plaintiff appeals.

According to the allegation of the complaint, which must be deemed true on this appeal, defendant, in March, 1925, brought suit for divorce in the state of New York against this plaintiff, charging adultery. In July of the same year, plaintiff in California instituted an action against defendant for maintenance. In the following October defendant visited plaintiff in California and offered to dismiss his action in New York if plaintiff would dismiss the maintenance suit in California and bring an action in divorce against defendant upon a charge of desertion. At this interview and at various times during several years thereafter, defendant stated that he had sworn confessions of certain named parties that each of them had committed adultery with plaintiff; that he would disgrace and degrade plaintiff and secretly take her child from her unless she agreed to defendant's demands. In 1925 plaintiff "partially consented," but neglected to bring the action in divorce for desertion until July, 1927. The whole proceedings remained dormant until November, 1928, at which time an answer was filed, also a stipulation signed by the respective attorneys that the divorce action should be tried as a default. The complaint also alleges that between December, 1928, and April, 1929, plaintiff ascertained that the statements and threats of defendant were made for the purpose of intimidating and compelling plaintiff to bring the suit in divorce against her will and for the purpose of freeing defendant from his marital obligations to plaintiff and their child.

[1-3] It is the rule in this state that equity will not interfere with judgments obtained through the collusive connivance of the parties to the proceeding. Bancroft v. Bancroft, 178 Cal. 359, at page 364, 173 P. 579. "To warrant such action there must be a showing of coercion, imposition, or fraud upon the party complaining." Lanktree v. Lanktree, 42 Cal. App. 648, at page 651, 183 P. 954, 955. The fraud or the means of coercion must be extrinsic or collateral to the subject of dispute in the action wherein the order or judgment complained of was made. If a judgment or order is the creature of extrinsic fraud it may be vacated. Where, however, evidence of the coercion or duress or the fraud could have been presented to the court or to an attorney of the complainant's own choosing during the pendency of the proceeding so that full examination of the facts could be made and full protection given to the rights of the parties, then equity will not interfere, but will leave the litigants to the fraudulent transactions where they have placed themselves. Mitchell v. Cline, 84 Cal. 409, 416, 24 P. 164. The threats to blacken the plaintiff's reputation and the charges of adultery were matters over which plaintiff herein could have had a thorough hearing during the pendency of the divorce case. There is nothing in the record to indicate that the attorney representing plaintiff in the divorce case was in fact the attorney for the defendant or that he was inimical in any respect to the best interest of the plaintiff. To this extent the allegations are not sufficient to warrant equitable cognizance. Lanktree v. Lanktree, supra.

[4] There is another allegation in the complaint that deserves more serious consideration. Plaintiff alleges that upon two previous occasions defendant had taken and kept the child away from plaintiff, which caused plaintiff suffering resulting in mental derangement; that defendant threatened to "secretly take their child from plaintiff" unless the maintenance action should be dropped and a divorce action in consonance with the views

of defendant should be instituted. If the threat was simply to take the child away by depriving plaintiff of her legal custody, the matter could be disposed of in a manner similar to the charges of adultery by bringing such threat to the attention of the court. The court had the right to determine the custody of the child, but the threat to secretly take the child from its mother presupposes an intention to take the child without the approval of the child's mother or the court. This is a fair and reasonable construction to place upon the allegation that defendant would secretly take away the child, and, if this construction is correct, defendant through coercion and duress forced this plaintiff to abandon a suit in maintenance, forced plaintiff to accept defendant's offer of financial settlement, and forced her to give defendant his freedom. "Extrinsic or collateral fraud operates not upon matters pertaining to the judgment itself, but relates to the manner in which it is procured." Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579. In Swallow v. Tungsten Products Co., 205 Cal. 207, 211, 270 P. 366, 367, the court said: "The species of fraud that furnishes the best example of extrinsic fraud is that kind which is practiced upon a defendant to keep him away from the trial, or to prevent him from claiming his rights in the premises, or from setting up an available defense." It may also be concluded that, when a plaintiff is prevented from claiming legal rights or from setting up an available cause of action, it is likewise extrinsic fraud. The question arises: Could not the plaintiff inform her attorney and receive ample protection from the court? The court could have given the custody of the child to plaintiff and caused contempt or criminal proceedings to be instituted if defendant should steal the child, but here we have a threat promised to be consummated before the trial unless plaintiff agreed to defendant's demands. The threat to prove adultery was a matter wherein plaintiff could attempt to disprove the charge during the trial. It would simply be a determination of the truth of the charge. If plaintiff believed that defendant would secretly take away the child before the trial and in pursuance of that belief agreed to defendant's demands, she was acting under duress. Pressure and constraint were used compelling her to act against her will, and destroyed her power of refusing to comply with defendant's demand that the maintenance action should be dismissed and that plaintiff should sue, not upon extreme cruelty, but upon desertion. In Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, 1022, in discussing the subject of marriage, the court said: "That relation is the basis of the family, the foundation of society. It cannot be destroyed by the mere consent, whim, or caprice of the parties to the marriage, nor can it be stipulated away in judicial proceedings. The relation can be dissolved only by consent of the state, and upon statutory grounds, presented in good faith to a court of competent jurisdiction. * * * It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together. * * *"

In United States v. Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93, the Supreme Court of the United States gives illustrations of collateral fraud. Therein the court said: "* * * Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent. * * *" In the case at bar, plaintiff appears as the successful litigant, but in reality she was not the successful party. The bringing of the action was not upon her request. The husband desired a divorce; the wife did not. The wife was unsuccessful in a maintenance suit, being forced to dismiss it by the threats of defendant. The wife sought a legal determination of the amount of support defendant should give her and the child. The husband was successful in the acceptance by the wife of an amount fixed by the husband. Defendant succeeded in securing to himself all that he desired. Plaintiff, though nominally successful, was in fact the defeated party, being prevented by fraud and duress from exhibiting fully her causes of action.

In Dennis v. Harris, 179 Iowa, 121, 153 N. W. 343, the wife was coerced into obtaining a decree of divorce by a threat to take her life. The court set aside the decree. The threat to secretly take away the child and that "plaintiff would never see said child again" was a matter extrinsic from the determination of the divorce action upon the ground of desertion. The court could determine the custody of the child as it could determine the question of alimony, but it could not deter the defendant from taking the child away so that the mother should never see the child again if the defendant concluded to disobey the order of the court and violate the law. Lanktree v. Lanktree, supra, relied upon by respondent, was a case in which the plaintiff "bartered her marital rights for a smaller sum than she might have exacted, if the other party to the collusive agreement had not misrepresented the amount of his property." In that case there was some claim of physical cruelty, but the court held that the plaintiff should have informed her attorney of that fact and received the protection of the court in her marital rights. In this case information to the court of the mental cruelty would have been of little avail. In the Lanktree Case the physical violence was a fact which the court could take into consideration in determining property rights. In the instant case, if the child had been taken away permanently, no award could compensate plaintiff.

[5] For the purposes of determining this appeal, the facts alleged in the complaint are assumed to be true, and, with these facts in mind, the judgment appealed from is reversed, the cause remanded, and the lower court directed to set aside the order sustaining the general demurrer and to enter an order overruling the same.

Judgment reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

119 Cal.App. 590

DELMUTO v. SUPERIOR COURT IN AND FOR SAN JOAQUIN COUNTY et al.

Civ. 4585.

District Court of Appeal, Third District, California.

Jan. 12, 1932.

Rehearing Denied Feb. 11, 1932. Hearing Denied by Supreme Court March 10, 1932.

1. Judgment ⚷340.

Order reopening and purporting to continue case and permitting further proceedings after only judgment called for by findings and conclusions has become final *held* beyond court's jurisdiction (Code Civ. Proc. §§ 663, 663a, 473).

2. Judgment ⚷217.

Judgment is real conclusion of law, and supersedes any conclusion embraced in decision.

3. Certiorari ⚷5(2).

Proceeding for certiorari to review proceedings after judgment of superior court should not be dismissed on ground petitioner has plain, speedy, adequate remedy by appeal.

> In a personal injury action, the only judgment called for by the findings and conclusions had become final, and then an order was entered reopening and purporting to continue the case, and permitting further proceedings. The application for certiorari was to review such action.

Application by Leo Delmuto, a minor by Chester E. Watson, his guardian ad litem, against the Superior Court in and for San Joaquin County and others, for certiorari to review and annul certain proceedings after judgment of the Superior Court of San Joaquin County, C. W. Miller, Judge, granting motion to amend conclusions of law, permitting the filing of a petition for appointment of a guardian ad litem and granting motion of plaintiff to amend petition on the face thereof. Order annulled; motion to dismiss proceeding denied.

A. Dal Thomson, of San Francisco, and Berry & Watson, of Stockton, for petitioner.

Charles H. Epperson, Jr., of Stockton, for respondents.

Mr. Presiding Justice PRESTON delivered the opinion of the court.

Petition to review and annul certain proceedings of the superior court of San Joaquin county.

The facts are these: Earcle Firkins was injured in an automobile accident in the city of Tracy, San Joaquin county, on July 8, 1928. On July 25, 1928, he brought an action for damages in the superior court of that county against Leo Delmuto, the driver of one of the automobiles involved in the accident, his father and mother, A. Delmuto and Mrs. A. Delmuto, and also against one Dominic Valinoti. Earcle Firkins and Leo Delmuto are both minors.

The complaint in said action alleged that petitioner was driving the car, and that his negligence caused the injuries complained of, and that A. Delmuto and Mrs. A. Delmuto were the parents of petitioner and had signed his application for a minor's license to drive the automobile, and were therefore responsible for the negligence of petitioner. The complaint also alleged that Dominic Valinoti was driving a third car, which was racing with the car driven by the petitioner, and was also liable in damages for the injuries to plaintiff.

After the case was started, but before trial, A. Delmuto died and was apparently forgotten by all parties, as no relief was sought against him. The case went to trial before the court without a jury, and after trial the court found that Dominic Valinoti was not negligent, but no judgment was entered for or against him. The court also found that petitioner Leo Delmuto was negligent, and that his negligence caused the injuries complained of. The court also found that the mother had signed Leo's application for a license, and was therefore liable for his negligence. The conclusions of law which followed said findings are as follows:

"1. That the plaintiff is entitled to a judgment against the defendant Mrs. A. Delmuto for the sum of $5,150, together with his costs of suit herein incurred.

"2. That plaintiff take nothing as against the other defendants named therein. (Leo Delmuto and Dominic Valinoti.)

"Let judgment be entered accordingly."

On November 22, 1928, a judgment was

made and entered upon these conclusions of law. The judgment, after the preliminary recitals, reads as follows: "Ordered, adjudged and decreed that the plaintiff Earcle Firkins do have and recover from the defendant Mrs. A. Delmuto the sum of $5,150, together with plaintiff's costs and disbursements incurred in said action, amounting to the sum of $38.50." Then follows the date and signature of the judge.

Nearly three years after said judgment became final, and on September 28, 1931, the plaintiff therein (petitioner in this proceeding) filed the following notice of motion in said case:

(Title of Court and Cause.)

"To Leo Delmuto and to Berry & Watson and George Wadsworth, his attorneys:

"You and each of you will please take notice that the undersigned plaintiff will, on Tuesday, the 6th day of October, 1931, at the hour of 9:30 a. m., or as soon thereafter as counsel may be heard, in department number 2 of the above entitled court, move the court for an order amending the conclusions of law hereinbefore filed in the following particulars, to-wit:

"That paragraph two of said conclusions of law be amended to read as follows: 'That plaintiff is entitled to a judgment against the defendant Leo Delmuto in the sum of five thousand one hundred fifty ($5,150), dollars, together with his costs of suit herein incurred. That plaintiff take nothing against the defendant Dominic Valinoti.'

"Or in lieu thereof that said conclusions of law be amended as follows: That paragraph two be amended to read as follows: 'That this action be contained (continued) as to the defendant Leo Delmuto, until such time as a guardian ad litem is appointed for the said Leo Delmuto, a minor. That plaintiff take nothing against the defendant Dominic Valinoti.' That plaintiff be allowed to file a petition for the appointment of a guardian ad litem for said Leo Delmuto instanter.

"Said motion will be made upon the ground that the conclusion of law heretofore existing that plaintiff take nothing against the defendant Leo Delmuto is not consistent with and is not supported by the findings of fact in said case duly found.

"Said motion will be based upon the files and records in the case, the evidence taken at the trial thereof, and oral and documentary evidence to be adduced at the hearing of said motion.

"Dated September 28, 1931.

"Chas H. Epperson,
"Attorney for Plaintiff."

After said motion was made and considered by the court, and on the 3d day of November, 1931, the court made the following order, which, after the preliminary matters, reads as follows: "* * * Thereupon, the Court made an order that the conclusions of law be amended as follows: That paragraph two be amended to read as follows: 'That this action be contained (continued) as to the defendant Leo Delmuto, until such time as a guardian ad litem is appointed for the said Leo Delmuto, a minor. That plaintiff take nothing against the defendant Dominic Valinoti;' that plaintiff be allowed to file a petition for the appointment of a guardian ad litem for said Leo Delmuto. The Court denied the motion as to the other grounds, and overruled the objections of defendants to the filing of the petition for the appointment of a guardian of Leo Delmuto defendants' objections being upon the ground that the Court had no jurisdiction to receive it. The motion of plaintiff to amend the petition upon the face thereof was granted. It was stipulated by counsel in open court that defendants may have time within which to apply for a writ of certiorari."

This is the order which the petitioner herein seeks to have reviewed and annulled.

[1, 2] Petitioner contends that the order reopening and purporting to continue this case, and permitting further proceedings, was in excess of the court's jurisdiction and void. We think this contention must be sustained.

The judgment rendered against Mrs. A. Delmuto was the only judgment called for by the findings and conclusions of law. And that judgment has long since become final. If the conclusions of law are erroneous in that they should have stated that plaintiff was also entitled to judgment against Leo Delmuto, plaintiff should have made a timely motion in the lower court to correct the conclusions of law, pursuant to sections 663 and 663a of the Code of Civil Procedure, and, failing in this, should have appealed from the judgment. 24 Cal. Jur. 1003; 14 Cal. Jur. 983. Plaintiff did neither, and the time for so doing has long since passed. Likewise the time for relief under section 473 of the same Code has passed.

The law, however, seems well settled that, when the judgment is given by the court, it is itself the real conclusion of law, and supersedes any conclusion embraced in the decision. 14 Cal. Jur. 983; Wilkinson v. Grant, 46 Cal. App. 429, 189 P. 319; Roberts v. Hall, 147 Cal. 434, 82 P. 66. Therefore the learned trial judge, in rendering judgment against Mrs. A. Delmuto alone, has concluded that no judgment should be entered against Leo Delmuto, and it now is beyond the jurisdiction of the court to change this conclusion. It is true no judgment was rendered against Leo Delmuto, but a final judgment against Mrs. A. Delmuto alone was entered, which is fully supported by the findings and conclusions of law, and which now bars petitioner from having changes made in said conclusions of law.

If we consider the conclusions of law, which the trial court has sought to change as really findings, it likewise had no power to change or correct them at this late date, for in Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001, 1004, the Supreme Court said: "The only mode under our system by which findings of fact may be disturbed by the trial court after they have been filed and judgment has been entered thereon, 'except perhaps in respect of a mere clerical error or misprision,' is by the granting of a new trial."

[3] We are also satisfied that the motion of respondent to dismiss these proceedings on the ground that petitioner has a plain, speedy, and adequate remedy at law by appeal cannot be granted under the facts revealed by the record. See Stanton v. Superior Court, supra, and cases there cited.

We think the order complained of was beyond the jurisdiction of the court to make, and therefore must be annulled, and the motion to dismiss the proceeding denied, and it is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

BARTON v. EL ENCANTO APARTMENTS, Inc., et al.*

Civ. 6969.

District Court of Appeal, Second District, Division 1, California.

Jan. 7, 1932.

Rehearing Denied Feb. 4, 1932. Hearing Granted by Supreme Court March 7, 1932.

1. Damages 🔑37.

Damages for breach of contract to pay architect 3 per cent. of building cost for services, 1 per cent. in cash and remainder in stock, *held* not speculative, where evidence showed value stock would have had building been built.

Such damages were not speculative as the commission in gross was agreed to by the parties as 3 per cent. of the cost of the building; the fact that 1 per cent. was to be paid in cash and 2 per cent. applied to subscription of 1672 shares of par value stock did not make it less definite.

2. Contracts 🔑235.

Architect's contract for services with corporation calling for application of two-thirds of 3 per cent. commission to stock subscription, corporation's failure to issue stock certificate *held* not to abrogate architect's rights to compensation under contract.

3. Damages 🔑37.

Architect's contract calling for erection of $4,600,000 building never erected, and for commission of 3 per cent. of total cost, proposal to increase cost to $6,000,000, does not authorize architect's recovery of damages for breach of contract on that basis.

4. Corporations 🔑225.

Stockholder obtaining judgment against corporation and other stockholders his stock should be figured in total number of shares for purpose of calculating proportionate liability of each stockholder (Civ. Code, § 322).

5. Damages 🔑120(3).

Cost of executing contract, plus amount remaining of cash payment not used for expenses, should be set off against amount due architect in suit for breach of contract for services.

Evidence disclosed that had the contract been executed it would have cost architect $28,900 to perform his services, and that of a $1,450 cash payment, architect had spent $713.60 in connection with work under contract.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by E. E. Barton against the El Encanto Apartments, Incorporated, and others. From a judgment for plaintiff, defendants Catherine Bayne Stephens and others appeal.

Modified and, as modified, affirmed.

C. M. Booth and Welburn Mayock, both of Los Angeles, for appellants.

Kimball Fletcher, of Los Angeles, for respondent.

HOUSER, J.

From the record herein it appears that it was mutually agreed between plaintiff and the corporation defendant that the plaintiff would render certain services as an architect for the corporation in and about the proposed construction of an apartment building estimated to cost $4,600,000; that for the services thus to be performed plaintiff was to receive a 3 per cent. commission, to be calculated on the final cost of said apartment building; that "the said defendant corporation gave directions to, and did, increase the proposed cost of the said apartment building from the prior amount of $4,600,000 to the amount of $6,000,000"; that the said commission of plaintiff was to be paid 1 per cent. in cash and the remaining 2 per cent. thereof in shares of stock in the corporation, "to be applied upon the subscription by the plaintiff to $162,700 par value of shares of capital stock of the said defendant corporation"; that of the 1 per cent. of the said commission to be paid by the corporation to plaintiff in cash, it was agreed that the sum of $2,000 would be paid shortly after the execution of the contract, which sum was to be used by plaintiff in the payment of expenses incident to the general services to be performed by plaintiff; that said apartment building was never constructed; and that said defendant corporation "performed none of the promises made by it or obligations imposed upon it in or by said contract," except that the defendant corporation did pay to plaintiff the sum of $1,450, of which amount plaintiff expended the sum of $713.60 in and about the performance of said contract. Furthermore, that had the apartment building been constructed, the cost to plaintiff in performance of his part of the contract between him and the defendant corporation would have been the sum of $29,800. It further appears that "the par value of said capital stock of said corporation is $100 per share; that if the defendant corporation had performed its obligation under said contract, the capital stock of said corporation would now be worth at least $100 per share." The complaint also contained allegations concerning the several liabilities of each of the respective defendants, together with a demand for judgment against the corporation in the sum of $150,200, as well as a judgment "against each of the defendants herein, excepting only said defendant corporation, for the portion of the said $150,200 which the number of shares of said corporation set opposite the names of said defendants, respectively, in said schedule, bears to the total number of shares of capital stock of said corporation subscribed, issued or outstanding." A demurrer to the complaint was interposed by the defendants who are appellants herein, which demurrer was overruled by the trial court. Thereafter, on the failure of said defendants to answer the complaint, judgment was entered in accordance with the prayer of said complaint. It is from such judgment that the appellants herein have prosecuted the instant appeal.

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*For subsequent opinion see 14 P.2d 499.

[1, 2] The first point urged by appellants is that the damages which were awarded to plaintiff were not only speculative in character, but as well that such damages were not proximately caused by the breach of the contract. In that connection, appellants cite certain authorities which indicate that in an action of the nature of that here under consideration, where no evidence is presented to the trial court by which the value of the shares of stock may be determined, the plaintiff has failed to prove any damage—particularly where it appears that according to the provisions of the contract between the parties the plaintiff was entitled to receive a certain number of shares in a corporation not in existence and which corporation never was organized. Peek v. Steinberg, 163 Cal. 127, 124 P. 834; Eisenmayer v. Leonardt, 148 Cal. 596, 84 P. 43. However, as to the facts in each of said cases it is apparent that the essential difference between them and the pertinent facts herein is that in each of the cited cases it affirmatively appeared that on the respective trials thereof no evidence was introduced by which value of such shares of stock was or could have been established; whereas in the instant case, besides the presumption which favors the validity of the judgment in all respects, it is recited in the judgment that on the hearing, "*evidence having been introduced,* * * * it is ordered, adjudged and decreed," etc. But, in addition thereto, the facts of the instant case are distinguishable from those of either of the cited cases in that herein by the provisions of the contract between the parties the compensation for the services of plaintiff was definitely fixed, with the proviso that 2 per cent. of the final cost of the apartment building was to be "applied upon the subscription by the plaintiff to $162,700 par value of shares of capital stock of the said defendant corporation." In other words, although the amount of the commission in gross was agreed upon by the parties, the manner of payment of a portion thereof was changed from a cash consideration to an equal consideration as represented by shares of the capital stock in the corporation. The failure of the corporation to execute its certificate of shares of its capital stock in favor of plaintiff and to deliver the same to him could have no adverse effect upon the contractual right of the plaintiff by which he was entitled in gross to a compensation of three per cent calculated upon the final cost of the apartment building.

Appellants also object to the judgment on the ground that other than "directions" given by the corporation to "increase the proposed cost of the apartment building from the prior amount of $4,600,000 to the amount of $6,000,000," the record herein contains nothing on which the assumption may be based that the original agreement of the parties to "erect a certain apartment building * * * at a cost of $4,600,000" in reality was changed to the extent that the commission of 3 per cent. to be paid to plaintiff on the "actual final total cost of said apartment building" may be said as a matter of law to have been earned by plaintiff on said sum of $6,000,000.

[3] On examination of the complaint in the action it appears that the agreement between the parties was that the apartment building would be erected "at a cost of $4,600,000," but that plaintiff was to receive his commission on the "actual final cost of said apartment building." Since the apartment building was never constructed, manifestly it is impossible to determine its "final cost." Although it may be true that the corporation gave "directions to and did increase the *proposed* cost" to a specified sum, it does not follow that either before the construction of the apartment building would have been com-

menced, or at any practicable time before its completion, the corporation might not have given "directions" either to return to the original "proposed" cost of the apartment building, or even to decrease in amount its "proposed" cost. As far as the allegations of the complaint disclose, no agreement was entered into between plaintiff and the corporation concerning any increase in the cost of the building. It is clear that in that regard the corporation, acting on its own initiative and without any binding obligation or liability to any person, had a right to change its "mind" in any way and as often as to it seemed desirable. According to the provisions of the contract between the parties, the corporation became liable to plaintiff only for "three per cent of the *actual* final cost of said apartment building." But since theretofore it had been definitely agreed by the respective parties to the contract that the apartment building would be erected "at a cost of $4,600,000," in such circumstances it becomes plain that that amount, rather than any other amount thereafter possibly contemplated by the corporation, should form the basis for the computation of the amount of the commission which would become due to plaintiff.

[4] But there is additional reason for the conclusion hereinafter indicated that as rendered the judgment is an incorrect expression as to the liability of each of the respective appellants. Nor in reaching such conclusion has this court lost sight of the particular circumstance that, although plaintiff was a subscriber for 1,627 shares of the capital stock of the corporation, no certificate of ownership thereof had been issued to him. As far as the corporation was concerned, by the instant action plaintiff sought only to recover his commission of 3 per cent. based upon the final cost of the apartment building; and as far as concerned the individual defendant stockholders, the action was brought for the purpose of establishing the personal statutory liability of each of them for the alleged debt of the corporation and the recovery of a judgment therefor. As between plaintiff and the corporation, the fact that, on the one hand, a possible cause of action existed in favor of plaintiff because of the failure of the corporation to issue to him the certificate of shares of stock to which, on payment of the purchase price thereof, he was entitled; or, on the other hand, that the corporation had a right to maintain an action against plaintiff on his unpaid stock subscription, or to offset such claim against his instant action for commission—was of no consequence or materiality in the ultimate result to the defendant stockholders following the determination of that which because of the failure of the corporation to defend the instant action, became an admitted or an adjudicated liability against it. If not before, at least as soon as such liability of the corporation had been judicially established, under the provisions of the statute (section 322, Civ. Code), each stockholder of the corporation became individually and personally liable for such proportion thereof as the amount of shares of the capital stock of the corporation owned by him bore to the whole of the subscribed capital stock of the corporation. Referring to the record herein, it is discovered that the names of the alleged respective stockholders in the corporation, together with the number of shares therein owned by each of such stockholders respectively, are set forth in the complaint in the action, and that the "total number of shares of the capital stock subscribed to or outstanding was and is 8251 shares." Presumably it was upon such allegation in the complaint in the action that the proportionate liability of each of the stockholders who are appellants herein was computed. But as hereinbefore appears, plaintiff was a subscriber to stock in said corporation for 1,627 shares thereof. His name as the owner of such shares of stock does not appear in the alleged list of stockholders set forth in the complaint; nor on calculation of the respective liabilities of the other stockholders does it appear that the shares of stock owned by plaintiff were taken into consideration. If in identical circumstances any other creditor of the corporation had brought an action similar in character to that here under consideration against the corporation and its stockholders, it is unlikely that any one would seriously question the liability of plaintiff herein as a stockholder of the corporation. Accepting as true the allegations contained in the complaint in the instant action to the effect that prior to the creation of the liability upon which the action is founded plaintiff had subscribed for 1,627 shares of stock in the corporation, it follows that that number of shares of stock added to 8,251 shares of such stock, or a total of 9878 shares, rather than 8,251 shares, as stated in said complaint, should form the basis for the computation of the proportionate liability of each of the appellants herein.

[5] The record herein further discloses the fact that, in attempting to determine the liability of each of the several stockholders in the corporation, no account was taken of the fact that, according to the admission of plaintiff, he had received from the corporation the sum of $1,450, but that of that sum he had expended the sum of $713.60 "in performing said contract." It is therefore apparent that, as against the commission due to plaintiff in the matter, not only the sum of $29,800 which plaintiff alleges would have been expended by him "in performing to completion all details and obligations required of the plaintiff under said contract," but as well the sum of $736.40, should be offset before any compu-

tation should be made regarding the liability of each of the several appellants herein.

No other question presented by appellants requires consideration by this court.

In pursuance of the conclusions herein expressed, it is ordered that as to appellants herein the judgment of the lower court be and it is modified so that in the several specified amounts said judgment against the said appellants shall be as follows, to wit: Catherine Bayne Stephens, $78,868.31; Lunette W. Smith, $1,392.82; Maude F. Bollman, $761.70. As thus modified, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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119 Cal.App. 556

LOSLEBEN v. CALIFORNIA STATE LIFE INS. CO.

Civ. 572.

District Court of Appeal, Fourth District, California.

Jan. 8, 1932.

1. Evidence 🔑123(10).

Close proximity in time to alleged accident does not make narrative statement regarding it admissible as part of res gestæ.

2. Evidence 🔑123(10).

In action on life policy, narrative statement concerning alleged accident made by insured to employer, *held* inadmissible as part of res gestæ.

3. Evidence 🔑128.

Insured's statements to physician as to what had caused existing condition *held* not admissible as part of res gestæ, where they were unnecessary to diagnosis.

4. Insurance 🔑668(13).

Evidence that insured sustained injury resulting in death authorizing recovery of double indemnity in life policy *held* sufficient as against motion for nonsuit.

Evidence showed that, shortly before employer left insured, he was in apparent good health and going ahead with his work. Upon the employer's return, insured was found in great pain. Physician subsequently discovered that decedent had twist of the bowel, or volvulus. Testimony of physician showed that condition could have been caused by jolt or sudden strain.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Ida Losleben against the California State Life Insurance Company. From judgment entered pursuant to nonsuit, plaintiff appeals.

Reversed.

William J. M. Heinz and McFadden & Holden, all of Anaheim, for appellant.

West & McKinney, of Santa Ana, for respondent.

BARNARD, P. J.

The plaintiff is the widow of George Phillip Losleben, who held an insurance policy issued by the defendant. This policy provided for the payment of $2,500 in the event of death resulting from natural causes and for an additional $2,500 "in the event that the death of the insured is caused by bodily injuries effected exclusively and wholly by external, violent and accidental means, said death occurring within ninety days after the happening of such accident." The insured was employed as a mechanic in a packing house, and on November 21, 1929, was directed by his employer to build a shelf over a workbench, which bench was about three feet high. The employer left the building about 3 o'clock on the afternoon of that day, leaving the insured engaged in this work. When the employer returned about two hours later, he found the insured in great pain and sent him home. Doctors were immediately called, an operation was performed, and on November 25, 1929, the insured died. The defendant paid the $2,500 contemplated by the policy for death from a natural cause, but refused to pay the additional $2,500. This action followed, and at the close of plaintiff's evidence the court granted a motion for a nonsuit. From the ensuing judgment this appeal is taken.

The first point raised by appellant is that the court erred in refusing to permit the employer to testify as to certain statements relative to what had occurred, made to him by the insured when he returned to the packing house and found him suffering, and also in refusing to permit similar testimony by the plaintiff as to statements made to her by her husband upon his return home. It is urged that these statements were admissible as a part of the res gestæ. The employer had testified that when he returned to the premises he observed that part of the work of putting up the shelving had been done, but that the work had not been completed; that the insured was not then engaged in the work; and that, as he entered, the insured came out of a little storeroom adjoining the office and stool in a "doubled up" position. There is no evidence that any one else was in the building during the time the employer was gone.

In Heckle v. Southern Pacific Co., 123 Cal. 441, 56 P. 56, 57, the court said: "There is no great difficulty in stating the general principles which prevail in determining whether, in a given case, certain declarations or acts are parts of the res gestæ. A declaration, to be admissible on that ground, must be an undesigned part or incident of the occurrence in question. It must be, in a general sense, contemporaneous with the main occurrence; although, in case of a sudden accident or attack, the declaration would not be inadmissible merely because the blow or collision immediately preceded it. It must be the natural and spontaneous outgrowth of the main occurrence, and must exclude the notion of deliberation or calculation, or the design to manufacture evidence for future purposes; and, if it be a mere narrative of past events, it then is clearly within the category of inadmissible hearsay, and must, beyond doubt, be excluded."

In Williams v. Southern Pacific Co., 133 Cal. 550, 65 P. 1100, 1102, the court said: "The ruling admitting these declarations was clearly erroneous. It is contended that they were part of the res gestæ. * * * Statements are like other circumstances when they are part of it, and, if the whole affair cannot be rightly understood without them, they are competent. Expressions of persons who are actors, made during the occurrence, may generally, but not always, be proved. If spontaneous and caused by the event, they may nearly always be shown. But if afterwards, no matter how shortly afterwards, there is an attempt to explain what has happened, or to account for it, or to defend one's self, or the like, it is incompetent and inadmissible as res gestæ. A narrative, even if given during the occurrence, is inadmissible."

In Murphy v. Board of Police, 2 Cal. App. 468, 83 P. 577, the court used the following language: "The witness was then asked to state what Murphy said to him at that time as to what was the matter with him. The question was objected to upon the ground that it was hearsay and no part of the res gestæ, and the court sustained the objection. The ruling was not erroneous. The evidence sought to be elicited was purely hearsay. It could not, under well-settled principles of evidence, be binding upon defendant. If Murphy had received injuries from the men who were seen running away, it would seem that plaintiff could have proven it without the evidence of Murphy's statement of a transaction that had ended and been completed. Murphy was not under oath. The defendant was not present. The statement was made, if made at all, after Murphy had been injured, if he had been injured."

[1, 2] Appellant's cause of action is based upon the theory that her husband received internal injuries as the result of falling from or jumping from the bench upon which he was working. It appears from the evidence that he had left the scene of his work and had gone into an adjoining room, from which he emerged when his employer returned. While the appellant was not permitted by the trial court to bring out in evidence statements made by the insured as to what time he claimed to have been injured, the time element is not controlling, and, even if the statements sought to be introduced in evidence were made to the employer within a few minutes after the injury occurred, that fact in itself does not make such statement admissible as a part of the res gestæ. Coryell v. Clifford F. Reid, Inc. (Cal. App.) 4 P.(2d) 295. Under the authorities prevailing in this state, we feel compelled to hold that the court correctly refused to admit evidence of these statements by the deceased. See, also, People v. Ah Lee, 60 Cal. 85; Lissak v. Crocker Estate Co., 119 Cal. 442, 51 P. 688; People v. Wong Ark, 96 Cal. 125, 30 P. 1115; Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243.

[3] It is next urged that the court erred in refusing to permit a physician who attended the insured to testify as to statements made to him by the insured as to what caused his injury. It is particularly urged that these statements were necessary and useful to the physician in enabling him to diagnose the trouble and treat the patient. The physician was allowed to testify as to what the patient told him in regard to his condition, in regard to the results of his examination of the patient, and in regard to what was found during an operation that followed. Objections were sustained, however, to questions attempting to bring out what the patient stated to the physician in relation to what had caused the existing condition. In our opinion these rulings of the court were correct. It does not appear that these statements were necessary to enable the physician to determine the condition of the insured, and it does appear that the nature of his trouble was determined by the physician from his objective examination of the patient. The condition of the patient being known to the physician, the insured's statement as to what had caused the condition was none the less hearsay because of having been made to a physician. Turner v. Turner, 187 Cal. 632, 203 P. 109.

In Jenkin v. Pacific Mutual Life Ins. Co., 131 Cal. 121, 63 P. 180, 181, the court said: "The manner in which the wound was inflicted does not appear from the evidence, except as it may be inferred from the nature and location of said wound. No person is shown to have been present with the insured at the time he received the mortal injury; and his statements to the physician and others as to how he came to be wounded were—properly, we think—stricken out by the court on motion of defendant."

In 22 Corpus Juris, at page 268, the rule is thus stated: "Narrative statements to a physician are to be rejected where they relate to facts not connected with diagnosis and treatment, such as the cause of an illness or injury, the circumstances under which an injury was received, or the instrument with which it was inflicted, or past sufferings of the patient."

[4] Appellant next contends that the court erred in granting a motion for a nonsuit; it being insisted that, irrespective of the fact that the various witnesses were not permitted to testify as to statements made by the deceased as to how the injury occurred, there still remained sufficient evidence to make out a prima facie case. We think this contention must be sustained. The deceased had been working in this packing house for about ten years. His employer testified that when he left him on the afternoon in question he appeared to be in perfectly good health and was whistling at his work; that in doing his work it was necessary for him to climb upon this bench, and in getting down to jump from the same; that when he returned he found the deceased suffering extreme pain and "doubled up"; that he sent him home and shortly thereafter went over to see him; that at that time the insured could not stand up straight; and that when he was put to bed he "drew himself up." The physician who was immediately called testified that he examined the insured and found his abdomen very much distended and very painful to the touch; that from his examination of the patient he could determine how the injury was caused within a certain range of possibilities; and that on the same day, November 21, he performed an operation. As to what he found, he testified as follows: "I found a condition of peritonitis of the abdominal cavity; fluid in the abdomen, and fecal matter; I found a perforation of the small intestine in the center, or twist of the bowel, what we call a volvulus—that is the technical name for a twist of that character. The circulation had been cut off by this twist and that segment of the bowel was blue and black, colored in the process of decay."

This physician testified that in his opinion this condition was caused by an injury. Another physician testified that he saw the insured on November 21; that the insured told him that the pain in his abdomen came on acutely that afternoon, compelling him to quit work, and that he almost collapsed; that when he saw the patient he was in such pain he could not say very much; that he held his stomach and complained of the terrible pain; and that he was lying down and rolling in pain. This physician testified that in his opinion the death of the decedent was caused by acute peritonitis, which was brought on by "the volvulus or twist of the bowel," and that this condition of the patient could be caused by "a sudden jolt, or a strain of the bowel wall, probably a sudden jerk or jump." Asked as to what kind of a condition volvulus is, he replied: "It is a twist in the bowel, usually occurring in the small bowel, and as soon as that takes place you have your circulation cut off in the bowel adjoining, and that bowel immediately becomes weakened, the blood supply is shut off, and, of course, immediately we have gas accumulate because the bowel is obstructed and the gas accumulates in all the bowel, and the weakened condition in the bowel which had been deprived of the circulation is liable to burst or perforate."

He then testified that this patient had a volvulus and a perforation of the bowel, and that this could be caused either by chronic constipation, by tuberculosis, or by a sudden jolt or strain. He then testified that he found no indications that this patient suffered from the ailments referred to, and that his bowel and all of his abdominal organs were in a healthy condition. Based upon the conditions he found, he testified that in his opinion this particular volvulus was caused by a strain.

In Jenkin v. Pacific Mutual Life Ins. Co., supra, the court said: "The burden is undoubtedly on the plaintiff by the very terms of the contract to show that the wound was inflicted accidentally, but it is not necessary, for him to make out his case, that he should produce the direct testimony of eye witnesses. If the circumstances placed in evidence, and the inferences to be drawn therefrom, and the presumptions arising thereon, point clearly to an accidental injury, the plaintiff has made out a prima facie case, and is entitled to a finding in his favor."

In our opinion, this evidence of a man in normal health suddenly stricken, with the evidence that the condition in which he was found could have been caused by a jolt or sudden strain, taken in connection with the place and circumstances in which he was working, with the absence of the only other things that could be expected to have caused his condition, and with the natural inferences and presumptions that may be drawn from the evidence introduced, was sufficient to make out a prima facie case, and that the motion for a nonsuit should have been denied. Nor is the result different because the deceased may have been injured while doing something he intended to do such as jumping from the bench. While he may have intended to jump from the bench, he may have slipped and fallen while so doing, and it can hardly be presumed that such slipping or falling was an intentional act. Davilla v. Liberty Life Ins. Co. (Cal. App.) 299 P. 831. We think a question of fact was presented which should have been passed upon by the jury.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

119 Cal.App. 582

MEIGHAN v. BAKER.

Civ. 7621.

District Court of Appeal, First District, Division 1, California.

Jan. 12, 1932.

1. **Automobiles** ⚷245(24).

Generally, degree of care required to relieve motorist of imputation of gross negligence, as respects liability for injury to guest, is fact question (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

2. **Automobiles** ⚷245(24).

Whether motorist was grossly negligent in making turn at high speed, so as to be liable for injuries to guest, *held* for jury (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

3. **Automobiles** ⚷224(6).

Guest *held* not contributorily negligent in not insisting that she be permitted to leave automobile because of excessive speed (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

> Though guest testified that she was of opinion that defendant motorist was driving rather fast, she further testified that she was not a driver and was no judge of speed, and that motorist assured her that there was nothing to prevent him from making good time.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Bertha Meighan against Frank B. Baker. Judgment for plaintiff, and defendant appeals.

Affirmed.

B. P. Gibbs, of Los Angeles, Theodore Hale, Barry J. Colding, and Carroll B. Crawford, all of San Francisco (M. Tellefson, of Los Angeles, of counsel), for appellant.

Walker Peddicord, of San Francisco, for respondent.

TYLER, P. J.

Action for damages for personal injuries.

Plaintiff was riding as a guest of defendant in an automobile owned and operated by him. While traversing the highway, defendant collided with a cement base of a wigwag signal at a railroad crossing, wrecking his car. The accident happened at Schuetzen Park crossing, south of San Jose, about 4 o'clock a. m. In consequence of the collision, plaintiff suffered a broken arm and other injuries. The case was tried before a jury, resulting in a verdict in favor of plaintiff in the sum of $1,000. From said verdict and the judgment entered thereunder, defendant appeals.

It is claimed that the evidence is insufficient to justify the verdict; that plaintiff was guilty of contributory negligence as a matter of law. Error of the court in its instructions to the jury is also relied upon for a reversal.

The basis of defendant's liability is founded upon the statutory enactment known as section 141¾ of the California Vehicle Act, as amended in 1929 (St. 1929, p. 1580). The provisions of this act, in substance, provide that any person, who as a guest accepts a ride in any vehicle upon any of the public highways of the state, and while so riding receives an injury, shall have no right of recovery against the operator of the car unless the injury was caused by the intoxication, willful misconduct, or gross negligence of such operator. Nowhere in the act is it attempted to define what constitutes gross negligence.

[1, 2] The main point relied upon for a reversal is that the evidence does not constitute such a degree of negligence as is necessary to establish liability under the provisions of the section of the California Vehicle Act above referred to. It appeared in evidence that defendant had offered to drive plaintiff and her friend, a Miss Carriere, from San Francisco to San Luis Obispo in order that they might attend the funeral of a relative. The party proceeded southerly along the great highway, stopping at the city of San Jose for breakfast. Leaving San Jose, they again traveled in a southerly direction, driving on the main highway until they reached a point where said highway crosses the tracks of the Southern Pacific Company. There is evidence to show that defendant at this time was driving his car at a speed estimated at from forty-five to fifty miles an hour. Defendant attempted to negotiate the turn but, at the rate of speed he was traveling, it was impossible to do so, with the result that his car left the highway, struck the cement base of the wigwag, was overturned and demolished; plaintiff receiving the injuries of which she here complains.

The question here presented is whether or not this evidence sustains the conclusion that defendant was guilty of gross negligence. The term "gross negligence" is incapable of precise definition, and its application and use may in some cases lead to unsatisfactory results, even to the extent of nullifying the limitation of liability contained in the statute. How much care will, in a given case, relieve a party from the imputation of gross negligence or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot exactly define. Generally speaking, the degree of care required under any given circumstances is a question of fact for the court or jury, and not a question of law. Malone v. Clemow (Cal. App.) 295 P. 70. Here the jury found the negligence to be gross, and we cannot say as a matter of law that it was not. Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62; Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915.

[3] Nor do we think it can be said that plaintiff was guilty of contributory negligence in continuing to ride with defendant and in not insisting that she be permitted to leave the car. While plaintiff testified she was of the opinion that defendant was driving rather fast, she further testified that she was not a driver and was no judge of speed, and defendant had assured her that there was nothing to prevent him from making good time.

Equally without merit is the claim that the court failed to instruct the jury that the negligence of defendant must have been the proximate cause of the injury. The record shows that the jury was fully and fairly instructed upon this subject.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

BRITTON v. BRYSON et al.*

Civ. 8058.

District Court of Appeal, First District, Division 2, California.

Jan. 12, 1932.

Rehearing Denied Feb. 11, 1932. Hearing Granted by Supreme Court March 10, 1932.

1. Husband and wife 🔑264.

As respects establishing community interest, undisputed evidence of divorce will alone support finding that man and woman have not been continuously husband and wife since marriage.

2. Divorce 🔑321½.

Effect of divorce decree is that marriage relation is severed, and property thereafter acquired by either party is not property of community.

3. Divorce 🔑326.

Parties having acquired bona fide domicile in Colorado and court having acquired personal jurisdiction of parties, Colorado divorce decree is entitled to be enforced in every state.

4. Judgment 🔑818(3).

Full faith and credit clause does not cover judgment outside court's jurisdiction, and question of jurisdiction may be made basis of collateral attack.

5. Divorce 🔑326.

Colorado divorce decree, admitted without objection, was conclusive proof of dissolution of marriage status.

6. Divorce 🔑167.

Decree of Colorado court without jurisdiction setting aside divorce was not entitled to be enforced in California.

Jurisdiction was sought by personal service upon the California administrator of the estate of the deceased husband; such service having been made in California. The action was in personam; hence the Colorado court could obtain jurisdiction only by personal service within the state.

7. Divorce 🔑167.

Action to set aside divorce decree *held* one in personam.

That such action was in personam follows from facts that res of marital relation was destroyed by death of former husband, and right of surviving spouse to proceed in rem to modify or annul divorce decree was lost, and decree showed upon its face that no real property in state where divorce was granted was involved.

8. Divorce 🔑167.

In personal action to set aside divorce decree, court *held* to have acquired no jurisdiction over person of deceased husband or his administrator (Code Civ. Proc. § 1913).

The administrator was in another state, and could not, even by consent, confer jurisdiction on the court by accepting service or by voluntary appearance outside state. Substituted service in a personal action is not permitted to extend to persons beyond the state.

9. Divorce 🔑167.

Colorado decree setting aside divorce after husband's death was not entitled to enforcement in California, in absence of personal service on husband's administrator in Colorado.

10. Husband and wife 🔑264.

Under evidence of husband's remarriage after divorce, finding that acquisition of real property while he and second wife were husband and wife, and deed from second wife, transformed property into husband's separate property, *held* justified.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

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*For subsequent opinion see 14 P.2d 502.

Action to establish community interest in certain real property and to determine adverse claims, brought by Sophie Britton against Frank Bryson, as administrator of the estate of John Henry Britton, deceased, and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Leland J. Allen, of Los Angeles, for appellant.

Dana R. Weller, of Los Angeles, for respondents.

NOURSE, P. J.

Plaintiff sued to establish a community interest in certain real property and to determine adverse claims thereto of her former husband, John Henry Britton, and of D. C. Hammell. Prior to the trial, John Henry Britton died, and Frank Bryson, as administrator, was substituted as defendant for him. The cause was tried without a jury, and defendants had judgment. Plaintiff has appealed upon typewritten transcripts.

Sophie Britton and John Henry Britton were married in the year 1873. On March 30, 1891, while both parties maintained their domicile in the state of Colorado, the husband procured a decree of divorce which awarded the wife certain real property situated in the city of Denver, Colo., the care and custody of the minor children, and alimony. On April 10, 1891, in the state of Texas, John Henry Britton was married to Rose E. Dixter with whom he was living as husband and wife at the time the property in suit was acquired by him. Following a deed from his wife, Rose Britton, of all her interest in the property, John Henry Britton executed two deeds of gift to defendant Hammell. The plaintiff sought in this action to have these deeds declared void on the theory that she was the real wife of John Henry Britton, and, as such, was entitled to a community interest in the property. This theory was based upon the assertion that the Colorado divorce was procured by fraud, and after the death of John Henry Britton the plaintiff went into the Colorado courts in a separate suit in equity and procured a decree declaring the divorce of 1891 void for fraud on the part of the deceased husband and his attorneys. In that action the Colorado court assumed jurisdiction through service of process upon the California administrator.

[1] The appellant raised three points in her brief which may be readily answered, but no one of which presents the real issues involved in her appeal. It is stated that fraud permeates all transactions on the part of the husband to remove property from the community, and this may be conceded as it has no bearing upon the issues. Next it is argued that full faith and credit should be accorded to a decree of a sister state. This also may be conceded with the qualifications to be hereafter noted. It is then argued that the evidence is insufficient to support the finding that John Henry Britton and Sophie Britton had not been continuously husband and wife since their marriage in 1873. Appellant cites her testimony to the effect that she was the wife of John Henry Britton from the date of their marriage in 1873 to the date of his death. But appellant overlooks the undisputed evidence of the divorce in 1891. This evidence alone supports the finding.

[2, 3] The real points at issue are (1) the effect of the divorce and the weight to be given the decree in this proceeding; and (2) the effect of the decree setting aside the divorce and the weight to be given that decree. The decree of divorce was received in evidence. It shows upon the face that it was rendered in the domicile of the parties after personal service upon the defendant and upon her appearance by counsel in court. All the prerequisite jurisdictional facts are present which entitled the respondents to place the decree in evidence. It was admitted without objection. The effect of the decree is that the marriage relation was severed as of the date of the decree, and property thereafter acquired by either the husband or the wife was not the property of the community. The weight to be given the decree is this—the parties having acquired a bona fide domicile in the state of Colorado, and the court having acquired personal jurisdiction of both parties the decree is entitled to be enforced in every state under the full faith and credit clause of the Federal Constitution. Cheever v. Wilson, 9 Wall. 123, 19 L. Ed. 604; Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654; Haddock v. Haddock, 201 U. S. 562, 570, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1; Kelsey v. Miller, 203 Cal. 61, 91, 263 P. 200.

[4] 2. The decree entered July 16, 1928, in the superior court of Bent county, Colo., setting aside the decree of 1891, presents a different situation. Objection was made to its admission in evidence, and the jurisdiction of the court to make it was directly challenged. By a long line of authorities the full faith and credit clause does not cover judgments or decrees made outside of the court's jurisdiction, and this question of jurisdiction can be made the basis of a collateral attack upon the decree in the same or in another forum. This proposition is stated in Thompson v. Thompson, 226 U. S. 551, 561, 33 S. Ct. 129, 131, 57 L. Ed. 347: "But it is established that the full faith and credit clause, and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction of the parties or subject-matter, or of the res in proceedings in rem. D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Reynolds v. Stockton, 140 U. S. 254,

11 S. Ct. 773, 35 L. Ed. 464; Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 134, 32 S. Ct. 641, 56 L. Ed. 1009, 1024, Ann. Cas. 1913E, 875." The more frequent application of this rule is to those cases where a divorce is obtained in a foreign state through a fraudulent residence simulated for the purpose and not in good faith. Bruguiere v. Bruguiere, 172 Cal. 199, 202, 155 P. 988, Ann. Cas. 1917E, 122; Kelsey v. Miller, 203 Cal. 61, 89, 263 P. 200; Haddock v. Haddock, supra; Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680, 681; and see generally for comments and citations Michigan Law Review, vol. 30, No. 2, December, 1931, pp. 285, 289. The authorities cited are but a reaffirmation of the well-settled rule expressed in Thompson v. Whitman, 18 Wall. 457, 463, at page 469, 21 L. Ed. 897, where it is said: "The jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." This rule has been repeatedly affirmed. National Exchange Bank v. Wiley, 195 U. S. 257, 270, 25 S. Ct. 70, 49 L. Ed. 184, where cases are cited.

With these rules in mind we may briefly state certain settled legal propositions which must be borne in mind in analyzing the ultimate issue to be decided which is this: Is the property in suit the community property of appellant and her former spouse?

[5] First. The Colorado decree of divorce is conclusive proof of the dissolution of the marriage status because it was received in evidence in this case without objection and was not subject to attack upon any of the grounds above noted. In the absence of such an attack, the decree was entitled to all the presumptions of regularity and finality under the full faith and credit clause of the Constitution. Kelsey v. Miller, 203 Cal. 61, 91, 263 P. 200.

[6] Second. The order of 1928 setting aside this decree was not entitled to be enforced in California because the Colorado court had no jurisdiction to make it. Jurisdiction was sought by personal service upon the California administrator of the estate; such service having been made in California. The action was in personam, hence the Colorado court could obtain jurisdiction only by personal service within the state.

[7] Third. That the action was in personam follows from these adjudicated principles: (1) The "res" of the marital relation was destroyed by the death of the former husband. Kirschner v. Dietrich, 110 Cal. 502, 504, 42 P. 1064; Hite v. Mercantile Trust Co., 156 Cal. 765, 768, 106 P. 102; Begbie v. Begbie, 128 Cal. 154, 155, 60 P. 667, 49 L. R. A. 141. Upon the destruction of the "res" the right of the surviving spouse to proceed "in rem" to modify or annul the divorce decree was lost because the entire divorce proceedings abated upon the death of the former husband. Same cases. An exception to this general statement should be noted. In McGuinness v. Superior Court, 196 Cal. 222, 232–236, 237 P. 42, 40 A. L. R. 1110, the Supreme Court, while reaffirming the rule of the Kirschner Case, held that the court had the inherent power to purge its records of a fraud practiced upon it, notwithstanding the death of one of the parties had destroyed the "res" and thus abated the action in which the fraud had been committed, and that, for this purpose, jurisdiction could be secured by personal service upon the administrator of the estate of one of the parties to the original action. The rule of this case does not, however, affect the situation here because it is clear from the discussion in the opinion that that proceeding was treated solely as a personal action to purge the court records of fraud and because no question of substituted service upon the administrator was involved. (2) The decree shows upon its face that no real property in the state of Colorado was involved. If it was designed to determine indirectly the title to real property situated in California it was nevertheless a personal action because the Colorado court had no jurisdiction over the "res" in California. Taylor v. Taylor, 192 Cal. 71, 76, 218 P. 756, 51 A. L. R. 1074.

[8] Fourth. Being a personal action, the Colorado court had no jurisdiction over the person of the deceased or of his administrator because (1) substituted service in a personal action is not permitted to extend to persons beyond the state (Pennoyer v. Neff, 95 U. S. 714, 727, 24 L. Ed. 565); and (2) the administrator could not, even by consent, confer jurisdiction upon the Colorado court by accepting service or by voluntary appearance outside the state. Section 1913, Code Civ. Proc.; McCully v. Cooper, 114 Cal. 258, 261, 46 P. 82, 35 L. R. A. 492, 55 Am. St. Rep. 66.

[9] Fifth. The action being "in personam," the Colorado decree was not entitled to be enforced in the California courts under the full faith and credit clause of the Constitution in the absence of personal service upon the administrator within the state of Colorado. Pennoyer v. Neff, 95 U. S. 714, 729, 24 L. Ed. 565; Haddock v. Haddock, 201 U. S. 562, 567, 606, 26 S. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.

[10] Sixth. Following evidence of the marriage of John Henry Britton and Rose Dixter after the Colorado divorce in 1891, and the presumption that such marriage was regularly solemnized (Kelsey v. Miller, 203 Cal. 61, 90, 263 P. 200), the trial court did not err in finding that the real property in suit was acquired while he and Rose Britton were husband and wife and that the deeds of conveyance from Rose to the deceased transformed

the property into the separate property of the deceased.

We have covered all the points raised in the briefs, and, upon the authorities cited, we conclude that the trial court correctly held that the Colorado decree of divorce was conclusive and entitled to the full faith and credit of the California courts; that the decree of 1928 purporting to annul the former decree was a personal judgment not binding upon the deceased or his personal representative and hence not entitled to full faith and credit in this state; and that the property in suit became the separate property of the deceased, and, as such, was transferred to the respondent Hammell free from any legal claim on the part of the appellant.

For these reasons the judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

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115 Cal.App.(Supp.) 777

CASADY v. FRY.

Civ. 556.

Appellate Department, Superior Court, Los Angeles County, California.

May 20, 1931.

1. Sales 🔑474(1).

Attachment of buyer's interest under conditional sales contract is wholly statutory (Code Civ. Proc. § 689a).

2. Sales 🔑474(1).

Where buyer's attachment creditor pays balance under conditional sales contract, statute subrogates creditor to rights of buyer, not seller (Code Civ. Proc. §§ 689b, 689c).

> When buyer's attachment creditor causes balance under conditional sales contract to be paid to seller, title to property passes to buyer by terms of Code Civ. Proc. § 689b, and under section 689c, when attached property is sold, proceeds must be applied first to repayment of sum paid to seller.

3. Sales 🔑474(1).

Where buyer's attachment creditor pays balance under conditional sales contract and judgment in attachment action favors buyer, writ becomes functus officio, and buyer becomes entitled to immediate possession of property (Code Civ. Proc. §§ 689a–689c).

4. Sales 🔑459.

Full payment, whether voluntary or through legal proceedings, vests title in buyer under conditional sales contract; bill of sale being unnecessary.

5. Sales 🔑474(1).

Buyer's attachment creditor paying balance under conditional sales contract, if not recovering judgment, cannot reimburse himself (Code Civ. Proc. §§ 689a–689c).

> Attachment creditor, if unsuccessful in his action against conditional buyer, cannot complain that he has no remedy for reimbursement, because he need not have availed himself of ancillary remedy of attachment, and because payment of balance due under conditional sales contract was made for his own benefit, not for benefit of his debtor, the conditional buyer.

6. Sales 🔑474(1).

Creditor who attaches buyer's interest and pays balance under conditional sales contract cannot, if unsuccessful in action against buyer, reimburse himself on theory that he became assignee of contract (Code Civ. Proc. §§ 689a–689c).

> Theory that attachment creditor, by paying balance due under conditional sales contract, became assignee thereof, is not tenable, because Code Civ. Proc. §§ 689a–689c, and their history, show that creditor succeeds to rights of buyer and not of seller.

7. Sales 🔑474(1).

That seller's assignee, after receiving payment in full from buyer's attachment creditor, assigned conditional sales contract to creditor's assignee, *held* ineffectual respecting reimbursement after creditor's attachment action failed (Code Civ. Proc. §§ 689a–689c).

> Assignment of contract after judgment adverse to attachment creditor did not aid creditor's assignee, as regards alleged right to reimbursement for amount paid to seller under conditional sales contract, since seller's assignee, when it purported to assign contract after receipt of payment in full, had no interest in property covered thereby which was susceptible of assignment by it.

Appeal from Municipal Court of Los Angeles; James H. Pope, Judge.

Action by Clarence L. Casady against George W. Fry, etc., who filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

J. M. Sinclair, of Los Angeles, for appellant.

A. P. Ohanneson, of Los Angeles, for respondent.

YANKWICH, Judge pro tem.

[1-4] Plaintiff was in possession of an automobile which he had purchased from Pegg Motor Sales, Inc., upon a conditional sales contract. Pegg Motor Sales, Inc., assigned the contract to Pacific Finance Company. On December 19, 1929, while the plaintiff still owed $75,92 upon said contract, the automobile was levied upon under a writ of attachment issued out of the municipal court of the city of Los Angeles. Pacific Finance Company interposed a third party claim in the above amount. They were paid said sum by the marshal, on behalf of the attaching creditor, Fletcher & Steele, a corporation. Pacific Finance Company released the contract and certificate of ownership to the automobile to the marshal. Later, judgment for plaintiff herein was rendered in the action in which the attachment had issued and the automobile was released to him. The plaintiff, still being in default of payments, Fletcher & Steele, attaching creditor, made demand of him for payment of installments due. These were refused. Demands by the defendant, to whom the attaching creditor later assigned its interest, were also refused. Following the refusal, the defendant took possession of the automobile. The action was in replevin for the recovery of possession, or value, with damages for loss of use. There is no dispute about these facts which were stipulated to as just summarized. Judgment went against the plaintiff upon his complaint, the court also rendering judgment in favor of the defendant upon his cross-complaint for the installment due, $17.92, and attorney's fees, in the sum of $90.00. The appeal involves the construction of sections 689a, 689b, 689c, of the Code of Civil Procedure. These sections read:

"Personal property in possession of the buyer under an executory agreement for its sale entered into after this section goes into effect may be taken under attachment or execution issued at the suit of a creditor of the buyer, notwithstanding any provision in the agreement for forfeiture in case of levy or change of possession." Section 689a.

"The officer levying on such property must within five days after being served with a verified written claim containing a detailed statement thereof, pay or tender to the seller full payment of all sums due or to accrue to him under the agreement, above set-offs, with interest to date of tender. If not so tendered, the levying officer is not bound to keep the property; provided, however, that when an attachment or execution creditor presents to the officer, within the five days, a verified statement that the claim of title under the conditional sale is void or invalid for reasons therein specified, and delivers to the officer a good and sufficient indemnity bond in double the amount of the indebtedness claimed by the seller or double the value of the personal property as the officer may determine and require, the officer shall retain the property and in case of an execution sell it in the manner provided by law.

"The bond shall be made to both the officer and the seller, and shal indemnify them and each of them for the taking of property against loss, liability, damages, costs and counsel fees. Exceptions to the sufficiency of the sureties and justification may be had and taken in the same manner as upon an undertaking on attachment.

"If the tender is refused the amount thereof must be deposited with the county treasurer, payable to the order of the seller. Until such payment or deposit is made, or an undertaking delivered to the officer, the property cannot be sold under the levy; but when made and also in case the seller fails to render his claim for thirty days following the personal service upon him by the levying officer of a written demand therefor, which service must be attested by the officer's certificate thereof, filed before the sale with the papers of the action wherein the attachment or execution was issued, then the title shall pass to the buyer and the property may be sold as in this chapter provided, free of all lien or claim of the seller." Section 689b.

"When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows:

"1. To the repayment of the sum paid to the seller, or deposited to his order, with interest from the date of such payment or deposit.

"2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases." Section 689c.

Before their adoption, it was not possible to attach the interest of the vendee in a contract of conditional sale of personal property. Morris v. Allen, 17 Cal. App. 684, 691, 121 P. 690; Heffner v. Jackson, 95 Cal. App. 476, 479, 273 P. 37. The object of these sections is to subrogate the attaching creditor to the rights, not of the vendor, but of the vendee. Upon payment of the money due to the seller, the title to the property passes to the buyer under the very wording of section 689b. See Kinsey v. Ryan, 74 Cal. App. 567, 241 P. 282. If judgment be in favor of the buyer, the writ becomes functus officio, and the buyer becomes entitled to the immediate possession of the property. Kinsey v. Boyes, 86 Cal. App. 248, 255, 260 P. 834. The effect of payment in full of the purchase price under a conditional contract of sale is to vest title in the buyer. No bill of sale is necessary to effect the transfer of title. And this is the result whether the payment be voluntary or through legal proceedings. Arnois v. Bell, 70 Cal. App. 222, 232 P. 758.

[5] In case the attaching creditor succeeds in his action, provision is made to reimburse him for the money advanced, out of the proceeds of the sale of the attached property upon execution. If he is not successful, he has no remedy by way of enforcement of the contract. He cannot be said to have been deprived of any right, because he made the advance, not for the benefit of his debtor, but for his own. Carstenbrook v. Wedderien, 7 Cal. App. 465, 94 P. 372.

[6] The only theory upon which the judgment here rendered can be sustained is that the attaching creditor by paying the amount due under the conditional contract of sale became the assignee of the contract, and thus acquired the rights of the seller herein. This theory is not tenable because the sections under consideration and their history show that the attaching creditor succeeds to the rights of the buyer and not of the seller. The procedure is for the benefit of the attaching creditor, to enable him to sequester, by attachment, interests of his debtor which could not, otherwise, be so sequestered. The remedy of attachment in this, as in all other cases, is optional with the seller. He need not avail himself of it. If he does, he runs the risk of losing the money advanced, unless it should be held that he could recover it upon a common count, as for money expended for the use or benefit of another. But here he cannot complain, as he need not have availed himself of the ancillary remedy of attachment. Or perhaps he can find some other way of protecting himself as in the case of one who pays to secure the release of a chattel mortgage in order to subject property to levy. See Flores v. Stone, 21 Cal. App. 105, 131 P. 348, 351, 352. In any event, no provision is made in the sections mentioned for his reimbursement, in case his debtor is successful in defeating the action in which the attachment was sought. This may be regretted. But, it is just another instance where certain penalty may flow from the doing of a certain act. And so long as the act is one to which a choice attaches, there is no inherent injustice in the situation.

[7] It should be added that the assignment of the contract to the defendant by Pacific Finance Company after judgment does not aid him. At the time it was made the company had no interest in the automobile which it could assign.

The judgment is reversed, and the cause is remanded for a new trial, with costs of appeal to appellant.

I concur: HARTLEY SHAW, Judge.

END OF CASES IN THIS VOLUME